94125-4

NO. 73223-4-I

THE COURT OF APPEALS

STATE OF WASHINGTON

DIVISION 1

930535

In Re the Detention of

ROBERT LOUGH,

Appellant.

ON APPEAL FROM THE SUPREME COURT OF THE

STATE OF WASHINGTON FOR KING COUNTY

APPELLANT'S PRO SE

PETITION FOR REVIEW

ROBERT LOUGH
Appellant/Pro Se

ROBERT LOUGH
P.O. Box 88600
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(253) 584-9602 or (253) 584-9603

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THE SUPREME COURT
OF THE STATE OF WASHINGTON

IN RE THE DETENTION OF	)	
	)	No. 73223-4-I
	)	
ROBERT LOUGH,	)	
	)	**PETITION FOR REVIEW**
	)	
APPELLANT.	)	
	)	

I. IDENTITY OF PETITIONER

Robert Lough asks this Court to review the decision of the Court of Appeals referred to in Section II below.

II. DECISION OF THE COURT OF APPEALS

Robert Lough seeks review of the Court of Appeals denial of his Pro Se Supplemental Statement of Additional Grounds that was filed in a timely manner but not the response to the State's denial of this brief under RAP 13.4(b) & RAP13.4(c)(7).

III. ISSUES PRESENTED FOR REVIEW

1. Does holding Mr. Lough's minimal layman ability to the high standards of a lawyer of the Bar violate Mr. Lough's constitutional right to have meaningful access to the Court?
2. Does unfairly rejecting Mr. Lough's Pro Se Supplemental Statement of Additional Grounds violate Mr. Lough's Constitutional right to have meaningful access to the Court?

3. Given the absence of any restrictions imposed by Statute, Civil Rules, or any other authority, may a detainee engage in his Constitutional right to have meaningful access to the Court's by raising appealable issues not otherwise raised in appellant counsel's brief that was filed on Mr. Lough's behalf by the Washington Appellate Project?
4. Was the Court's use of RAP 17.7 as the reason to deny Mr. Lough's pro se Supplemental Statement of Additional Grounds so vague and ambiguous as to be improperly used?

IV. STATEMENT OF THE CASE

Robert Lough was civilly committed for Post Traumatic Stress Disorder, Anti Social Disorder, and "no" paraphilias at all[1] on February 19, 2015. Mr. Lough is the only SVP in Washington State to have been committed without any paraphilias, PTSD, ASD[2], and with only one conviction.[3] On May 11, 2016, Mr. Lough received his copy from the Washington Appellate Project of the six issues they had raised in their Appellate Brief filed on Mr. Lough's behalf. Mr. Lough counted over 30 more issues that he felt relevant to be raised and filed a pro se Supplemental Statement of Additional Grounds to raise six more issues that Mr. Lough felt were the most important on June 2nd, 2016. On June 10th, 2016, the court administrator/clerk rejected Mr. Lough's pro se Supplemental Statement of Additional Grounds and abused her authority by refusing to process a properly filed Motion. On June 14th, 2016, the State filed a "Motion To Strike Pro Se Brief" of Mr. Lough's Supplemental Statement of Additional Grounds. The State's argument being "such a brief is not authorized by the Rules of Appellate Procedure," which is incorrect. On June 23rd, 2016, the Washington Appellate Project filed a

[1] Neither has any sexual connotations relative to either disorder. Dr. Packard dismissed all paraphilias as there weren't any.
[2] There are no treatment programs available at SCC for either disorder, thus Mr. Lough's commitment is strictly punitive only.
[3] See Exhibits 1 – 4 (A10 – A22)

response on Mr. Lough's behalf apposing the denial of his properly filed brief. On August 29th, 2016, the Court replied with "We have considered the motion under RAP 17.7 and have determined that it should be denied." When Mr. Lough read RAP 17.7 to get an understanding of the Court's ruling, Mr. Lough found that their ruling had to be incorrect as RAP 17.7 states "An aggrieved person may object to a ruling of a commissioner or clerk....." No where in RAP 17.7 does it definitively state "why" Mr. Lough's brief should be denied so he contacted the Washington Appellate Project to see if they were going to appeal this decision. While they agreed with Mr. Lough that his assessment was correct, they were not going to file any further appeals on his behalf even though the Court said Mr. Lough could file a Discretionary Review of their decision if he chose to do so. Being very confused and frustrated at this callous view of Mr. Lough's indefinite confinement in a mental institution when he clearly does not fit the criteria for commitment, Mr. Lough decided to file a pro se appeal of his own of the Court's decision to deny his Supplemental Statement of Additional Grounds. Even though Mr. Lough is a layman with no knowledge of the law, he feels that his poor, but honest effort, was better than no effort at all put forth by the Washington Appellate Project to continue this appeal process on Mr. Lough's behalf in this matter.

