

69844-3

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NO. 69844-3

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

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In re the Detention of Michael Bargas

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR SKAGIT COUNTY

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APPELLANT'S BRIEF

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## SUMMARY OF ARGUMENT

Civil commitment pursuant to RCW 71.09 is a massive deprivation of liberty and before the State may indefinitely confine Mr. Bargas, the appellant herein, it must prove beyond a reasonable doubt that he currently suffers from a mental condition that distinguishes him from the ordinary criminal recidivist and renders him so unable to control his sexual impulses that he is likely to commit future sex offenses if not confined. Mr. Bargas was not diagnosed with a sexual disorder and the State failed to establish that his diagnoses of Antisocial Personality Disorder (ASPD), polysubstance abuse, and psychopathy rendered him likely to sexually reoffend if not confined. Moreover, given the consensus among the experts that if Mr. Bargas refrained from substance use he would be *unlikely* to sexually reoffend, confining him in the Special Commitment Center (SCC), where intensive substance abuse treatment is unavailable, violates his right to due process.

## ASSIGNMENTS OF ERROR

1. The State failed to prove beyond a reasonable doubt that Mr. Bargas has a mental condition that renders him unable to control his sexual impulses.

2. The State failed to show beyond a reasonable doubt that Mr. Bargas is likely to commit future sexually violent offenses if not confined.

3. Because there was uncontested testimony that intensive substance abuse treatment was unavailable at the SCC, the nature and duration of Mr. Bargas' confinement is unrelated to the purpose of his confinement, thereby rendering his commitment to that facility unconstitutional.

#### ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. In order to confine an individual under RCW 71.09, the State must prove that the person suffers from a mental condition that makes it so difficult for them to control their sexual impulses that they are likely to sexually reoffend if not confined. Where Mr. Bargas' only diagnoses were ASPD, polysubstance abuse, and psychopathy, did the State prove beyond a reasonable doubt that he has a mental condition that renders him unable to control his sexual impulses?

2. In order to make out its case for confinement under RCW 71.09 the State must show that an individual is currently likely to sexually reoffend if not confined. Where Mr. Bargas' penile plethysmograph testing revealed no deviant sexual interests and where actuarial instruments placed him at a low percentage risk of reoffense, did the State

prove beyond a reasonable doubt that that he is currently likely to commit future sexually violent crimes if not confined?

3. Civil commitment is a massive deprivation of liberty and the Supreme Court has found that as a matter of due process, such confinement is constitutional only when the “nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed.” *Jackson v. Indiana*, 406 U.S. 715, 738, 92 S.Ct. 1845, 32 L.Ed.2d 435 (1972). Where both psychological experts agreed Mr. Bargas was unlikely to reoffend if he refrained from using substances and where the State’s expert opined that he was in need of intensive substance abuse treatment to address that risk, was it a violation of due process to order his confinement in the SCC, where such treatment is unavailable.

#### STATEMENT OF THE CASE

Mr. Bargas has been convicted of three sexual offenses. CP 455; RP V. 3, p. 53-55.<sup>1</sup> All three offenses were committed while Mr. Bargas

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<sup>1</sup> All citations to the clerk’s papers are herein cited as “CP\_\_”. The recorded proceedings for this matter are contained in a non-consecutively paginated six-volume transcript. The first volume relates to pre-trial conferences held on March 14, 2011 and July 20, 2012. The other five volumes contain the transcript of the bench trial held in Skagit County Superior Court from December 10-20, 2012. All citations herein are cited to the volume and page as “RP V. \_\_, p. \_\_”.

was under the influence of drugs and alcohol. RP V. 4, p. 43-46, RP V. 5, p. 10. His most recent offense occurred in 1996. CP 455; RP V. 3, p. 53-55. Though he pled guilty to that offense for a negotiated sentence of eight years, the court ultimately sentenced him to fourteen years of incarceration. RP V. 2, p. 31. On February 17, 2011, after serving almost his entire sentence, the State filed a petition to indefinitely confine Mr. Bargas as a sexually violent predator under RCW 71.09. CP 454. Following a probable cause determination, Mr. Bargas was transferred to the SCC. Id.

In December 2012, a five-day bench trial was held pursuant to RCW 71.09.060, before the Honorable John M. Meyer in Skagit County Superior Court. CP 454. At the trial, the State offered the testimony of staff from the Department of Corrections as well as from the SCC. The State also offered the testimony of Dr. Henry Richards, a forensic psychologist and the former Superintendent for the SCC. RP V. 3, p. 40. Dr. Richards interviewed Mr. Bargas in anticipation of trial and diagnosed him with ASPD, polysubstance abuse, and psychopathy. RP V.3, p. 86. He opined that these disorders resulted in a mental abnormality that caused Mr. Bargas to have serious difficulty controlling his sexual behaviors such

that he was likely to engage in predatory sexual violence if not confined to a secure treatment facility. RP V. 3, p. 80, 143; RP V. 4, p. 15.

