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CRIMINAL JUSTICE DIVISION  
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SPOKANE COUNTY CLERK

STATE OF WASHINGTON  
SPOKANE COUNTY SUPERIOR COURT

In re the Detention of:

NO. 13-2-00608-6

JAMES JONES,

PETITIONER'S TRIAL  
MEMORANDUM

Respondent.

COMES NOW the Petitioner, State of Washington, by and through Assistant Attorneys General Thomas Howe and Erin C. Dyer, and hereby submits its trial memorandum in anticipation of the civil commitment trial in this sexually violent predator ("SVP") action. The purpose of this Memorandum is to offer an analysis of the expected legal and evidentiary issues to be presented at trial based on the facts of the case as stated in the Certification for Determination of Probable Cause previously filed herein. The trial of this matter is scheduled to begin on September 22, 2014.

**I. PROCEDURAL HISTORY**

On February 12, 2013, Petitioner, State of Washington, filed a petition alleging that James Edward Jones is a sexually violent predator as defined by RCW 71.09 *et seq.* On February 19, 2013, the court found probable cause to support the petition and Jones was transported to the Special Commitment Center ("SCC") of the Department of Social and Health Services for the purpose of the custodial detention and evaluation. Jones has remained in total confinement since the filing of the SVP petition. The trial in this matter is scheduled to begin on September 22, 2014.

1 **II. STATEMENT OF ANTICIPATED FACTS**

2 James Jones was born on November 11, 1951 and is now 62 years old. He has been  
3 convicted of two sexually violent offenses as that term is defined in RCW 71.09.020(17).

4 **A. Sexually Violent Offenses**

5 **1. 1996 Rape in the Second Degree by Forcible Compulsion, Spokane County**  
6 **96-1-01869-5**

7 During the evening of August 8, 1996, 14-year-old J.L. encountered 44-year-old Jones as  
8 she was walking home from the store. She had only known Jones for a few months. Jones was  
9 hanging out and drinking with friends and invited her inside. Shortly thereafter, Jones told  
10 J.L. that he wanted to show her something in the garage behind his mother's home. They walked  
11 to the nearby garage. Once inside, Jones barricaded the door. J.L. tried to leave, but Jones hit  
12 her several times and told her she was not leaving. He threatened to kill her if she screamed.

13 Jones told her to pull her pants down. She told him, "No." Jones responded that he did  
14 not like the answer no and threw her down on the couch and started to strangle her. He forcibly  
15 pulled down her pants and underwear and vaginally raped her with his penis while she resisted.  
16 After the rape, J.L. tried to escape, but Jones threw her up against a wall. She fought him and  
17 struggled and fell on the floor. Jones then vaginally raped her again on the floor. After the  
18 second rape, J.L. stood up and Jones knocked her back down. He moved her back to the couch,  
19 held her down, and told her he would kill her if she left and told anyone what happened.  
20 J.L. eventually escaped wearing only her shirt and bra. She ran to a friend's home and called  
21 911. The police arrived and took her to the hospital.

22 Jones was charged with two counts of rape in the second degree by forcible compulsion  
23 and one count of unlawful imprisonment. On May 30, 1997, a jury found Jones guilty of all  
24 three counts. On September 19, 1997, the court sentenced Jones to 198 months in prison for each  
25 rape, to be served concurrently. The unlawful imprisonment conviction merged with the rapes.

1 Jones was also sentenced to 36 months of community custody and ordered to participate in  
2 sexual deviancy treatment.

3 **B. Other Sexual Offenses**

4 **1. 1986 Rape, Spokane County (Dismissed)**

5 On June 30, 1986, 36-year-old J.D. left the Sun Burst Tavern and discovered three  
6 of her car tires had been slashed. Thirty-four-year-old Jones, a stranger, drove up in a  
7 blue-over-gold Buick and offered to get her some tires. He drove her to a trailer and asked her  
8 to come inside and talk. She agreed. Once inside, Jones told her he was going to "make love"  
9 to her. She refused. Jones then dragged her to the back of the trailer and threw her on the bed.  
10 He removed her pants and started to strangle her. Jones told her that he would kill her if she  
11 screamed. Jones penetrated her vagina with his penis several times over the next three hours.  
12 During the rapes, he held a kitchen knife and potato peeler up to her throat and told her he  
13 would kill her if she did not do what he said.