There is no law library, thus no reference materials. There is a computer that SCC has programed to only show 20 cases at a time and broken down a lot like it is now. If any copies are needed of anything, it has to be mailed to the Advocate with a request for copies. After they have made a copy for SCC's records, they then send out the copies in two to three weeks or longer. Mr. Lough has no access to the internet to read current case law to cut and paste, but must write everything out by hand first, then spend all the time he can on the computer trying to find authorities to support his arguments; and this takes a lot of time.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. Standard of Review

The Court of Appeals will accept Discretionary Review when "[t]he court has so far departed from the accepted and usual course of judicial proceedings...as to call for review by the Appellate Court." RAP 2.3(b)(3), RAP 13.4(B), RAP 13.4(C)(7), RAP 13.5(a).

B. Argument

Mr. Lough's interest in the outcome of a civil commitment proceedings has "great weight and gravity," affording due process protections not otherwise afforded to civil litigants. *See, Addington v. Texas*, 441 U.S. 418, 427, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979).

Commitment statutes "are subject to strict scrutiny because they affect an important and fundamental constitutional right—the right to liberty." *Foucha v. Louisiana*, 504 U.S. 71, 80, 112 S. Ct. 1780, 118 L. Ed. 2d 437 (1992). Mr. Lough has only one conviction for rape that he has already served over 30 years for and then was brought straight from prison to the Special Commitment Center upon his release date. Mr. Lough has now been committed indefinitely for this very same conviction, all without having any prior convictions or recent overt acts to substantiate such an abuse of the State's authority to commit Mr. Lough. This literally constitutes Double Jeopardy, thus violating Mr. Lough's constitutional right to "not be twice punished for a single conviction with a completed sentence.

Therefore, Mr. Lough should retain even more rights and liberties in this judicial process that is otherwise afforded to a normal defendant who is in trial for a "actual" crime committed, as apposed to being committed indefinitely, "alleging" a hypothetical possibility that Mr. Lough "might" reoffend in the next ten years if released from total confinement, when Mr. Lough is already 57 years old and counting. *Hydrick v. Hunter*, 500 F. 3d 978, 989 (9th Cir. 2007), vacated and remanded on other grounds, ("the rights afforded prisoners set a floor for those that

must be afforded SVP's and that where the defendants violate a standard that is clearly established in the prison context, the violation is clearly established under SVP scheme;" See also *Bell v. Wolfish*, 441 U.S. 520, 99 S. Ct. 1861, 60 L. Ed. 2d 447, "they may claim the protection of the Due Process Clause to prevent additional deprivation of life, liberty, or property without due process of law; *Meachum v. Fano*, 427 U.S. 215, 225, 96 S. Ct. 2532, 2538, 49 L. Ed. 2d 451 (1976); *Wolff v. McDonnell*, 418 U.S. 539, 555-556, 94 S. Ct. 2963, 2974-75, 41 L. Ed. 2d 935 (1974)("A fortiori, pretrial detainees, who have not been convicted of any crimes, retain at least those constitutional rights that we have held are enjoyed by convicted prisoners.").

For a prisoner wishing to file a Statement of Additional Grounds, he does so under the Rules of Appellate Procedure, RAP 10.10. The Appellate Court only considers issues raised in a pro se Statement of Additional Grounds for review if those issues adequately inform the Appellate Court of the nature and occurrence of the alleged errors. *State v. Calvin*, 302 P.3d 509 (2013), republished at 176 Wash.App. 1, 316 P.3d 496, amended on reconsideration, review granted in part, cause remanded 183 Wash.2d 1013, 353 P.3d 640.

Even though a defendant represented by counsel on appeal is not required to cite to the record or authority in a pro se Statement of Additional Grounds, he must still inform the Court of the nature and occurrence of of the alleged errors. *State v. Meneses*, 149 Wash.App. 707, 205 P.3d 916 (2009), as amended, review granted in part 167 Wash.2d 1008, 220 P.3d 783, affirmed in part 169 Wash.2d 586, 238 P.3d 495. See also, *State v. Skuza*, 156 Wash.App. 886, 235 P.3d 842 (2010), as amended, review denied 170 Wash.2d 1021, 245 P.3d 775.