Mr. Bargas offered the testimony of staff from the Department of Corrections and the SCC as well. RP V.4, p. 134, 149. He also offered the testimony of Dr. Chris Fisher, a psychologist who, like Dr. Richards, found that Mr. Bargas suffers from ASPD and polysubstance abuse. RP V.4, p.177-79. However, Dr. Fisher concluded that Mr. Bargas did not meet the criteria for confinement under RCW 71.09 because such disorders did not render him unable to control his sexual impulses. *Id.* Finally, Mr. Bargas offered numerous lay witnesses who testified regarding his religious convictions, his personal character and history, and the support they could provide if he were to be released to the community. RP V.6, p. 3, 13, 21, 30.

The court issued a written decision on February 7, 2013, finding beyond a reasonable doubt that Mr. Bargas met the criteria for confinement pursuant to RCW 71.09. CP 454-59. The court found that Mr. Bargas lacked credibility and that he had not maintained his sobriety when in the community and that he had not engaged in substance abuse treatment that would help him stay sober and stop offending. CP 456. The court credited the testimony of Dr. Richards over that of Dr. Fisher, and



found that Mr. Bargas suffers from alcohol abuse, polysubstance dependence, ASPD and psychopathy; the court further found that Mr. Bargas has deviant sexual arousal and that these disorders caused Mr. Bargas serious difficulty controlling his sexually violent behavior. CP 457. The court credited Dr. Richards' risk assessment and, based upon the Static 99 and PCL-R, as well as the dynamic factors identified by Dr. Richards, concluded that Mr. Bargas was likely to reoffend if not confined. CP 457-58. The court thereafter ordered Mr. Bargas confined to the SCC until his condition has so changed that he is safe to be released to the community. CP 459.

#### ARGUMENT

**1. The State failed to show beyond a reasonable doubt that Mr. Bargas' substance abuse and personality disorders render him unable to control his sexual impulses.**

As a matter of both due process and statutory direction, before a person may be civilly confined as a sexually violent predator under RCW 71.09 the State must first prove beyond a reasonable doubt that the person "suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility." RCW 71.09.060; RCW 71.09.020(1); *In re Det. of Young*, 122 Wn.2d 1, 48, 857 P.2d 396 (1993). In reviewing a trial court's findings of fact and conclusions of law in a proceeding held

pursuant to RCW 71.09, this Court must determine whether “substantial evidence” supports the challenged findings and whether those findings support the trial court's conclusions. *In re Det. of Thorell*, 149 Wn.2d 724, 744, 72 P.3d 708 (2003), *cert. denied*, 541 U.S. 990, 124 S.Ct. 2015, 158 L.Ed.2d 496 (2004). Thus, on review, “when viewed in the light most favorable to the State, there must be sufficient evidence in the finding of mental illness to allow a rational trier of fact to conclude the person facing commitment has serious difficulty controlling behavior.” *Id.*

Here, the State failed to present substantial evidence that Mr. Bargas’ ASPD, substance abuse, and psychopathy renders him so unable to control his sexual impulses that he must be confined to a secure facility. Under both prevailing Supreme Court precedent and Washington’s statutory definition of “mental abnormality,” this linkage is a required element for sexually violent predator (SVP) commitment, and one which the State failed to prove at Mr. Bargas’ RCW 71.09 proceeding.

In *Kansas v. Hendricks*, 521 U.S. 346, 357, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997), the Kansas Sexually Violent Predator Act (SVPA) survived constitutional challenge because the finding of dangerousness required for commitment was predicated upon proof of more than a mere predisposition to violence; rather, it required evidence of past sexually violent behavior and a present mental condition that makes it difficult, if

not impossible, for the person to control his dangerous sexual behavior. *Id.* at 358. While approving the Kansas statute generally, Justice Kennedy noted in his concurring opinion: “If, however, civil confinement were to become a mechanism for retribution or general deterrence, or if it were shown that mental abnormality is too imprecise a category to offer a solid basis for concluding that civil detention is justified, our precedents would not suffice to validate it.” *Id.* at 373.