14 J.D. eventually escaped and ran to a neighboring home for help. Jones fled in the  
15 Buick. The neighbors told J.D. they knew a black male named Jimmy Jones who drives a  
16 blue-over-gold Buick. They called the police. Jones' brother subsequently advised the police  
17 that the trailer belonged to their mother and that Jones occasionally stayed in the trailer. He  
18 also said that Jones drove a blue-over-gold Buick. Police searched the trailer and located the  
19 potato peeler described by the victim. They also found Jones' wallet on the bed.

20 Jones was arrested later that night outside of his mother's home in a blue-over-gold  
21 Buick. Jones denied any involvement in the sexual assault. He said that he was at the China  
22 Gate earlier in the evening and then drove to his mother's home and had been asleep ever  
23 since.

24 On July 2, 1986, Jones was charged with rape in the first degree. Due to the lack of  
25 personal identification by J.D., police conducted a line-up at the jail. J.D. picked a different  
26

1 male, not Jones, out of the line-up. Based on the lack of identification, the prosecutor dropped  
2 the charge. Although Jones initially denied any sexual involvement with J.D., he recently  
3 admitted that he lied to the police. He now admits to having sexual intercourse with  
4 J.D., although he claims it was consensual.

5 **2. 1990 Rape, Grant County (Uncharged)**

6 On June 6, 1990, officers were dispatched to a gas station in Sacramento, California  
7 where 14-year-old M.G. reported that 38-year-old Jones raped her several days ago in  
8 Grand Coulie, Washington and then took her to California. M.G. explained that she had run  
9 away from home and Jones took her camping in Grand Coulie. Jones was her mother's  
10 ex-boyfriend. M.G. reported that she and Jones were in the back of his station wagon when he  
11 started to force himself on her. She told him she did not want to have sex with him, but he  
12 insisted that sex was part of the deal. She tried to fight him off, but he grabbed both of her  
13 arms and held her down. He then forced his penis inside her vagina. They spent the next  
14 several nights on the road at rest stops. She reported that she was afraid to leave. However,  
15 while at a gas station, M.G. saw an opportunity to get away and called the police.

16 Sacramento police responded and approached Jones in a parking lot. Jones gave an  
17 alias of "Johnny Jones." Jones was on parole in Washington at the time. Jones denied  
18 sexually assaulting M.G. He reported that they "kissed and stuff," but that he did not have sex  
19 with her. He said he met M.G. at a party.

20 It does not appear that any rape charges were filed against Jones in Washington State.  
21 However, Jones was convicted in California of Giving a False Identification and sentenced to  
22 five days in jail. Jones then waived extradition and was returned to Washington for a parole  
23 revocation hearing. Both M.G. and her mother testified at the parole revocation hearing. On  
24 August 22, 1990, Jones was found guilty of violating the following conditions of parole:  
25 (1) Forcing M.G. to have intercourse with him against her will in Grant County on or about  
26

1 June 2, 1990; (2) Taking M.G. to Sacramento, California against her will on or between  
2 June 2, 1990 and June 7, 1990; and (3) Giving false information to Sacramento police on  
3 June 7, 1990. Jones' parole was revoked based on these violations and he was returned to  
4 prison. Jones remained in prison until his maximum expiration date and was released on  
5 November 15, 1991. Although Jones initially denied having sex with M.G., he now admits to  
6 having sexual intercourse with her, although he claims it was consensual.

7 **3. 1992 Rape, Spokane County (Uncharged)**

8 On March 6, 1992, officers were dispatched to the hospital regarding a rape that  
9 occurred the prior evening. Thirty-one-year-old J.C. reported that she met a man named  
10 JJ (later identified as Jones) at a bar and agreed to go to his home to "get stoned." When they  
11 arrived at his home, which was a garage converted to a house, Jones made sexual advances.  
12 She resisted his advances and told him to take her back to the bar. Jones "freaked out" and  
13 grabbed her by the hair and told her she was not leaving. He threw her to the floor and said,  
14 "I'm stronger than you bitch, I'll break your neck." She continued to struggle and he hit her  
15 head on the floor until she lost consciousness. She lost a necklace during the struggle. She  
16 awoke with him nude on top of her. He had removed her pants and underwear and was  
17 penetrating his vagina with his penis. During the sexual assault, Jones' mother knocked on the  
18 door. J.C. pulled away from Jones, got dressed, and asked his mother to take her home. She  
19 agreed. During the car ride, J.C. saw two female acquaintances and jumped out of the car and  
20 told them she was just raped. They took her to the hospital. She had bruises and scrapes on  
21 her back, chest, head, and legs.