"It follows logically that the rights afforded prisoners set a floor for the rights that must be afforded sexually violent predators." *Chubb v. Sullivan*, 330 P.3d 423; *Jones v. Blanas*, 393 F.3d 918 at 931-32 ("[P]ersons who have been involuntarily committed are entitled to more

considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish.").

In RAP 10.10 it states a brief can be up to 50 pages in length. Mr. Lough's brief is only 15 pages in length total and adds only a few more minutes of reading, "literally," for the Court on top of the brief filed on Mr. Lough's behalf by the Washington Appellate Project, thus no hardship upon the Court to accept. Mr. Lough, having only one single conviction for which he has already served more than 30 years for or having any recent overt acts at all to bring any kind of attention to Mr. Lough that he might reoffend[4] if released from total confinement, retains even greater liberty protections than individuals detained under criminal process. *Youngberg v. Romeo*, 457 U.S. 307 at 321-22, 102 S.Ct. 2452 (1982)("Civil detainees retain greater liberty protections than individuals detained under criminal process.").

VI. CONCLUSION

For all of the above reasons, this Court should permit Mr. Lough to file for consideration his pro se Supplemental Statement of Additional Grounds. It does not create prejudice to the State, is not unfair to the trial judge, and does not create an inconvenience for this Court.

Acceptance of Mr. Lough's pro se Supplemental Statement of Additional Grounds promotes justice and provides Mr. Lough with the process necessary to ensure the constitutional requirements of RCW 71.09 are satisfied.

Mr. Lough respectfully requests this Court to accept his Statement of Additional Grounds.

DATED this 30th day of January 2017.

Respectfully submitted,

ROBERT LOUGH
PRO SE APPELLANT

[4] The End of Sentence Review Board found Mr. Lough "non-referable" prior to his release. Mr. Lough was brought to the Special Commitment Center as a independent commitment process initiated by one of Mr. Lough's counselors in prison who contacted various prosecutors until he found one to stop Mr. Lough's release from prison and get him transferred to the Special Commitment Center facility to be committed. This was done in retaliation for hitting him in prison while incarcerated. See Exhibits #2-A15-16, #3-A17-20, #5, #6

COURT OF APPEALS DIVISION I
OF THE STATE OF WASHINGTON

IN RE THE DETENTION OF ROBERT LOUGH. APPELLANT.	No. 73223-4-I **AFFIDAVIT OF MAILING**

I certify under the penalty of perjury under the laws of the State of Washington that I am 18 years of age or older and I am the Appellant, and that on this 30th day of January, 2017, I deposited the following documents:

APPELLANT'S PRO SE SUPPLEMENTAL
STATEMENT OF ADDITIONAL GROUNDS

In the U.S. mail, postage prepaid, one first class envelope addressed to:

The Court of Appeals
State of Washington
One Union Square
600 University Street
Seattle, WA 98101-4170

Andrea Ruth Vitalich
King County Prosecutors Office
516 3rd Avenue, Suite W554
Seattle, WA 98104-2362

Washington Appellate Project
C/O Mr. Travis Stearns
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101

Robert Lough

ROBERT LOUGH, APPELLANT
Box 88600
Steilacoom, Wash 98388-0647

NO. 73223-4-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

ROBERT LOUGH,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE

STATE OF WASHINGTON FOR KING COUNTY

APPELLANT'S PRO SE SUPPLEMENTAL

STATEMENT OF ADDITIONAL GROUNDS

ROBERT LOUGH
Appellant/Pro Se

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OF THE STATE OF WASHINGTON

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	)	No. 73223-4-I
	)	
ROBERT LOUGH	)	
	)	**APPELLANT'S PRO SE SUPPLEMENTAL**
	)	**STATEMENT OF ADDITIONAL GROUNDS**
APPELLANT	)	
	)	
	)	
	)	
	)	

7. MR. LOUGH'S CONSTITUTIONAL AND STATUTORY DUE PROCESS RIGHTS WERE VIOLATED WHEN THE COURT REFUSED TO DISMISS THE WARRANT OBTAINED WHEN THE STATE USED ALTERED DOCUMENTS TO OBTAIN THIS WARRANT TO SUPPORT THE STATE'S SEXUALLY VIOLENT PREDATOR PETITION AGAINST MR. LOUGH.

a. Mr. Lough had a constitutional and statutory right to be released from prison after completing his sentence in it's entirety without having committed any recent overt acts or chargeable offenses to hold and/or arrest Mr. Lough for.