The Supreme Court revisited the showing required to sustain civil commitment as a sexually violent predator in *Kansas v. Crane*, 534 U.S. 407, 122 S.Ct. 867, 151 L.Ed.2d 856 (2002), again dealing with the Kansas statute. In *Crane*, the court noted that though a “total and complete lack of control” over sexually violent behaviors was not required in order to sustain SVP commitment, the “critical distinguishing feature” for offenders who may be properly subject to such statutes are those who have “a special and serious lack of ability to control behavior.” *Crane*, 534 U.S. at 412-13. The court then determined that due process in this context required “proof of serious difficulty in controlling behavior” that is sufficient to distinguish a dangerous sex offender subject to civil commitment from the “dangerous but typical recidivist convicted in an ordinary criminal case.” *Id.* at 413. Critically, this distinction limits civil commitment only to that subset of offenders whose “illness, abnormality

or disorder,” renders them sexually dangerous and therefore in need of indefinite civil confinement. *Id.* at 413. Implicit in that distinction between the dangerous sexual offender and the dangerous but typical criminal recidivist, is that the behavior that cannot be controlled is sexual behavior that is causally linked to a mental condition. *See also Foucha v. Louisiana*, 504 U.S. 71, 86-87, 112 S.Ct. 1780, 118 L.Ed.2d 437 (1992)(rejecting the use of ASPD to sustain confinement because such “rationale would permit the State to hold indefinitely [a person] shown to have a personality disorder.”)

These precedents are reflected in Washington’s definition of “sexually violent predator,” which requires a showing that an alleged mental abnormality or personality disorder “makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility.” RCW 71.09.020(18). Indeed, in *Thorell*, the Washington Supreme Court found that due process requires more than mere proof of a risk to reoffend but rather proof of a risk to reoffend which stems from a mental disorder. 149 Wn.2d at 715-16. Moreover, though RCW 71.09.020(18) anticipates that confinement under that chapter may be premised upon a personality disorder, the State is still required to prove that the alleged disorder causes an individual a “special and serious” lack of control over their sexual behavior that distinguishes them from an

ordinary criminal recidivist. *Crane*, 534 U.S. at 412-13. Accordingly, during the underlying RCW 71.09 bench trial, the State was required to prove that Mr. Bargas suffers from a mental condition that causes him special and serious difficulty controlling his sexual behavior and makes him likely to commit sexual offenses if not confined. It failed to do so.

At trial Dr. Richards testified that Mr. Bargas suffers from ASPD, alcohol abuse, and psychopathy and that these conditions render Mr. Bargas unable to control his sexual impulses. RP V.3, p. 143. However, as he admitted at trial, a mental abnormality cannot be inferred from the presence of a diagnosis— under the statute, the manifestations of the alleged disorders must make a person likely to commit sexual offenses. RP V.4, p. 59-60; RCW 71.09.020(18). *See also Crane*, 534 U.S. at 412-13. However, it is clear from Dr. Richard’s testimony that Mr. Bargas’ history of sexual offending is the result of substance abuse and a criminal lifestyle, and not the result of a mental condition that causes an ongoing and serious inability to control his sexual behaviors.

First, Dr. Richard’s diagnosis of ASPD does not supply a causal connection between Mr. Bargas’ alleged mental state and a “special and serious” inability to control his sexual impulses. Under the DSM-IV-TR, the criteria for ASPD are:

- A. There is a pervasive pattern of disregard for and violation of the rights of others occurring since age 15 years, as indicated by three (or more) of the following:
1. Failure to conform to social norms with respect to lawful behaviors as indicated by repeatedly performing acts that are grounds for arrest
  2. deceitfulness, as indicated by repeated lying, use of aliases, or conning others for personal profit or pleasure
  3. impulsivity or failure to plan ahead
  4. irritability and aggressiveness, as indicated by repeated physical fights or assaults
  5. reckless disregard for safety of self or others
  6. consistent irresponsibility, as indicated by repeated failure to sustain consistent work behavior or honor financial obligations
  7. lack of remorse, as indicated by being indifferent to or rationalizing having hurt, mistreated, or stolen from another.
- B. The individual is at least age 18 years.
- C. There is evidence of conduct disorder with onset before age 15 years.
- D. The occurrence of antisocial behavior is not exclusively during the course of schizophrenia or a manic episode.

Diagnostic and Statistical Manual-IV-TR (“DSM-IV-TR”), p. 706; RP Vol. 3, p. 94. Nowhere in this criteria is volitional incapacity, much less sexual preoccupation or deviancy, contemplated. Thus, as even Dr. Richards admitted, a simple diagnosis of ASPD alone cannot be

considered sufficient to justify total confinement under RCW 71.09. *See* RP V. 4, p. 60.

