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8 **STATE OF WASHINGTON**
SPOKANE COUNTY SUPERIOR COURT

9 In re the Detention of:

NO. 06-2-05263-8

10 SHAWN BOTNER,

PETITIONER'S TRIAL BRIEF

11 A/K/A SHAWN BOWER,

12 Respondent.

13 Petitioner, State of Washington, hereby submits its trial memorandum in anticipation of
14 the trial of this sexually violent predator (SVP) involuntary civil commitment action. The case
15 is set for a jury trial beginning August 20, 2009.

16 **I. PROCEDURAL HISTORY**

17 On December 6, 2006, Petitioner filed a petition alleging that Shawn Botner is an SVP,
18 as defined by RCW 71.09.020(16). On February 26, 2007, the court entered an order affirming
19 the existence of probable cause to believe Mr. Botner was an SVP, and directed that
20 Mr. Botner be transported to the Special Commitment Center (SCC) to await trial.

21 **II. STATEMENT OF ANTICIPATED FACTS**

22 Petitioner plans to call approximately nine witnesses in its case-in-chief. These witnesses
23 include, in part, experts in the evaluation and treatment of sex offenders, treatment professionals,
24 and Mr. Botner himself. Through these witnesses and by means of exhibits, Petitioner will prove
25 the following:

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1 **A. SEXUALLY VIOLENT CRIMES AND OTHER SEXUAL OFFENSES.**

2 Mr. Botner was born on May 11, 1973, and is now thirty-six years old. He has been
3 convicted of two sexually violent offenses as that term is defined by RCW 71.09.020(15).

4 **1. 1988 – Indecent Liberties Against a Child Under Age 14**

5 When Mr. Botner was fifteen years old he molested his nine-year old niece H.B. on two
6 occasions. Mr. Botner pled guilty to one count of Indecent Liberties Against a Child Under
7 Age 14 and was sentenced to 21-28 weeks in JRA. The State will present the testimony of H.B.,
8 certified copies of the relevant charging and dispositional documents, and Mr. Botner’s testimony
9 related to this crime.

10 **2. 1992 – Attempted Rape in the First Degree**

11 When Mr. Botner was eighteen years old he attempted to rape Cari Weber. Mr. Botner
12 attacked Ms. Weber in a public restroom, strangled her, pulled her pants and underwear down
13 to her ankles, and then fled the scene. Mr. Botner pled guilty to one count of Attempted Rape
14 in the First Degree and was sentenced to 110 months in prison plus 24 months of community
15 custody. The State will present the testimony of Ms. Weber, certified copies of the relevant
16 charging and dispositional documents, and Mr. Botner’s testimony related to this crime.

17 **3. Recent Overt Act - 2006**

18 Mr. Botner was released to the community on April 2, 2001. Over the course of the
19 next five years Mr. Botner was repeated incarcerated for probation violations for his failure to
20 report to his CCO, continued drug and alcohol use, his failure to comply with outpatients Sex
21 Offender Treatment, and failure to register as a sex offender. On July 7, 2006, Gonzaga
22 campus security guard Barry Matthews discovered numerous items along the Centennial Trail
23 in Spokane. Among the items recovered was a duffle bag with the name “Shawn B.” written
24 on the side. Inside the duffle bag were numerous dominion papers in the name of “Shawn
25 Bower”, along with women’s clothing, pornography, wigs, sex toys, lubrications, a dildo and a
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1 notebook. Inside the notebook Mr. Matthews discovered a handwritten note that described Mr.
2 Botner's fantasy of entering a sex shop dressed as a woman and attacking the store clerk with a
3 blackjack, raping her repeatedly, and dismembering her body. The handwritten note also
4 contained a list of items to bring with him to the rape, including lubricant, a dildo, and a blow-
5 up among other items.

6 Following the report by campus security, Mr. Botner was identified as a person of
7 interest by Spokane police. On July 11, 2006, Mr. Botner's Community Corrections Officer
8 was notified that Mr. Botner was suspected of leaving notes along the Centennial Trail
9 detailing the above described offense against the female adult store clerk.