Civil commitment involves a serious deprivation of liberty and requires the State to comply with due process, *Addington v. Texas*, 441 U.S. 418, 419-20, 425, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979)

Mr. Lough was charged and convicted of rape that occurred on April 11, 1986. He was sentenced to 30 years. Mr. Lough had less than two weeks left of his prison sentence when he was told he was to be committed under the RCW 71.09 Sexually Violent Predator Law (SVP). Having no other charges or convictions of any other rapes, Mr. Lough demanded documentation being used to initiate

this commitment process. Mr. Lough was denied any documentation. He was told to ask all questions to the attorneys that would be appointed for him. Approximately seven months later Mr. Lough finally received the documentation he was looking for. See Exhibits #1, #2, #3, #4, #5, #6.

As the documents clearly show, the State literally altered various Risk Level documents and presented them to the court as factual to get a warrant for Mr. Lough. Exhibits #1 A17-A20.

To establish probable cause for a warrant, the "affidavit in Support" of warrant must set forth sufficient facts to convince a reasonable person of the probability the defendant is in criminal activity. U.S.C.A. Const. Amend. 4; West's RCWA Const. Art. I, § 7; *State v. Ferro*, 64 Wn.App. 195, 823 P.2d 526 (1992)(charging documents)(claims that under *State v. Leach*, 113 Wash.2d 679, 782 P.2d 552 (1989), the complaint filed against him was constitutionally deficient). The Court of Appeals agreed.

The State is held to a higher standard when requesting a warrant and is presumed as well as is expected to be truthful when presenting documents included in the Affidavit of Support. Had the court taken the time to verify Mr. Lough's Criminal History and the End of Sentence Review Committees "non-referral" determination, it would have seen immediately that the State was presenting altered documents and no warrant could have been issued and Mr. Lough would be a free man today. Exhibits #3 A10-A14, #4 A15-A16.

"A warrant may be issued only upon evidence which would be competent in a trial of the offense charged before a jury, and the facts must be sufficient to lead a man of prudence to believe the offense had been committed." *Pallett v. Thompkins*, 10 Wn.2d 697, 118 P.2d 190 (1941).

b. *When Mr. Lough showed cumulative errors on State's warrant, then the Cumulative Errors Rule applies and dismissal of warrant is mandatory.*

There were a multitude of errors spanning four pages in Exhibits #1 A17-A20. All of these errors are shown to be errors in Mr. Lough's Affidavit. Exhibits #2 A21-A22. To prove beyond doubt that these documents have been deliberately altered by the State to initiate an illegal warrant against

Mr. Lough, Mr. Lough has included his entire criminal history to prove his only having one single conviction for rape, but more important is the fact that Mr. Lough has "never" been charged with even an allegation of rape, before or after, his conviction for rape in 1986. The State's "assertion" that Mr. Lough has multiple convictions of rape with the intention of depriving him of his liberty indefinitely should never be enough for any court to accept as sufficient to issue a probable cause warrant. Presenting factual evidence must be a necessary element of any such proceedings, in fact, it should be mandatory. *State v. Revers*, 130 Wn.App. 689 (1985)(In seeking to prove a prior felony conviction in an escape case, best evidence is certified copy of Judgment and Sentence.). *State v. Holsworth*, 93 Wn.2d 148 (1980)(State need prove existence of priors by a preponderance of evidence); *Curtis v. United States*, 128 L.Ed.2d 517 (1994); *State v. Lopez*, 147 Wn.2d 515 (2002), RCW 9.94A.500(1) (State was obligated to obtain Judgments and Sentences to prove prior convictions); *State v. Ford*, 137 Wn.2d 472, 480-82 (1999); *State v. Mendoza*, 165 Wn.2d 913 (2009); *State v. Allen*, 150 Wn.App. 300, 314-17 (2009). Failure to do so, precludes remand to allow State a further opportunity to meet its burden. *State v. McCorkle,* 137 Wn.2d 490, 497 (1999), c.f. *State v. Bergstrom*, 162 Wn.2d 87 (2007) (affirms *State v. Lopez*, 107 Wn.App. 270 (2001)).