Indeed, for this very reason, national experts in the field of SVP commitment have found that “the diagnosis of Antisocial Personality Disorder alone, without an attending diagnosis of paraphilia, would almost never lead to a finding that an offender would be likely, or very likely, to reoffend with another sexually violent act.” Jack Vognsen, PhD & Amy Phenix, PhD, *Antisocial Personality Disorder is Not Enough: A Reply to Sreenivasan, Weinberger, and Garrick*, 32 J. Am. Acad. Psychiatry L. 440, 440- 442 (2004). Even Allen Frances, one of the architects of the DSM-IV-TR, has opined that ASPD should be used to support confinement as a sexually violent predator only when “it can be demonstrated that it leads specifically to a pattern of sexual offenses.” Allen Frances, MD, et al., *Defining Mental Disorder When it Really Counts: DSM-IV- TR and SVP/SDP Statutes*, 36 J. Am. Acad. Psychiatry L. 375, 381 (2008).

At trial, Dr. Richards attempted to conjure this required connection between Mr. Bargas’ ASPD and his sexual offending, testifying

substance abuse disinhibits him, allows him to do things that are of violence exploitative, without feeling... When I listened to him I agree he doesn’t want to hurt anybody. Antisocial Personality

Disorder drives him toward certain opportunistic exploitative situations, environments. Substance abuse disinhibits him at the moment. It facilitates criminal activity...essentially creates a lifestyle that is crime prone and sexual offense prone.

RP V.3, p.143. However, under this construct, it is clear that Mr. Bargas offends while under the influence, not because ASPD or substance use compels him to sexually offend, but because his substance abuse disinhibits him and puts him in situations in which crimes are generally more likely to occur. However, simply showing that Mr. Bargas is more likely to *choose* to commit sexual offenses while intoxicated is insufficient for a finding of mental abnormality under the precedent set by *Crane*. 534 U.S. at 412-13.

As pointed out by the dissent in *Crane*, “[o]rdinary recidivists choose to re-offend and are therefore amenable to deterrence through the criminal law; those subject to civil commitment under the [Kansas statute], because their mental illness is an affliction and not a choice, are unlikely to be deterred.” *Id* at 420-21 (Scalia, J., with whom Thomas, J., joined). *See also, Varner v. Monohan*, 460 F.3d 861, 864 (7th Cir. 2006) (“*Crane* held that the Constitution requires findings that separate inability to control from unwillingness to control.”); *U.S. v. Wilkinson*, 646 F. Supp. 2d 194, 196 (Mass. Dist. Ct. 2009)(in order to justify SVP commitment the person must be dangerous because of a mental condition



“which causes him to have serious difficulty in making reasoned choices.”). The testimony of Dr. Richards supports a finding that Mr. Bargas can in fact control his behavior, but that when he uses substances, he may not chose to. Such a showing is insufficient to sustain confinement pursuant to RCW 71.09.

In fact, Dr. Richards testified, both during his deposition and at trial, that all of Mr. Bargas’ sex offenses were related to his substance abuse and that if he remained sober he would *not* be likely to reoffend. CP 75; RP V. 4, p. 43. According to Dr. Richards, if he did not use substances, Mr. Bargas would be a fundamentally different person. *See* RP V. 4, p. 19. He went so far as to state in his deposition, “I think that if he were to show more awareness [of his substance abuse], then—then it would be unlikely that the pattern [of sex offending] would have continued.” CP 221.

Dr. Richards’ essential argument then, appears to be Mr. Bargas “drags himself into the gutter by drinking, living a marginal life, trying to play the role of petty hustler” and that when in this situation, he seeks out “environments, bars, families where there’s a single mother, a marginal person emotionally, a marginal person socially....” RP V. 3, p. 143-44. *See also* CP 73-74. However, keeping bad company and hanging out in undesirable bars with single mothers is not a mental abnormality, and a

tendency to make dubious life choices is not the “special and serious” lack of volitional control over one’s sexual impulses required by *Crane*, 534 U.S. at 412-13. In order to qualify as a condition for which total confinement is necessary, the State must show beyond a reasonable doubt that Mr. Bargas suffers from a condition that compels him to commit sexual offenses, thereby distinguishing him from the “dangerous but typical recidivist.” *Id.* Dr. Richards’ testimony failed to make that showing.

Moreover, in order to form the basis for confinement, the alleged disorder must *currently* cause a “special and serious” inability to control sexual behavior. RCW 71.09.060; *Hendricks*, 521 U.S. at 371. Though Dr. Richards makes much of the fact that Mr. Bargas did not remain sober while in the community, and that therefore his past alcohol use continues to put him at risk of sexual recidivism, Mr. Bargas has not been in the community since his last criminal offense in 1996. CP 461. And though Mr. Bargas abused alcohol at that time, there is no evidence that he continues to have the same problem seventeen years later. Indeed, all the evidence points to the contrary.