22 Police officers interviewed Jones' mother at her home. She reported that she had not  
23 seen Jones for a couple of days and denied seeing or talking to J.C. She agreed to let officers  
24 search the home and eventually admitted that Jones was in the bedroom. Officers found Jones  
25 hiding in a corner behind a dresser. Jones reported that J.C. agreed to have sex with him in  
26

1 exchange for drugs. They had consensual sex and he gave her \$50. He reported that she  
2 "went off" when she saw his mother. Jones' mother subsequently admitted that she had talked  
3 to J.C. and gave her a ride. Jones' mother reported that J.C. seemed a little anxious, but she  
4 refused to answer any more questions. Officers found J.C.'s broken necklace on the floor.  
5 Jones had a 1.5 inch scratch over his eye and blood under one of his fingernails. Jones was  
6 arrested and transported to jail.

7 During the investigation, police discovered that J.C. had a lengthy criminal history,  
8 including a history of drug use and making a false report. When questioned by officers, she  
9 initially denied any prior drug use. However, she subsequently admitted that she does abuse  
10 cocaine and alcohol. She continued to report that Jones had sexually assaulted her. A  
11 detective noted considerable bruising on her legs, hips, back, shoulders, and head. She also  
12 had some bumps on her head. After J.C. failed a polygraph test, no rape charges were  
13 requested and Jones was released from jail.

14 **4. 2011 Assault 3<sup>rd</sup> (Amended from Rape 1<sup>st</sup>), Yakima County 11-1-01300-1**

15 In December 2010, Jones was released from prison after serving his sentence for the  
16 1996 rapes. Less than one year later, Jones committed another sexual assault while on  
17 probation.

18 On September 6, 2011, officers were dispatched to a welfare check. Officers responded  
19 and located 36-year-old J.B. in the passenger seat of a car driven by 59-year-old Jones.  
20 J.B. flagged over the officers, who immediately noticed two large welts swelling on J.B.'s face  
21 and red marks around her neck. J.B. was very upset and reported that Jones had raped her.

22 J.B. met Jones earlier that day and gave him a ride home. Jones told her he wanted to  
23 show her something inside his apartment. As soon as she entered his apartment, he slammed  
24 the door behind her, grabbed her by the neck, threw her on the bed, and kicked her in the  
25 stomach. When she tried to get up, he punched her in the face and knocked her back down.  
26

1 Jones hit her and choked her with his hands as she struggled and tried to get away. Jones  
2 vaginally raped J.B., who lost consciousness at one point during the assault. After talking to  
3 the officers, the victim went to the hospital. She had abrasions and bruises all over her body,  
4 including on her neck and face.

5 Officers interviewed a female who lived in the same building as Jones and was present  
6 at the time of the incident. She reported that J.B. ran over to her and frantically told her to call  
7 911. At that point, Jones entered the room and grabbed J.B. by the neck and hair and dragged  
8 her back down to his apartment. The female could hear Jones assaulting J.B. as J.B. screamed.  
9 When asked why she didn't intervene and call 911, the female reported that she did not have a  
10 phone and did not want to get involved.

11 On September 9, 2011, Jones was charged with rape in the first degree. In November  
12 2012, charges were amended to rape in the first degree or, in the alternative, rape in the second  
13 degree by forcible compulsion and assault in the third degree. On November 14, 2012, Jones  
14 pled guilty to assault in the third degree and the rape charge was dismissed. He was sentenced  
15 to twelve months in prison and given credit for time served.

16 **C. Petitioner's Anticipated Witnesses**

17 Petitioner intends to present the testimony of the following witnesses:

18 **1. Harry Hoberman, Ph.D.**

19 Dr. Hoberman is a forensic psychologist and the State's expert in this case who will  
20 provide an opinion as to whether Jones suffers from a mental abnormality and/or personality  
21 disorder which makes him likely to engage in predatory acts of sexual violence if not confined  
22 in a secure facility.  
23

24 ///

25 ///

1           **2.     M.G.**

2           M.G. is the victim of the above referenced 1990 rape in Grant County, WA. She will  
3 testify about the facts and circumstances of the Jones' sexual assault of her at that time.