When assessing evidence's materiality, the court must take into account the cumulative effect of the suppressed evidence in light of other evidence, not merely the probative value of the suppressed evidence standing alone. *Kyles v. Whitley*, 514 U.S. 419, 433 (1995)("[R]egardless of request, favorable evidence is material...", at 436 (citing *United States v. Bagley*, 473 U.S. 667, 682 (1985) at 682). See also, *Valdovinos v. McGrath*, 598 F.3d 568, 579 (9th Cir. 2010)(*Brady* violation because cumulative affect of undisclosed evidence, against backdrop of relatively weak prosecution case, undermines confidence in verdict). The "Court" has held that the State's duty under *Brady* arises regardless of whether the defendant makes a request for the evidence.

Aside from exculpatory evidence, the State is also obligated to disclose information that could

be used to impeach State witnesses, especially where the witness's testimony is an important part of the State's case. *Giglio v. U.S.*, 405 U.S. 150 (1972)(In *Giglio*, the defendant disclosed evidence post-trial that the State had failed to disclose a promise of immunity made to the defendant's co-conspirator, the only witness. Id. at 150-51. Finding that the State's case "depended almost entirely" on the witness's testimony, the Court reversed the conviction because "evidence of any understanding or agreement as to a future prosecution would be relevant to his credibility and the jury was entitled to know of it." Id. at 154-55; *Bagley*, 473 U.S. at 676-77; *Gonzalez v. Wong*, 667 F.3d 965, 982-84 (9th Cir. 2012) (Undisclosed psychological reports on prison informant could have provided new grounds on which to impeach informant). See also, *Stickler v. Green*, 527 U.S. 263, 281-82 (1999); *Cone v. Bell*, 556 U.S. 449, 469 (2009)("[W]hen the State withholds from a criminal defendant evidence that is material to his guilt or punishment, it violates his right to due process of law in violation of the 14th Amendment.").

With so many errors in the State's probable cause warrant, clearly the Cumulative Errors Rule applies and dismissal is thereby mandatory. *State v. Oughton*, 26 Wn.App. 74, 85, 612 P.2d 812 (1980) (When defendant can prove cumulative errors on State's warrant, then Cumulative Errors Rule applies and dismissal is mandatory.).

8. MR. LOUGH'S CONSTITUTIONAL AND STATUTORY DUE PROCESS RIGHTS WERE VIOLATED WHEN THE COURT REFUSED TO GRANT SUMMARY JUDGMENT WHEN THE STATE'S EXPERT, DR. RICHARD PACKARD, HAVING DROPPED ANY AND ALL SEXUAL PARAPHILIAS AGAINST MR. LOUGH, RESPONDED WITH "I DON'T KNOW" WHEN ASKED SEVERAL QUESTIONS ABOUT MR. LOUGH SEXUALLY REOFFENDING IF RELEASED FROM CUSTODY.

a. The court violated Mr. Lough's constitutional and statutory due process rights when it refused to grant summary judgment.

"A defendant is entitled to summary judgment when he or she shows an absence of evidence supporting an issue material to the plaintiff's case." *Hauber v. Yakima*, 107 Wn.App. 437, 448, 27 P.3d 257, 262 (2001). "After the defendant challenges the sufficiency of the evidence regarding an essential

element, the inquiry shifts to the plaintiff, who must set forth specific facts showing that a genuine issue exists." *Id.* A party cannot rely on inadmissible evidence in response to a summary judgment motion. *Lynn v. Labor Ready, Inc.*, 136 Wn.App. 295, 309, 151 P.3d 201, 209 (2006). Nor can it "rely on speculation and conjecture to raise a genuine issue of material fact." *Johnson v. Recreational Equip., Inc.*, 159 Wn.App. 939, 956, 247 P.3d 18, 27 (2011).

Plaintiff must prove three elements at trial in this matter:

> (1) that the respondent has been convicted of or charged with a crime of sexual violence, (2) that the respondent suffers from a mental abnormality or personality disorder, and (3) that such abnormality or disorder makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility.

In re Det. of Post, 170 Wn.2d 302, 309-10, 241 P.3d 1234, 1238 (2010).

b. Plaintiff relies on diagnosis not held to a reasonable degree of psychological certainty to argue it's theory of a mental abnormality.