At trial there was extensive testimony that drugs and alcohol are widely available in both prison and the SCC. *See, e.g.*, RP V.2, p.175, CP 38, RP V. 3, p. 84, RP V.4, p.178. Despite the availability of substances in

an environment from which he cannot escape, and despite being surrounded by peers who are using substances, there is no evidence that Mr. Bargas has ever used drugs or alcohol while in prison or at the SCC. *See* RP V. 2, p. 135; RP V. 3, p. 84; RP V. 4, p. 177-78. Moreover, Mr. Bargas has been attending Alcoholics Anonymous for years, and although Dr. Richards appears to have little confidence in the program, he also acknowledged that there is no intensive substance abuse program at the SCC. RP V. 3, p. 87. RP V. 4, p. 48. Thus, even if Mr. Bargas' substance abuse led to his sexual offending in the past, there is no evidence that it would currently, and it is patently clear that it is a showing of a *current* compulsion to commit sex offenses that is required for confinement under RCW 71.09. *In re Det. of Moore*, 167 Wn.2d 113, 124, 216 P.3d 1015 (2009).

Nor does Dr. Richards' diagnosis of psychopathy lend any additional support to the State's case. Dr. Richards admitted that psychopathy is not a distinct personality disorder or mental illness in the DSM-IV-TR, and that in the new DSM-V, there is no significant difference between the two diagnoses. RP V. 3, p. 95, 101.<sup>2</sup> According to Dr. Richards, the addition of psychopathy to Mr. Bargas' alleged

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<sup>2</sup> Dr. Richards testified that he considered both the DSM-IV-TR and the revised criteria of the DSM-V when considering Mr. Bargas' case. RP V. 3, p. 81.

diagnostic list is a specifier with respect to his ASPD, indicating the presence of a particular type of antisocial behavior. RP V. 3, p. 95-98. Though Dr. Richards scored Mr. Bargas on the PCL-R, the assessment instrument for psychopathy, he ultimately opined that Mr. Bargas was a “psychopathic opportunist,” and was therefore less inclined to use violence, “not sexually interested in violence,” and “less likely to have deviant sexual arousal patterns.” RP V.3, p. 111; RP V. 4, p. 95.

The crux of the determination of whether an individual requires total confinement under RCW 71.09 is whether the person suffers from a condition that makes them likely to engage in sexually violent behavior if not confined. Psychopathy has no diagnostic criteria that relate to violent sexual compulsion and according to Dr. Richards, even if Mr. Bargas may be properly diagnosed with psychopathy, his is of the sort that does *not* result in such a compulsion. Thus, like his diagnosis of ASPD and substance abuse, Dr. Richard’s diagnosis of psychopathy fails to provide the requisite link between Mr. Bargas’ alleged mental condition and a compulsion to commit sexually violent offenses. *Crane*, 534 U.S. at 412-13.

In sum, taking the foregoing evidence in the light most favorable to the State, the State failed to prove that Mr. Bargas’ ASPD, substance

abuse, and psychopathy render him unable to control his sexual impulses and the trial court's finding to the contrary should be reversed.

**2. Where a validated penile plethysmograph test showed no deviant sexual interests and actuarial scores placed Mr. Bargas in a risk group that had a low percentage risk of reoffending, the State failed to prove beyond a reasonable doubt that Mr. Bargas is currently likely to commit future sexually violent crimes if not confined.**

In order to commit an individual as a sexually violent predator under RCW 71.09 the State must prove beyond a reasonable doubt that the person currently suffers from a condition that makes it likely he will commit crimes of sexual violence if not confined. RCW 71.09.020(18); RCW 71.09.060. Assuming *arguendo* that the State proved that Mr. Bargas has a mental condition that affects his ability to control his sexual impulses, it must further show that he is in fact likely to succumb to these urges and commit future sexual offenses. However, according to the numerous actuarial instruments as well as penile plethysmograph (PPG) testing and polygraph examination introduced at trial, Mr. Bargas not only demonstrates no sexual deviance but he presents a statistically low risk of reoffense.

Prior to trial the State moved to compel a PPG test of Mr. Bargas, arguing that it was required in order to obtain a comprehensive evaluation of Mr. Bargas' risk of recidivism and that, according to Dr.

Richards, “deviant sexual arousal as assessed by means of PPG testing has been shown to be a potent factor in empirically based prediction of risk to reoffend sexually.” CP 578, 510. Dr. Richards further stated that PPG test results have been incorporated into actuarial risk assessment. *Id.* Though Mr. Bargas objected to the testing on religious grounds, arguing that forcing him to watch deviant sexual stimuli violated his constitutional rights, the Court ultimately ordered the testing. CP 583, 589-94, 607, 609-11.