10 At two o'clock a.m. on July 30, 2006, Spokane police stopped Mr. Botner while he was
11 riding a bicycle with no headlight or rear reflector. As the police approached him, they saw that
12 Mr. Botner was wearing a bra stuffed to give the appearance that he had breasts. He also had a
13 stockinette over his hair. Police took possession of a backpack Mr. Botner was carrying with
14 him. Inside police found an unopened package containing a dildo, a black and white French
15 maid costume, new and used women's underwear, a blond wig, and a folder of pornographic
16 pictures. There was also a glass case containing a rope, rubber gloves, and condoms. As police
17 inspected the rubber gloves, Mr. Botner commented that he had been tied to his previous crime
18 by his fingerprints.

19 Mr. Botner's Community Corrections Officer discovered that Mr. Botner had moved
20 out of his registered address on July 28, 2005, and obtained a warrant for his arrest for failure
21 to register his address. Mr. Botner was arrested on August 11, 2006 and incarcerated for 180
22 days for various probation violations. Prior to his release from confinement the State filed
23 this SVP petition.

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1 **B. SEXUALLY VIOLENT PREDATOR EVALUATION**

2 On July 13, 2009, Harry Hoberman, Ph.D., completed a 143-page addendum to his
3 original sexually violent predator evaluation of Mr. Botner. In conducting his evaluation, Dr.
4 Hoberman reviewed thousands of pages of records, including various police reports, legal
5 documents, previous psychological evaluations, materials from the Department of Corrections
6 relevant to Mr. Botner's incarceration, and deposition transcripts.

7 Dr. Hoberman reports that it is his opinion, to a reasonable degree of psychological
8 certainty that Mr. Botner suffers from Pedophilia, Sexual Sadism, Personality Disorder (or a
9 Personality Disorder, Not Otherwise Specified (NOS)) and/or Psychopathy. Dr. Hoberman
10 concluded that at least one of these disorders constitutes a "mental abnormality" as that term is
11 defined in RCW 71.09.020.

12 Dr. Hoberman also conducted a risk assessment which consisted of examination of the
13 results of actuarial tools applied to Mr. Botner, and examination of static and dynamic risk factors
14 relative to Mr. Botner. Dr. Hoberman used four actuarial instruments, the Static-99, Static-2002,
15 the Sex Offender Risk Appraisal Guide (SORAG), and the Minnesota Sex Offender Screening
16 Tool Revised (MnSOST-R) to assess Mr. Botner's recidivistic potential. Given Mr. Botner's
17 scores on these actuarial instruments, Dr. Hoberman opined that Mr. Botner is "more likely than
18 not" to reoffend in a sexually violent manner if not confined in a secure facility.

19 To capture his true recidivism rate, Dr. Hoberman examined static and dynamic risk
20 factors relative to Mr. Botner which the research has shown are significantly related to sexual
21 recidivism. Dr. Hoberman concluded that none of the dynamic risk factors he evaluated serve to
22 mitigate Mr. Botner's risk for sexual reoffending, and rather than some of them serve to increase
23 his risk.

24 Dr. Hoberman opines to a reasonable degree of psychological certainty that Mr. Botner's
25 mental abnormality causes him serious difficulty in controlling his behavior, such that he is likely
26 to engage in predatory acts of sexual violence if not confined to a secure facility. It is also Dr.

1 Hoberman's opinion that Mr. Botner's recent behaviors in the community qualify as a recent overt
2 act or act(s).

3 **C. EXCERPTS FROM THE RESPONDENT'S VIDEOTAPED DEPOSITION.**

4 The State took a videotaped deposition of Mr. Botner on July 10, 2009. It is anticipated
5 that excerpts of that deposition may be offered during the State's case-in-chief.

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7 **III. LEGAL AUTHORITY**

8 **A. REQUISITES OF COMMITMENT AS A SEXUALLY VIOLENT PREDATOR**

9 In order to involuntarily civilly commit Mr. Botner under RCW 71.09, the State must
10 prove beyond a reasonable doubt that he is an SVP. RCW 71.09.060(1). The term "sexually
11 violent predator" is defined in RCW 71.09.020(16) as a person who:

- 12 1) Has been convicted of or charged with a crime of sexual violence; and
13 2) Suffers from a mental abnormality or personality disorder; and
14 3) That the mental abnormality or personality disorder makes the person likely
to engage in predatory acts of sexual violence if not confined in a secure
facility.