4           **3.     Mary Flores, Community Corrections Officer**

5           Ms. Flores was Jones' Community Corrections Officer from approximately 1994 to  
6 1996 on approximately four different felony offense convictions out of Spokane and Grant  
7 counties. Ms. Flores will testify about Jones' performance under her supervision, including  
8 reasons for parole/probation revocation(s), as well as any statement Jones made to Ms. Flores  
9 while under supervision.  
10

11           **4.     Shelley Mesplie, Community Corrections Officer**

12           Ms. Mesplie was Jones' Community Corrections Officer upon release from prison in  
13 December of 2010 for his convictions of Rape in the Second Degree. She supervised Jones  
14 while out in the community in Yakima until Jones was arrested for committing another rape  
15 offense on September 6, 2011. Ms. Mesplie will testify about Jones' performance under her  
16 supervision, including the reasons for his revocation of earned early release time on the rape  
17 conviction, as well as any statements Jones made to Ms. Mesplie while under her supervision.  
18

19           **5.     Jennifer Williams, Department of Corrections, Records Custodian**

20           Ms. Williams is a records custodian for the End of Sentence Review Program at the  
21 Department of Corrections. She will offer testimony via declaration under penalty of perjury  
22 that Mr. Jones currently has 857 days of community custody supervision remaining under  
23 cause number 96-1-01869-5, Rape in the Second Degree.  
24

25       ///

26       ///

1           **6.     Kelli Hart**

2           Ms. Hart was employed as a nurse at Airway Heights Correctional facility in January of  
3 2009. She will testify about encounters with Jones in prison, wherein Jones gave her  
4 affectionate/love notes and caressed her arm.

5           **7.     Melisa Gilbert**

6           Ms. Gilbert was employed as a librarian at Coyote Ridge Correctional facility in May  
7 of 2009. She will testify via video preservation deposition about encounters with Jones in the  
8 prison library, wherein Jones gave her affectionate/love notes, and his reaction when the  
9 conduct was reported to supervisors.

10           **8.     Carissa Bonnema**

11           Ms. Bonnema is employed as a Residential Rehabilitation Counselor 3 at the Special  
12 Commitment Center (SCC). She will testify via video preservation deposition regarding  
13 Jones' behavior toward her upon arriving at the SCC in February of 2013, wherein he was  
14 observed by several staff to be staring at Ms. Bonnema and tracking her movements. She will  
15 also testify as to his reaction when confronted by this behavior.

16           **9.     James Jones, Respondent**

17           Petitioner may call the Respondent to testify during its' case-in-chief, either in person  
18 or by videotaped deposition. The portions of Respondent's deposition that Petitioner may play  
19 during trial have been previously identified and provided to Respondent.

20           **10.    Rebuttal Witnesses**

21           The state is not yet aware of witnesses that may be necessary in its rebuttal case, which  
22 will depend upon the testimony presented in Respondent's case.



1 pervasive and inflexible, has onset in adolescence or early adulthood, is stable over time and  
2 leads to distress or impairment.” RCW 71.09.020(9).

3         The degree to which a person must be “likely” to reoffend requires the State to prove  
4 that Gillis “more probably than not will engage in such acts if released unconditionally from  
5 detention” in the SVP action. RCW 71.09.020(7). Those future acts must be “predatory.”  
6 That is, they must be acts directed towards strangers, persons with whom a relationship has  
7 been established or promoted for the primary purpose of victimization, or persons of casual  
8 acquaintance with whom no substantial personal relationship exists. RCW 71.09.020(10).

10           **2.         Serious Difficulty Controlling Behavior**

11         In *Thorell*, the Washington State Supreme Court (“WSSC”) specifically rejected  
12 appellants’ contention that the U.S. Supreme Court in *Kansas v. Crane*, 543 U.S. 407,  
13 122 S. Ct. 867 (2002), created a new element, necessitating a separate finding of “serious  
14 difficulty in controlling behavior.” *Thorell*, 149 Wn.2d at 737-738. The WSSC held that  
15 *Crane* required only that the State demonstrate a link between the mental disorder and an  
16 alleged SVP’s ability to control his behavior. *Id.* As such, serious difficulty controlling  
17 behavior is most often added to the language in the second element in SVP cases, which  
18 becomes:  
19