After a thorough PPG exam, the results of the test were deemed inconclusive; Mr. Bargas demonstrated no meaningful response to any sexual stimuli. RP V. 4, p. 98. Moreover, the polygraph testing revealed that Mr. Bargas had not attempted to deceive or “beat” the PPG test, and that his responses were in fact truthful. RP V. 4, p. 98-100. Despite previously arguing that the PPG testing was a “potent factor” in an objective risk assessment, at trial the State attempted to dismiss the test results when they did not support its case, arguing that despite the results, Mr. Bargas maintains deviant sexual interests and therefore presents a high risk of reoffense. RP V. 4, p. 97-100, 112-14.

The State cannot have it both ways. If the PPG is a valid scientific assessment tool for sexual deviance, then it is telling that Mr. Bargas did not demonstrate sexually deviant interests during the test.

Indeed, the only evidence that the State offered to support its claim of deviant sexual interests was Mr. Bargas' criminal history. RP V. 4, p. 112-14. However, Mr. Bargas' last criminal offense was in 1996—over 17 years ago—and as both Dr. Richards and Dr. Fisher explained, sexual recidivism, as well as general antisocial behavior, decreases over time, particularly after the fourth decade of life. RP V. 3, p. 95; RP V. 4, p. 185-188. Mr. Bargas was 39 at the time of his last offense; he is now 56. Under RCW 71.09 it is Mr. Bargas' *current* risk of reoffense that must be proven, not his historical risk. RCW 71.09.060; *Hendricks*, 521 U.S. at 371.

Moreover, all three experts who administered the Static 99-R, the most widely accepted actuarial instrument in sexual violence risk assessment, scored Mr. Bargas as a four, which correlates to a group in which 17 to 23 percent of offenders are expected to recidivate within five years. RP V.3, p. 152-58.<sup>3</sup> Though Dr. Richards used additional actuarial instruments in his assessment, he testified that he weighed the results of the Static 99-R most heavily because it has been scientifically validated. *Id.* Notably, when questioned about the shortcomings of these actuarials, Dr. Richards acknowledged the scientific limits to predicting the future,

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<sup>3</sup> Dr. Richards also cited the ten-year risk estimates for this group as ranging from 26 to 33 percent. RP V. 3, p. 157-58. However, he also admitted that most recidivism occurs within two years of release. RP V. 4, p. 24.

stating bluntly that an evaluator must “hold onto the candle or curse the darkness.” RP V. 4, p. 71. Though the psychiatric community may continue to use these tests for assessment and treatment despite their shortcomings, such a “candle” cannot be considered proof beyond a reasonable doubt that Mr. Bargas is likely to reoffend.

However, rather than accept his own admission that there are few strong predictors for sexual violence, including the actuarial tests, Dr. Richards appeared to “double-down,” using his subjective clinical judgment to assess Mr. Bargas’ “dynamic” risk factors, thereby increasing his risk of offense to over fifty percent. RP V. 4, p. 15. These allegedly dynamic factors include Mr. Bargas’ personality, history of substance abuse, limited capacity for initiating and maintaining intimate relationships and his social alienation. RP V. 4, p. 11, 14. Not only are these factors generally unchanging due to Mr. Bargas’ continuing confinement, and therefore not actually “dynamic,” but they are also unsupported by the evidence presented at trial.

As Dr. Richards noted, Mr. Bargas was generally well behaved while in DOCS, and has been similarly cooperative at the SCC. RP V. 4, p. 82, 88-89.<sup>4</sup> Mr. Bargas called staff from both prison and the SCC who

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<sup>4</sup> At trial the State made much of the fact that Mr. Bargas had been involved in an incident at the SCC in April 2012, introducing extensive



testified that he treats them with respect and that he has not been a behavior problem in either institution. PR V. 4, p. 139-40, 158. Mr. Bargas also called numerous lay witnesses with whom he has maintained decades long relationships, all of whom testified regarding their significant and long term relationships with him, which included writing letters and visiting during his decades of incarceration. *See e.g.*, RP V. 3, 69-75; RP V.4, 35-36; RP V. 6, p. 9-40. *See also* V.4, p. 158 (in prison Mr. Bargas associated primarily with other religious inmates). Even Dr. Richards admitted that Mr. Bargas has generally avoided antisocial people in SCC. RP V. 4, p. 107. However, rather than rely on this recent evidence that Mr. Bargas has in fact developed meaningful relationships and community, despite his years of incarceration, Dr. Richards focused instead upon Mr. Bargas' decades old criminal offenses and the marginal lifestyle he adopted while abusing substances during that time in order to support the allegedly dynamic factors that increased Mr. Bargas' risk of reoffense. RP V. 4, p. 11, 14.