15 The degree to which a person must be "likely" to reoffend requires the State to prove
16 that Mr. Botner "more probably than not will engage in such acts if released unconditionally
17 from detention" in the SVP action. RCW 71.09.020(7). Those future acts must be
18 "predatory." That is, they must be acts directed towards strangers, persons with whom a
19 relationship has been established or promoted for the primary purpose of victimization, or
20 persons of casual acquaintance with whom no substantial personal relationship exists.
21 RCW 71.09.020(9).

22 **B. EXPERT OPINION TESTIMONY IN SVP CASES – IN GENERAL**

23 The expert testimony by Dr. Hoberman in this case will be no different than that
24 typically provided in other SVP cases. The State will present Dr. Hoberman's qualifications as
25 an expert and then move to her opinions in the two areas where she can assist the finder of fact:

- 26 1) Whether Mr. Botner suffers from a mental abnormality or personality disorder which cause

1 him serious difficulty controlling his sexually violent behavior; and 2) If so, whether those
2 conditions make Mr. Botner more likely than not to commit predatory acts of sexual violence
3 unless he is confined in a secure facility for treatment.

4 As is done in other SVP cases, Dr. Hoberman will also provide the Court with an in-
5 depth explanation of the methods he used to reach his opinions, as well as the factual bases of
6 the opinions. In his evaluation of Mr. Botner, Dr. Hoberman relied heavily on the records
7 generated by various entities relating to Mr. Botner. These records discuss Mr. Botner's
8 criminal, sexual, incarceration, educational, medical, mental health, family, and treatment
9 history. They are of the type reasonably relied upon by experts in the field who conduct SVP
10 evaluations. Dr. Hoberman also used actuarial tools and empirical risk factors to anchor his
11 opinion regarding the level of risk Mr. Botner poses to the community. Such risk assessment
12 methodology is generally accepted in the relevant scientific community, are commonly used in
13 SVP cases, and their admissibility has been repeatedly endorsed by the courts.

14 **C. EXPERT OPINION: AN EXPERT MAY TESTIFY ABOUT OPINIONS THAT**
15 **EMBRACE ULTIMATE ISSUES TO BE DECIDED BY THE TRIER OF FACT**

16 An expert in an SVP case cannot opine that an individual is, or is not, an SVP.
17 *In re Detention of Aquil*, 84 Wn. App. 88, 100, 929 P.2d 436 (1996). The State does not intend
18 to elicit testimony from Dr. Hoberman that Mr. Botner is an SVP.

19 However, the State does intend to elicit testimony from Dr. Hoberman that Mr. Botner
20 suffers from mental abnormalities and personality disorders, as well as testimony that he is
21 more likely than not to commit predatory acts of sexual violence unless confined because of
22 these mental disorders. Such testimony, although it touches on ultimate issues of fact to be
23 determined by the fact-finder, is admissible pursuant to ER 704:

24 Testimony in the form of an opinion or inferences otherwise admissible is not
25 objectionable because it embraces an ultimate issue to be decided by the trier of
26 fact.

1 Experts such as Dr. Hoberman have been permitted to provide testimony on these same
2 issues in other sex predator cases. For example, as the Washington Supreme Court noted in
3 rejecting objections to expert testimony:

4 The State requested Wolfe assess whether Campbell fell under the category of a
5 sexually violent predator as defined in RCW 71.09. In order to meet this
6 request, Wolfe met with Campbell and administered psychological testing on
7 him. He also extensively reviewed Campbell's criminal and penal record.

8 Wolfe diagnosed Campbell as having a mental abnormality and a personality
9 disorder that pointed towards the likelihood of Campbell committing future acts
10 of a sexually violent and predatory nature. Wolfe evaluated Campbell as
11 suffering from the condition of "paraphilia." Paraphilia is characterized as
12 having repetitive urges, impulses, and sexually arousing fantasies of rape.
13 Wolfe testified that paraphilia is not curable through the passage of time alone;
14 cure requires intensive intervention . . .

15 Following his examination of Campbell and based on Campbell's record, Wolfe
16 testified Campbell was more likely than not to reoffend in a sexually violent and
17 predatory manner if he were released . . . Wolfe continued to monitor
18 Campbell's progress while Campbell has been committed at the SCC and Wolfe
19 has stated he has seen no progress that would cause him to reassess his trial
20 testimony as to Campbell's condition or dangerousness.

21 *In re Detention of Campbell*, 139 Wn.2d 341, 356-57, 986 P.2d 771 (1999).