20           “Respondent suffers from a mental abnormality or personality disorder *which*  
21           *causes him serious difficulty controlling his behavior.*”

22         As noted above, in *Thorell*, the Washington Supreme Court, in analyzing  
23 *Kansas v. Crane*, determined that the State must provide some evidence that an alleged SVP has  
24 serious difficulty controlling his behavior. *Thorell*, 149 Wn.2d at 737. The Court made clear  
25 however that serious difficulty controlling behavior does not mean a person lacks all control:  
26

1 Applying the United States Supreme Court's reasoning to the Washington  
2 SVPA, we hold that proof that a person facing commitment under chapter  
3 71.09 RCW lacks behavioral control is not a new element of the SVP  
4 commitment and a jury need not make a separate finding regarding 'lack of  
5 control.' However, the jury's finding that an SVP suffers from a mental illness,  
6 defined under our statute as a 'mental abnormality' or 'personality disorder,'  
7 coupled with the person's history of sexually predatory acts, must support the  
8 conclusion that the person has serious difficulty controlling behavior, although  
9 *this evidence need not rise to the level of demonstrating the person is*  
10 *completely unable to control his or her behavior.*

11 *Id.* at 742 (emphasis added).

12 As the U.S. Supreme Court acknowledged in *Crane*, even the most severely mentally ill  
13 individuals retain some ability to control their behavior. *Crane*, 122 S. Ct. at 412. "The word  
14 'difficult' indicates that the lack of control to which this Court referred was not absolute."  
15 *Id.* at 411. "Insistence upon absolute lack of control would risk barring the civil commitment of  
16 highly dangerous persons suffering severe mental abnormalities." *Id.* at 412. Thus, the State  
17 must prove only that Mr. Gillis has *serious difficulty* controlling his behavior, not that he *lacks*  
18 *control* of his behavior, which is a clear misstatement of the law set forth in *Thorell* and *Crane*.

#### 19 **B. An SVP Trial is Civil in Nature and Criminal Rights Do Not Apply**

20 While the State has the burden of proving that Jones is a sexually violent predator  
21 beyond a reasonable doubt, Washington's sexually violent predator statute is civil in nature.  
22 *In re Personal Restrain of Young* 122 Wn.2d 1, 23, 857 P.2d 989 (1993). As such, courts have  
23 determined that most criminal protections, other than those set forth in RCW 71.09, do not  
24 apply. *In re Detention of Petersen*, 138 Wn.2d 70, 91, 980 P.2d 1204 (1999). For example,  
25 Jones does not have a Fifth Amendment right against self-incrimination in an SVP case. *Young*,  
26 122 Wn.2d at 23. Jones does not have a Sixth Amendment right to confront witnesses or to be  
present at a deposition. *In re Detention of Stout*, 159 Wn.2d 357, 374, 150 P.3d 86 (2007).  
However, the court's statutory contempt authority set forth in RCW 7.21 *et seq.* governs in SVP  
cases. *In re Detention of Young*, 163 Wn.2d 684, 693, 185 P.3d 1180 (2008).

1 **C. Testimony of Jones' Prior Sexual History is Relevant and Admissible**

2 The State intends to present testimony relating to Jones' sexual history, including the  
3 testimony of some of Jones' victims. Testimony of Jones' sexual history, including by prior  
4 victims, is an integral part of the State's proof in SVP cases, and the WSSC has repeatedly  
5 recognized the importance of such evidence and held it admissible in SVP cases.  
6 *Young, supra*, 122 Wn.2d 1.

7 "In assessing whether an individual is a sexually violent predator, prior sexual history is  
8 highly probative of his or her propensity for future violence." *Young*, 122 Wn.2d at 53. In  
9 *Young*, the trial court permitted Young's victims to testify about the facts surrounding Young's  
10 sexual assault of them. The trial court overruled Young's objection that such evidence was  
11 irrelevant and unfairly prejudicial. On appeal, the WSSC held that testimony by Young's  
12 victims regarding the sexual assaults perpetrated by him was properly admitted. *Id.* at 53. The  
13 Court reasoned that, "the manner in which the previous crimes were committed has some  
14 bearing on the motivations and mental states of [Young], and is pertinent to the ultimate  
15 question here." *Id.*