In light of the PPG results indicating that Mr. Bargas currently has no deviant sexual arousal patterns and the actuarial instruments that

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testimony regarding his alleged participation. *See* RP V. 2, p. 129-157; CP 17-38. However, the testimony revealed that though other residents were drunk and assaultive during the incident, Mr. Bargas was not and was ultimately found to be a witness, not a participant in the incident. CP 33; RP V.4, p. 54.

place him at a low risk of reoffense, even taking the evidence presented at trial in the light most favorable to the State, the State failed to prove that Mr. Bargas currently has deviant sexual urges that render him likely to reoffend if not confined.

**3. Mr. Bargas' confinement in SCC violates his right to due process because the intensive substance abuse treatment he requires is unavailable in that facility.**

In order to confine an individual, the courts have unequivocally found that “due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed.” *Jackson*, 406 U.S. at 738. *See also Foucha*, 504 U.S. at 79; *State v. Klein*, 156 Wn.2d 103, 119–20, 124 P.3d 644 (2005)(quoting *Foucha* that “[d]ue process requires that the nature of the commitment bear some reasonable relation to the purpose for which the individual is committed.”). Indeed, in upholding the state’s civil commitment scheme, the Washington Supreme Court noted specifically that the statute was constitutional in part because it was “focused on treating petitioners for a current mental abnormality” and that the statutory provisions provide direct care and treatment for the committed individuals and afford them release as soon as they are no longer dangerous. *In re Young*, 122 Wn.2d at 20-22. Because of this focus on treatment, the *Young*

court found that “[f]acially, the Statute and associated regulations suggest that the nature and duration of commitment is compatible with the purposes of the commitment,” thus satisfying the constitutional requirements set forth in *Jackson. Id.*, at 35. More recently, in *State v. McCuiston*, 174 Wn.2d 369, 389-90, 275 P.3d 1092 (2012) *cert denied*, 133 S.Ct. 1460, 185 L.Ed. 2d 368 (2013), the Supreme Court cited extensively to the legislative intent behind RCW 71.09, finding that the legislature intended to ensure that the statutory focus of RCW 71.09 is on specialized sex offender treatment and that the statute anticipates that individuals be released from confinement only when their alleged mental condition remits through the treatment provided at the SCC.

In Mr. Bargas’ case, the nature and duration of his commitment is not related to the reason for his confinement. Specifically, Mr. Bargas is being confined as a sexually violent predator in order to provide him with alcohol and substance abuse treatment. Not only is his reason for confinement thus unrelated to the nature of his commitment, but the undisputed evidence produced at trial indicates that there is no intensive substance abuse treatment currently offered at SCC.

At trial, both Dr. Richards and Dr. Fisher agreed that Mr. Bargas suffers from alcohol abuse and ASPD and that he needs intensive drug and

alcohol treatment in order to address his history of substance abuse. RP V. 4, p. 19-20; RP V. 5, p. 10. Moreover, both doctors opined that Mr. Bargas' risk of reoffense stems from his substance use and that if he did not abuse substances, he was unlikely to commit sexually violent offenses in the future. *See* CP 75, RP V. 4, 43 (Dr. Richards); RP V.5, p. 10 (Dr. Fisher). Thus, *even assuming* that Mr. Bargas is likely to commit sex offenses in the future due to his substance abuse, the treatment that Mr. Bargas requires in order to address his risk of recidivism is not the specialized sex offender treatment offered at SCC, it is intensive substance abuse treatment. However, as the trial court rightly found, no such program is currently available at the SCC. CP 456.

Dr. Richards, who was formerly the Superintendent of the SCC and is therefore familiar with the facility's treatment modalities, revealed that the only substance abuse treatment offered at the SCC is Alcoholics Anonymous and Clinically Assisted Self- Help (CASH), which is a clinician guided program similar to AA. RP V. 3, p. 86-87. Dr. Richards testified that though Mr. Bargas attends AA, he considers that program self-help, not therapy. RP V. 3, p. 86-87. Moreover, Mr. Bargas informed Dr. Richards that many participants in the AA program do not take it seriously and use it as a forum to brag about their disruptive behavior in

the sex offender programming. RP V. 4, p. 94. Dr. Richards agreed with Mr. Bargas' account, stating that such behavior was likely counterproductive, however he offered no alternative, simply stating "I would hope there were a few people there who were, you know, serious about staying sober in the group." Id.