22 **D. EXPERT OPINION: EXPERTS IN SVP CASES MAY TESTIFY**
23 **CONCERNING THE FACTUAL BASES OF THEIR OPINIONS**

24 The factual bases of an expert's opinion may be composed of information which is
25 either: 1) In the trial record, or 2) Not in the trial record, but of a type reasonably relied upon
26 by other experts in the pertinent field in rendering opinions on the subject matter at issue.
ER 703¹; *Riccobono v. Pierce County*, 92 Wn. App. 254, 267, 966 P.2d 327 (1998). The
provision of ER 703, that permits an expert to rely upon information, provided to him prior to
trial, and which is not in the trial record, was designed to bring courtroom practice into line
with the practice of the experts themselves when they are not in court.

¹ ER 703 provides "[t]he facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence."

1 *Riccobono*, 92 Wn. App. at 267-68 (citing the Federal Advisory Committee comments on the
2 identical federal rule, FRE 703).

3 ER 705 provides that an expert may give the reasons underlying his or her opinion.
4 ER 703 and ER 705, when read together, permit the, “admission of otherwise hearsay evidence
5 and inadmissible facts for the purpose of showing the basis of the expert’s opinion.”
6 *Group Health Coop. of Puget Sound, Inc. v. Dept. of Revenue*, 106 Wn.2d 391, 399,
7 722 P.2d 787 (1986). In this situation, the extra-record and sometimes inadmissible evidence
8 is not substantive evidence in the case, but is admitted for the limited purpose of explaining the
9 expert’s opinion.

10 **E. RISK ASSESSMENT IN SVP CASES: IN GENERAL**

11 RCW 71.09 requires that the State prove that Mr. Botner’s mental abnormality and
12 personality disorder make him more likely than not to engage in predatory acts of sexual
13 violence if he is unconditionally released to the community. RCW 71.09.020(16), .060. This
14 is done in SVP cases through expert testimony.

15 One portion of Dr. Hoberman’s risk assessment of Mr. Botner includes the reliance
16 upon actuarial tools. These tools are now used in all SVP cases to assess risk. Their use has
17 been endorsed by the Supreme Court in the *Thorell* decision. *Thorell*, 149 Wn.2d at 753-58.
18 In *Thorell*, the court held that the actuarial risk assessment tools used in SVP cases are not
19 subject to a *Frye* test because they are not based on novel scientific techniques, but rather on
20 established statistical methods. *Id.* At 753-6.

21 **1. Risk Assessments Based on Clinical Judgment**

22 Mental health professionals have long been asked by the courts to provide opinions
23 regarding a persons’ risk to commit violent and sexually violent acts if released into the
24 community. Historically, these opinions have been based on clinical judgment. Clinical
25 judgment describes the process in which the risk assessment is based upon the expert’s
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1 education and experience, as well as those factors peculiar to the subject of the assessment that
2 the expert considers relevant.

3 Research has established that the accuracy of risk assessments based on clinical
4 judgment is suspect.^{2,3} Despite this, courts have routinely admitted risk assessments conducted
5 using clinical judgment. *See e.g., Barefoot v. Estelle*, 463 U.S. 880, 896-906, 103 S. Ct. 3383,
6 77 L. Ed. 2d 1090 (1983); *In re Young*, 122 Wn.2d at 15-16, 55-56. Such testimony is relevant
7 and the accuracy of the assessment is properly a matter of weight to be determined by the
8 fact-finder. *Id.*

9 **2. Risk Assessments Based on Structured/Guided Clinical Judgment**

10 The early research questioning the accuracy of risk assessments conducted using
11 clinical judgment also showed that the accuracy of such opinions could be enhanced by basing
12 them on factors empirically linked with recidivism.⁴ This method of risk assessment is called
13 structured, or guided, clinical judgment.⁵

14 Although structured clinical judgment improved the accuracy of assessments made
15 using unstructured clinical judgment, it too has shortcomings. One of these is the inability of
16 the expert to determine how much relative weight to give to the various factors.⁶ This problem
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20 ² The citations to the psychological literature will be placed in footnotes because of the length of most of
the citations.