16 The holding in *Young* was later reaffirmed in *In re Detention of Turay*, 139 Wn.2d 379,  
17 986 P.2d 790 (1999). In *Turay*, the trial court refused to order the State to accept Turay's offer  
18 to stipulate to his convictions and preclude his victims from testifying. 139 Wn.2d at 400.  
19 Instead, the trial court permitted Turay's victims to testify about the facts of the offenses. *Id.*

20 The WSSC held that Turay's victims were properly permitted to testify. *Id.* at 402.  
21 The Court rejected Turay's claim that such testimony was unfairly prejudicial and prohibited  
22 by ER 403. *Id.* at 400-02. In doing so, the Court focused on the highly probative nature of the  
23 evidence and the materiality of the issues which such evidence illuminated. *Id.* at 401. The  
24 WSSC held that prior sexual history is admissible to assist the trier-of-fact in assessing the  
25 mental state of an alleged SVP, the nature of his sexual deviancy, and the likelihood that he  
26

1 will commit a crime involving sexual violence in the future. *Id.* As such, the State will offer  
2 the testimony of Malone's victims, as well as testimony relating to his sexual history.

3 **D. Experts in SVP Cases May Testify Concerning the Factual Bases of Their Opinions**  
4 **Even if the Fact Are Not Otherwise Admissible in Evidence**

5 The WSSC has repeatedly rejected challenges to expert testimony in SVP cases that  
6 their opinions are based upon hearsay or other inadmissible evidence. *See Young, supra*,  
7 122 Wn.2d at 55-58; and *In re Detention of Marshall*, 156 Wn.2d 150, 161-63, 125 P.3d 111  
8 (2005). The WSSC has held that admission of an expert's testimony in SVP cases is proper  
9 under ER 703. *Young*, 122 Wn.2d at 58; and *Marshall*, 156 Wn.2d at 162. ER 703 permits an  
10 expert to base his or her expert opinion on facts or data that are not otherwise admissible  
11 provided they are of a type reasonably relied on by experts in the particular field. *See also*  
12 *City of Bellevue v. Kravik*, 69 Wn. App. 735, 742, 850 P.2d 559 (1993) ("Expert opinion may be  
13 given even where the underlying factual material would otherwise be inadmissible.")

14 Further, ER 705 permits an expert to relate hearsay and other inadmissible facts to the  
15 fact finder in order to explain the reasons for the expert's opinions. ER 705<sup>1</sup>; *Marshall*, 156  
16 Wn.2d at 163. *Of Puget Sound, Inc. v. Dept. of Revenue*, 106 Wn.2d 391, 399, 722 P.2d 787  
17 (1986). In such a situation, the hearsay is not substantive evidence, but is admitted for the  
18 limited purpose of explaining the expert's opinion and an instruction to that effect is  
19 appropriate. *Marshall*, 156 Wn.2d at 163.

20 Combined, the *Young* and *Marshall* decisions conclusively establish that an individual's  
21 psychiatric history, including treatment records, prior psychological evaluations, court records,  
22 arrest records, police reports and medical records are the types of materials reasonably relied  
23 upon by psychologists who treat and evaluate sex offenders. In accord with this authority, Dr.

24  
25 <sup>1</sup> ER 705 provides that "[t]he expert may testify in terms of opinion or inference and give reasons  
26 therefore without prior disclosure of the underlying facts or data, unless the judge requires otherwise. The expert  
may in any event be required to disclose the underlying facts or data on cross-examination."

1 Hoberman will testify to his reasonable reliance on the information he considered. He will  
2 further testify, in accord with *Marshall*, that such information is regularly relied upon by  
3 professionals in the field for purposes unrelated to litigation, including sex offender evaluations.

4 The State intends to introduce the evidence at issue to prove three things: (1) that Jones  
5 currently suffers from a mental abnormality and a personality disorder; (2) that his mental  
6 abnormality and personality disorder cause him serious difficulty controlling his behavior, and  
7 (3) that his mental abnormality and personality disorder make him likely to engage in predatory  
8 acts of sexual violence if he is not confined in a secure facility. These facts are material in this  
9 action since they form the elements of the definition of an SVP which the State must prove at  
10 trial beyond a reasonable doubt. *Turay, supra*, 139 Wn.2d at 401; RCW 71.09.020(18). The  
11 State will propose a limiting instruction to be read to the jury during expert testimony.