The State relies on diagnosis not held to a reasonable degree of psychological certainty to argue it's theory of a mental abnormality. "Expert opinion testimony concerning a person's mental status is not admissible unless the expert holds his or her opinion with reasonable medical and psychological certainty." *In re Twining*, 77 Wn.App. 882, 891, 894 P.2d 1331, 1336 (1995)(abrogated in part by *In re Det. of Pouncy*, 168 Wn.2d 382, 229 P.3d 678 (2010))

To defeat summary judgment "Expert testimony must be based on the facts of the case and not on speculation or conjecture." *Davies v. Holy Family Hosp.*, 144 Wn.App. 483, 493, 183 P.3d 283, 288 (2008). "Such testimony must also be based upon a reasonable degree of medical certainty." *Id.* "...An affidavit cannot be used to create an issue of material fact by contradicting prior deposition testimony." *Davis v. Fred's Appliance, Inc.*, 171 Wn.App. 348, 357, 287 P.3d 51 (2012). See also *McCormick v. Lake Washington School District*, 99 Wn.App. 107, 111, 992 P.2d 511, 513-14 (1999) ("Self-serving affidavits contradicting prior depositions cannot be used to create an issue of material fact").

Deposition of Dr. Packard Page 309/Page 5 of Summary Judgment

1. Q: "...if you had to set aside these question marks and you couldn't rely on those, would you have enough left over that you could say to a reasonable degree of psychological certainty that Robert Lough has a set of conditions that predispose him to commit sex offenses?"
A: "I don't know."

Deposition of Dr. Packard Page 371-74/Page 9 of Summary Judgment

2. Q: "How many of those people are going to go out and commit a predatory act of sexual violence if not confined in a secure facility?"
A: "I don't know."

Deposition of Dr. Packard Page 16/Page 10 of Summary Judgment

When asked if anti-social behavior is sufficient by itself, Dr. Packard said "no."
3. Q: "O'kay. But is it sufficient by itself?
A: "No."

Realizing that in doing the right thing by dropping all paraphilias as Mr. Lough had none to be diagnosed with, but having already been paid over $60,000.00 to commit Mr. Lough as a SVP, Dr. Packard now finds that Mr. Lough suffers from post-traumatic stress disorder and substance abuse disorder rather than simply say "Mr. Lough does not fit the criteria as a sexually violent predator." P.T.S.D. is the resulting diagnosis confirming the horrible physical abuse Mr. Lough suffered as a child and compounded by the 30 years of incarceration in a hostile environment in a maximum security prison. P.T.S.D. explains Mr. Lough's propensity for violence, but "not as a sex offender."

As for the substance abuse disorder, this too is a misdiagnosis because Mr. Lough has been clean and sober since April 11, 1986, a direct result of the horror Mr. Lough felt, and still feels to this day, at what he had done while under the influence of heroin & cocaine (Speedball), and alcohol; with a vow to never touch any of it ever again. With drugs and alcohol being so wide spread throughout the prison system, clearly it was always readily available to Mr. Lough had he chosen to sample any of it. Given how many times Mr. Lough was assaulted, stabbed, and beaten up over the 30 years of his incarceration and having to deal with so much stress that is a daily routine in prison, the fact that Mr.

Lough still chose to remain clean and sober clearly proves his resolve to never re-offend sexually against another woman ever again. Equally obvious is Dr. Packard's grasping at thin air as he tries to earn his $60,000.00 payment from the State to find a diagnosis to commit Mr. Lough, over the $10,000.00 cap the State would only allow Mr. Lough's experts to be paid.

While Dr. Packard's diagnosis is alleged to be held to a reasonable degree of psychological certainty, they also fail to distinguish Mr. Lough from "the dangerous but typical recidivist." "'Mental abnormality' means a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to the commission of criminal sexual acts in a degree constituting such person a menace to the health and safety of others." RCW 71.09.020(8). While a predisposition to criminal sexual acts need not amount to a "complete lack of control" there has to "be proof of serious difficulty in controlling behavior." *Kansas v. Crane*, 534 U.S. 407, 413 (2002). "And this, when viewed in light of such features of the case as the nature of the psychiatric diagnosis, and the severity of the mental abnormality itself, must be sufficient to distinguish the dangerous sexual offender whose serious mental illness, abnormality, or disorder subjects him to civil commitment from the dangerous but typical recidivist convicted in an ordinary criminal case." *Id.*

The *Crane* court cited to Justice Kennedy's reflective concurrence in *Kansas v. Hendricks*, where he cautioned against civil confinement simply becoming "a mechanism for retribution or general deterrence." *Id.* at 412. Justice Kennedy had continued: "...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." *Kansas v. Hendricks*, 521 U.S. 346, 373 (1997)(concurrence by Justice Kennedy).