21 ³ Howard Barbaree, et. al., *Evaluating the Predictive Accuracy of Six Risk Assessment Instruments for*
Adult Sex Offenders, 28 *Crim. Just. & Behav.* 490, 517 (2001); William M. Grove & Paul E. Meehl, *Comparative*
Efficiency of Informal (Subjective, Impressionistic) and Formal (Mechanical, Algorithmic) Prediction
Procedures, 2 *Psychology, Pub. Pl'y., & L.* 293 (1996); John Monahan, *Violence Prediction, The Past Twenty*
and the Next Twenty Years, 23 *Crim. Just. & Behav.* 107, 111 (1996); Vernon Quinsey et al., *Actuarial Prediction*
of Sexual Recidivism, 10 *J. Interpers. Viol.* 85 (1995); Marnie E. Rice & Grant T. Harris, *Violent Recidivism:*
Assessing Predictive Validity, 63 *J. Consulting & Clinical Psychology* 737 (1995).

23 ⁴ R. Karl Hanson, *What Do We Know About Risk Assessment?* in 1 *THE SEXUAL PREDATOR* 8-13 (Anita
24 Schlank & Fred Cohen eds., 2001).

25 ⁵ *Id.* at 8-4.

26 ⁶ Harry M. Hoberman, *Dangerousness and Sex Offenders – Assessing Risk for Future Sex Offenses*, in 2
THE SEXUAL PREDATOR 11-14-15 (Anita Schlank ed., 2001).

1 contributed to the development of actuarial instruments designed to assess the risk of
2 recidivism.

3 **F. ACTUARIAL RISK ASSESSMENT INSTRUMENTS: IN GENERAL**

4 Simply put, actuarial risk assessment instruments use commonly employed statistical
5 methods to determine the relative weight to be given to various factors associated with
6 recidivism. Research has demonstrated that such tools are the most accurate and reliable
7 method of assessing the risk posed by sex offenders.

8 The actuarial instruments commonly used to assess risk have all been developed in the
9 same general manner.⁷ For each, the researchers first identified a group of violent offenders.
10 Sample groups have included violent offenders detained in secure mental health facilities, as
11 well as persons imprisoned for violent and sexually violent offenses.

12 The researchers then gathered information on each offender, focusing on those
13 variables that previous research demonstrated were linked to recidivism. In general, the
14 information collected has related to the offenders' criminal histories, sexual preferences,
15 substance abuse, and family history. The variables are either static – unchangeable over time
16 (e.g. whether convicted of sex offense) – or dynamic – capable of change over time (e.g.
17 successful completion of sexual deviancy treatment).

18 The researchers then conducted follow-up studies of the group members to see if any
19 reoffended after their release from custody. Comparing the data gathered for each individual,
20 the researchers found that certain variables were more closely associated with the recidivists,
21 while others were linked to those who did not reoffend.

22 Finally, the researchers used standard statistical methods to find the mix of relevant
23 variables providing the maximum predictive power, as well as the relative weight to be given
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25 ⁷ An excellent general discussion of the various aspects of actuarial tools, including examples of their use
26 in various fields, is contained in John A. Swets et al., *Better Decisions Through Science*, Scientific American
82-87 (October 2000).

1 each variable. The statistical methods used by the researchers are not new, but have been
2 employed for many years in other fields including, for example, the insurance industry.

3 The actuarial instruments generally consist of between four and sixteen items, each of
4 which has been linked to recidivism. Each item asks the expert using the instrument for a
5 certain piece of data about the offender whose risk is being assessed. To ensure consistent
6 scoring, the developers of each instrument have published coding rules for each item. The
7 expert then scores the individual items, with the offender receiving a certain number of points
8 for each. The number of points assigned is dependent on the relative weight of the particular
9 item as determined by the statistical method employed by the developer of the instrument. At
10 the conclusion of this process, the expert arrives at a numeric raw score for the offender. The
11 expert can then refer to information provided by the authors of each instrument, which indicate
12 the recidivism rates associated with the offender's raw score.

13 It is critical to note that the actuarial instruments do not tell the expert that the person
14 being assessed will, in fact, reoffend at a particular rate. Rather, the actuarial instruments tell
15 the expert the recidivism rate of that group of offenders that the person being assessed most
16 closely resembles. The actuarial instruments used to assess sexual recidivism are not based on
17 any novel scientific techniques, but are merely the application of tried and true statistical
18 methods to new data.