12 **E. An Expert May Testify About Opinions That Embrace Ultimate Issues to be**  
13 **Decided by the Trier of Fact**

14 An expert in an SVP case cannot opine that an individual meets the definition of a  
15 sexually violent predator. *In re Detention of Aquil*, 84 Wn. App. 88, 100, 929 P.2d 436 (1996).  
16 The State does not intend to elicit testimony from Dr. Hoberman that Jones is a sexually  
17 violent predator and will request in pretrial motions that Jones' expert be precluded from  
18 testifying that Jones is *not* a sexually violent predator.

19 However, the State does intend to elicit testimony from Dr. Hoberman that Jones  
20 suffers from a mental abnormality and that because of that mental abnormality, he is more  
21 likely than not to commit predatory acts of sexual violence unless he is confined in a secure  
22 facility. Such testimony, although it touches on ultimate issues of fact to be determined by the  
23 fact-finder, is admissible pursuant to ER 704, which provides:

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 fact.  
26

1 ER 704. Testimony on these issues has been endorsed by Washington appellate courts. In  
2 *In re Detention of Bedker*, 134 Wn. App. 775, 777, 146 P.3d 442 (2006), an SVP case,  
3 Bedker argued that the trial court erred in permitting the State's expert to testify that he  
4 suffers from the Pedophilia, which the expert opined was a mental abnormality. *Bedker*,  
5 134 Wn. App. at 777. Bedker claimed that this was an inadmissible legal conclusion that was  
6 analogous to an expert opining in a criminal case that the defendant is guilty. *Id.* The Court of  
7 Appeals rejected Bedker's argument and held that this was proper expert opinion testimony.  
8 The Court explained that while it would be improper for an expert to express an opinion that  
9 Bedker met the statutory definition of an SVP because that is the ultimate legal question in an  
10 SVP case, it would not be improper for an expert to opine that Bedker suffered from a mental  
11 abnormality within the meaning of the statute because that is a necessary element of the  
12 determination that he is a sexual predator. *Id.* at 778.

13 "Expert opinion testimony, however, is not objectionable simply because it 'embraces  
14 an ultimate issue to be decided by the trier of fact.'" *Id.*, quoting ER 704. Expert opinion  
15 testimony may encompass ultimate issues of fact if it meets the requirements of ER 702 and  
16 ER 403. *Id.* Whether a person suffers from a mental abnormality "is based upon the  
17 complicated science of human psychology and is beyond the ken of the average juror."  
18 *Id.* at 779. In addition, the Court noted that Bedker was free to challenge the opinion of the  
19 State's expert, and did so. Bedker also presented testimony from his own expert that he did not  
20 suffer from a mental abnormality. *Id.*

21 Similarly, in *In re Detention of Campbell*, 139 Wn.2d 341, 986 P.2d 771 (1999), the  
22 WSSC rejected Campbell's challenges to the testimony of the State's expert who testified that  
23 Campbell suffered from a paraphilia and opined that the paraphilia made Campbell likely to  
24 reoffend if not confined in a secure facility. 139 Wn.2d at 356-58. Campbell questioned the  
25 ability of anyone to predict future dangerousness and argued that the expert should have relied  
26

1 on actuarial instruments rather than a clinical risk assessment. *Id.* The WSSC rejected  
2 Campbell's claims, holding that his arguments go the weight of the evidence and not its  
3 admissibility. *Id.* at 358. Thus, such evidence is routinely admitted in SVP cases.

4 **F. Expert Opinion on Risk Assessment**

5 RCW 71.09 requires that the State prove that Aronson's mental abnormality or  
6 personality disorder makes him likely to engage in predatory acts of sexual violence if he is not  
7 confined in a secure facility. RCW 71.09.060. Courts have repeatedly held that predictions of  
8 future dangerousness are admissible in SVP cases. *Young, supra*, 122 Wn.2d at 56;  
9 *Thorell, supra*, 149 Wn.2d at 756; *Campbell, supra*, 139 Wn.2d at 357-58; *In re Detention*  
10 *of Post*, 145 Wn. App. 728, 759, 187 P.3d 803 (2008) (In SVP cases, "both sides are properly  
11 allowed to present expert witnesses who make risk predictions based on various tests and  
12 factors.").