The CASH program, the only other substance abuse program offered at SCC, was described as similarly ineffective. Dr. Richards testified that Mr. Bargas has not participated in the program because, in Mr. Bargas' opinion, the program focused on "tearing a person down" and that it appeared chaotic and badly run, with changing therapists and programming which made it impossible for individuals to progress through the program. RP V. 3, p. 88. Dr. Richards conceded that such a program may cause setbacks and that though he worked to stabilize CASH during his tenure, it was a challenge. RP V. 3, p. 90. He claimed that, while Mr. Bargas' assessment was fair, ultimately "you fight the war with the Army you have, not with the Army you wish you had." Id.

Dr. Richards attempted to mitigate his testimony regarding the substance abuse programming offered at SCC by testifying that substance abuse would be addressed as part of the more general sex offender treatment program offered at SCC; however he conceded that he

“wouldn’t qualify it as an intensive program.” RP V. 4, p. 49. In fact, he admitted that very few of the clinicians at the SCC are certified drug and alcohol counselors. *Id.* Finally, he stated that this lack of programming is primarily a budgetary issue, though the SCC has been in existence since 1990. RP V. 4, p. 49-50. This paucity of appropriate programming within SCC renders Mr. Bargas’ placement there unconstitutional.

Notably, though the *Young* court rejected a challenge in which respondents alleged that confinement under RCW 71.09 was unconstitutional because their mental disorders were not amenable to treatment, unlike Mr. Bargas, the respondents in that case were diagnosed with paraphilias, sexual disorders that could be appropriately treated through the specialized sex offender treatment offered at SCC. *Young*, 122, Wn.2d at 29-31. In contrast, Mr. Bargas’ risk to reoffend is due to his substance abuse, a condition for which SCC *does not* provide treatment. Thus, unlike the respondents in *Young*, Mr. Bargas has shown “that the *specific* conditions of confinement are incompatible with treatment.” *Id.*, at 31 (emphasis in original). Indeed, the evidence introduced at trial revealed that if confined at the SCC, Mr. Bargas has two options to address his risk of reoffense: attend a farcical AA group in which other participants crow about their recent misbehavior or participate in the

CASH program, in which therapists untrained in substance abuse treatment come and go, programmatic goals are shifted routinely, and participants never graduate.<sup>5</sup> Though Dr. Richards may be comfortable consigning Mr. Bargas to the ineffectual substance abuse treatment options offered at SCC, in light of the consensus that his risk of reoffending stems from his substance abuse and that the treatment he requires is effective and intensive substance abuse programming, his confinement in a facility in which such a program is not offered offends constitutional standards of due process. *Jackson*, 406 U.S. at 738.

Disturbingly, not only is the nature of Mr. Bargas' confinement impermissibly unrelated to the purpose of his confinement, but given the paucity of treatment options available to him, it is unlikely the duration of his confinement will be related to the purpose of his confinement either. As Dr. Richards noted, Mr. Bargas needs intensive substance abuse treatment in order to mitigate his risk of using, and therefore decrease his risk of recidivism; because Mr. Bargas will never be able to obtain that

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<sup>5</sup> Not only is appropriate treatment unavailable, but Mr. Bargas is being placed in a locked environment in which even the staff acknowledges drug and alcohol use is frequent. Consequently, Mr. Bargas' continued confinement at SCC does more than simply prevent him from obtaining the treatment he allegedly needs-- it puts him at risk for relapse.


intensive treatment at SCC, committing him to that facility is effectively sentencing him to total confinement in perpetuity.

Thus, the trial court's finding that Mr. Bargas requires confinement under RCW 71.09, despite the lack of appropriate substance abuse treatment to address Mr. Bargas' alleged risk of reoffending, was error that should be reversed by this Court.

#### CONCLUSION

Because the State failed to prove beyond a reasonable doubt either that Mr. Bargas has a mental condition that renders him unable to control his sexual impulses or that he is currently likely to sexually reoffend if not confined, the trial court's finding to the contrary was in error and should be reversed. Moreover, because any risk of reoffense Mr. Bargas poses stems from his substance abuse, and intensive treatment to address that issue is decidedly unavailable at the SCC, the trial court's order confining him to that facility should be reversed as in violation of Mr. Bargas' right to due process.

Respectfully submitted this 16<sup>th</sup> day of September, 2013

  
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Washington Appellate Project - 91052  
Attorneys for Appellant



**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO**

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IN RE THE DETENTION OF	)	
	)	
MICHAEL BARGAS,	)	NO. 69844-3-I
	)	
	)	
APPELLANT.	)	

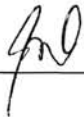
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I, MARIA ARRANZA RILEY, DECLARE THAT ON THE 16<sup>TH</sup> DAY OF SEPTEMBER, 2013, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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