19 **G. ACTUARIAL INSTRUMENTS: AN IMPROVEMENT IN PREDICTIVE**
20 **ACCURACY**

21 The actuarial instruments are an integral part of any risk assessment, including those
22 done in SVP cases. Actuarial tools are routinely used by experts to help assess risk because
23 scientific research has shown that they are more accurate and reliable than the traditional
24 method of risk assessment, clinical judgment, a method routinely admitted by the legal
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1 system.⁸ The relative accuracy and reliability of the actuarial instruments is underscored by
2 the cross-validations of instruments. A cross-validation involves the application of the
3 instrument to a new sample of offenders to ensure it accurately assesses recidivism. All of the
4 commonly used risk assessment instruments have been cross-validated, most numerous times.
5 These cross-validations have confirmed the predictive accuracy of the instruments.

6 **H. THE ACTUARIAL INSTRUMENTS ARE GENERALLY ACCEPTED AS AN**
7 **INTEGRAL PART OF ANY SEX OFFENDER RISK ASSESSMENT**

8 Risk assessments conducted using actuarial tools have been proven to be more accurate
9 than assessments conducted using traditional clinical judgment. In recognition of the improved
10 accuracy that the actuarial tools provide, the scientific literature supports their use as an
11 integral part of any sex offender risk assessment:

12 [A]ssessors of the dangerousness of known sex offenders should be willing to
13 consider all apparently relevant and useful sources of information (including
14 both actuarial and clinical data) in offering opinions regarding the relative risk
15 of dangerousness of sex offenders being considered for civil commitment.⁹

16 ⁸ Howard E. Barbaree et al., *supra* note 3, at 517-18 (“whereas a guided clinical approach to risk
17 assessment may be found to predict recidivism from time to time, an actuarial approach is favored over the
18 clinical judgments because of consistently superior reliability and validity.”); R. Karl Hanson, *supra* note 6, at 8-
19 16 (“the predictive accuracy of the available scales has been as good or better than the best guided clinical
20 evaluations.”); Dennis M. Doren, *EVALUATING SEX OFFENDERS*, 107 (2002) (“mechanical procedures are at least
21 equally if not more accurate [than clinical procedures] and; therefore, are to be preferred over clinical judgment
22 procedures.”); *see also*, Robyn M. Dawes et al., *Clinical versus Actuarial Judgment*, 243 *Science* 1668 (1989)
23 (“Research comparing these two approaches shows the actuarial method to be superior.”); William M. Grove &
24 Paul E. Meehl, *supra* note 5, at 293 (“empirical comparisons of the accuracy of the two methods (136 studies over
a wide range of predictions) show that the mechanical method is almost invariably equal to or superior to the
clinical method . . .”); William M. Grove et al., *Clinical versus Mechanical Prediction*, 12 *Psychological*
Assessment 19 (2000) (“Superiority for mechanical-prediction techniques was consistent, regardless of the
judgment task, type of judges, judges’ amounts of experience, or the types of data being combined.”);
Grant T. Harris et al., *Appraisal and Management of Risk in Sexual Aggressors*, 4 *Psychology, Pub. Pol’y, & L.*
73 (1998) (“in literally hundreds of comparisons over many domains including the prediction of recidivism,
clinical judgment has essentially never been found to be superior to actuarial methods, whereas the converse has
most often been demonstrated”).

25 ⁹ Harry M. Hoberman, *supra* note 6 at 11-52; *see also*, Dennis M. Doren, *supra* note 8, at 114 (“the use
26 of actuarial risk assessment instruments within sex offender civil commitment evaluations seems ethically
mandated . . .”).

1 In addition, several states have required or permitted the use of actuarial instruments in
2 various sex offender risk assessment contexts.¹⁰ Finally, the acknowledged acceptance of the
3 actuarial risk assessment tools is demonstrated by ATSA’s Practice Standards and
4 Guidelines § 15.07, which states, “Members conducting risk assessments **shall** use an
5 appropriate actuarial risk assessment instrument when one is available for the client being
6 evaluated” (emphasis in original). The failure to use an appropriate actuarial risk assessment
7 tool constitutes an ethical violation for ATSA members. ATSA Professional Code of Ethics,
8 Ethical Principles § 2 (j).

9 **I. ACTUARIAL RISK ASSESSMENT INSTRUMENTS ARE ADMISSIBLE**
10 **PURSUANT TO ER 702 AND 703**

11 In *Thorell*, the Washington Supreme Court addressed the legal standard to apply to the
12 admissibility of actuarial risk assessment tools in SVP cases. The opponents of the instruments
13 argued that they are based upon novel scientific techniques, are; therefore, admissible only
14 under *Frye*, and the instruments do not meet the *Frye* standard. *Thorell*, 149 Wn.2d at 754.