13 Further, the WSSC has repeatedly held that risk assessments based on both clinical and  
14 actuarial determinations of future dangerousness are admissible and satisfy the *Frye* standard.  
15 *Thorell*, 149 Wn.2d at 156. The *Thorell* Court recognized that a pure actuarial assessment  
16 evaluates only a limited set of predictors and does not include important factors not included in  
17 actuarial measures. *Id.* at 753. Additionally, the *Thorell* Court acknowledged that evaluators  
18 often use actuarial instruments to "anchor" their risk assessments in SVP cases. *Id.* at 754.  
19 The WSSC noted in *Thorell* that they had previously rejected arguments that an expert was  
20 required to rely solely on an actuarial assessment for predictions of future dangerousness,  
21 finding that such arguments go to the weight of the evidence not its admissibility. *Id.* at 755.

22 Actuarial risk assessment involves the use of actuarial tools that incorporate statistical  
23 analysis to determine the relative weight to be given to various risk factors empirically  
24 associated with sexual and violent recidivism. Some commonly used actuarial instruments  
25 used in SVP cases include the Static-99R, Static-2002R, and Sex Offender Risk Appraisal  
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1 Guide (SORAG). These actuarial instruments consist of numerous items, each of which has  
2 been linked through extensive research to sexual or violent recidivism. The evaluator must  
3 consider the entire record to determine how to score an individual on each item. For example,  
4 an individual receives points based on the number of sexual convictions he has had, whether he  
5 has a male victim or a stranger victim. To ensure consistent scoring, the developers of each  
6 instrument have published coding rules to explain how each item should be scored – for  
7 example, the meaning of “stranger” victim. The expert then adds the points to reach a total  
8 score. The total score is associated with empirical data identifying the offender’s statistical  
9 risk of reoffense, including a risk category (e.g. low, moderate, high), an absolute risk estimate  
10 and relative risk compared to other offenders studied.

11 It is critical to note that actuarial instruments do not tell the evaluator that the person  
12 being assessed will, in fact, reoffend. Rather, actuarial instruments tell the evaluator the  
13 percentage of individuals who were charged or convicted of a new offense in the group of  
14 offenders that scored the same as the person being assessed. In other words, it is a group risk  
15 estimate, not an estimate of the likelihood that the individual being assessed will be charged or  
16 convicted of a new offense.

17 A “guided” or “structured” clinical assessment incorporates risk factors not included in  
18 actuarial instruments. As stated in *Thorell*, while actuarial instruments typically “anchor” an  
19 evaluator’s risk assessment, evaluators consider risk factors outside of actuarial tools, as well.  
20 Because actuarial instruments are limited to a specific set of “static” or unchanging risk factors,  
21 evaluators often consider “dynamic” or changeable risk factors and “protective” or mitigating  
22 factors. Like actuarials, there are a variety of instruments that include empirically-studied  
23 dynamic risk factors, such as sexual preoccupation, sexual interest in children, impulsiveness,  
24 and lack of cooperation with supervision. Protective factors include empirically-studied  
25 factors, such as the amount of time an individual was in the community between sexual  
26

1 offenses, having less than fifteen years left at risk due to age or health status, and completion of  
2 a sex offender treatment program.

3 Dr. Hoberman conducted a comprehensive risk assessment in this case, relying in part  
4 upon actuarial tools, in part upon dynamic risk factors, as well as protective factors in  
5 determining whether Jones is likely to engage in predatory acts of sexual violence if he is not  
6 confined in a secure facility. The State will elicit testimony from Dr. Hoberman that, after  
7 considering all of this information in his risk assessment, it is his opinion that Jones is likely to  
8 reoffend if not confined in a secure facility.

9 DATED this 16<sup>th</sup> day of June, 2014.

10 ROBERT W. FERGUSON  
11 Attorney General

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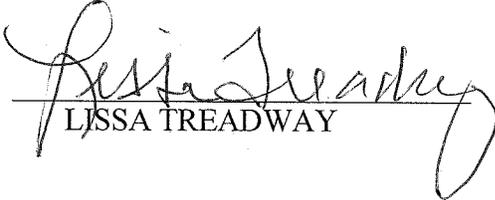
DECLARATION OF SERVICE

On the 16<sup>th</sup> day of June, 2014, pursuant to the Electronic Service Agreement between the parties, I sent via electronic mail a true and correct copy of Petitioner's Trial Memorandum addressed as follows:

Marla Polin  
polinlaw@hotmail.com

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 16<sup>th</sup> day of June, 2014, at Seattle, Washington.

  
LISSA TREADWAY