15 The court rejected this argument and agreed with the State’s position that the tools are
16 not novel scientific evidence and do not need to be run through the *Frye* test. *Id.* at 755. The
17 theories and procedures “used to construct actuarial instruments are well accepted in the
18 scientific community . . .” *Id.* The court also based its decision on its prior holdings in other
19 SVP cases. For example, in *Young*, the court held that clinical risk assessments, which are less
20 accurate than actuarial assessments, are admissible and not subject to *Frye* despite the
21 uncertainty surrounding such predictions. *Young*, 122 Wn.2d at 56. The court later reaffirmed
22 this holding in *In re Detention of Campbell*, 139 Wn.2d 341, 355, 986 P.2d 771 (1999), a case
23 involving clinical risk assessment. In conclusion, the *Thorell* court stated:

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25 ¹⁰ See e.g., Minn. Stat. § 244.052 (requiring development of a statistically derived risk assessment
26 instrument to assess risk of sex offenders for community notification purposes); R.I. Code R. 30 020 002 § 2.5
(permitting consideration of actuarial instruments in assessing risk of sex offenders for registration purposes).

1 Based on our established precedent, we reiterate that the *Frye* standard has been
2 satisfied by both clinical and actuarial determinations of future
3 dangerousness . . . [Objections to the actuarials] go to the weight of the
4 evidence rather than its admissibility and are to be assessed under ER 702 and
5 ER 703.

6 *Thorell*, 149 Wn.2d at 756. The *Thorell* court held that the actuarial instruments are admissible
7 pursuant to ER 702 and 703.

8 **J. THE STATE MUST PRESENT SUFFICIENT PROOF THAT MR. BOTNER
9 SUFFERS FROM A MENTAL DISORDER(S) THAT CAUSES HIM TO HAVE
10 SERIOUS DIFFICULTY CONTROLLING HIS DANGEROUS SEXUAL
11 BEHAVIOR**

12 In *Thorell*, the court considered whether the United States Supreme Court's holding in
13 *Kansas v. Crane*, 543 U.S. 407, 122 S. Ct. 867, 151 L. Ed. 2d 856 (2002), requiring the State to
14 present "proof of serious difficulty in controlling behavior," (*Crane*, 122 S. Ct. at 871) had
15 created a new element to be proven in an SVP proceeding. The *Thorell* court rejected this
16 argument, noting:

17 What is critical to both *Hendricks* and *Crane* is the existence of "some proof"
18 that the diagnosed mental abnormality has an impact on offenders' ability to
19 control their behavior. *Crane* requires linking an SVP's serious difficulty in
20 controlling behavior to a mental abnormality, which together with a history of
21 sexually predatory behavior, gives rise to a finding of future dangerousness
22 justifies civil commitment, and sufficiently distinguishes the SVP from the
23 dangerous but typical criminal recidivist.

24 *Thorell*, 149 Wn.2d at 736. (citations omitted).

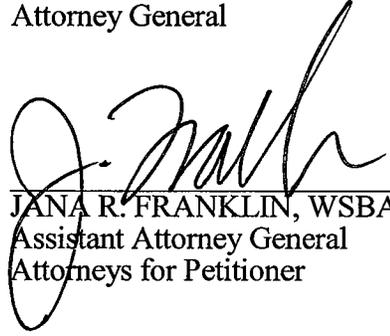
25 The court specifically rejected appellants' contention that *Crane* had created a new
26 element, necessitating a separate finding of "serious difficulty in controlling behavior."
Id. at 742, 745. The court suggested that inclusion of such a finding would be "the better
practice." *Id.* at FN 8. Petitioner will present sufficient evidence at this trial to support such a
determination.

1 **K. QUESTIONS FROM THE JURY**

2 Petitioner has no objection to the Court following CR 43(k) which permits questions
3 from the jury.

4 RESPECTFULLY SUBMITTED this 23 day of July, 2009.

5 ROBERT M. MCKENNA
6 Attorney General

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10 JANA R. FRANKLIN, WSBA #35524
11 Assistant Attorney General
12 Attorneys for Petitioner
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