The State's failure to assert admissible evidence of a mental abnormality that passes this test is a critical flaw. For these reasons this petition must be dismissed.

9. MR. LOUGH'S CONSITUTIONAL AND STATUTORY DUE PROCESS RIGHTS WERE VIOLATED WHEN THE COURT GAVE THE JURY ERRONEOUS INSTRUCTIONS THAT INVITED THE JURY TO "SPECULATE" FUTURE RISK FOR MR. LOUGH THAT WAS NOT SUPPORTED BY THE EVIDENCE.

a. Jury erroneously instructed to commit Mr. Lough speculating on future crime not supported by substantial evidence is prejudicial.

Mr. Lough had requested to have a Bench Trial, as apposed to a jury trial, due to all of the facts involved that were above and beyond the majority of most jury pools understanding, thus a sitting Judge would have been more appropriate. When the State denied Mr. Lough's request for a jury trial, Mr. Lough objected and he was told that the State decides what kind of trial it will be, not the defendant. This was most confusing to Mr. Lough as he had thought that was "the only" decision he was allowed to make in a court room. Especially, when so many of the details were based upon facts that were based upon statistical supposition themselves, thus Mr. Lough thinks this too is prejudicial as he thought it was the one fundamental right of any accused; jury of his peers or a bench trial with a Judge. This clearly is the basis for Mr. Lough's commitment as the jury was left to commit on what they did understand, i.e., that Mr. Lough is a horrible and violent person.

This belief was validated by one of the jurors (Mr. Keith Huang) who contacted Mr. Lough after his trial and came to visit him at the SCC facility. Mr. Huang said "he" had voted to commit Mr. Lough due to his propensity for violence, "not" out of fear that Mr. Lough would ever again assault another woman if released from total confinement. Mr. Huang said "other jurors felt the same way, too." And, how several of them were in tears for having been forced to change their vote to commit Mr. Lough when they had initially voted not to commit before judge Shaffer refused their initial hung jury and ordered them to continue to deliberate until "everyone was in agreement." Four days later the jury came back with a unanimous decision to commit Mr. Lough.

When the court erroneously instructed the jury to commit Mr. Lough indefinitely without any real evidence to support such a finding, it's prejudicial because, to reach such a finding amounts to

simply reaching into ones pocket for a coin and to flip it, calling out "heads or tales" while it's still in the air. Issues which are beyond or beside the point to be decided are extraneous. *Ridinger v. State*, 146 Tex. Cr.R. 286, 174 S.W.2d 319, 320 (extraneous offense: one that is extra, beyond, or foreign to the defense for which the party is on trial). Due to the erroneous jury instructions this petition should be dismissed.

10. MR. LOUGH'S CONSTITUTIONAL AND STATUTORY DUE PROCESS RIGHTS WERE VIOLATED WHEN THE COURT GAVE MULTIPLE COMMENTS ON THE EVIDENCE IN THE "APPEARANCE OF FAIRNESS."

a. Judge Shaffer violated the appearance of fairness doctrine and should not preside over Mr. Lough's case in the future if his petition is not dismissed outright as it should be.

Throughout Mr. Lough's trial the court was clearly biased against Mr. Lough. Judge Shaffer made decisions granting various motions in limine for Mr. Lough prior to trial starting, yet throughout Mr. Lough's trial, reversed most of them in favor of the prosecution. All but a few objections were overruled in favor of the State. On various occasions Judge Shaffer helped the State to make it's arguments and the State happily agreed with all of these "suggestions."

When Mr. Lough presented his Writ of Mandamus to the court, Judge Shaffer refused to allow it to be presented and argued, stating that "that's what a trial is for." When Mr. Lough's trial did start, Mr. Lough again tried to present his Writ of Mandamus as evidence of malfeasance, Judge Shaffer again denied it to be heard. See Exhibit #7

When Mr. Lough tried to explain how there was not any treatment courses at SCC for Post Traumatic Stress Disorder (PTSD), which explains Mr. Lough's propensity for violence, but in no way supports the State's contention that Mr. Lough is an SVP, Mr. Lough was told to take all of the SVP classes at SCC even though Dr. Packard (State's expert) himself stated that Mr. Lough has no paraphilias. When Mr. Lough requested that someone who specializes in PTSD to be hired to treat Mr. Lough's diagnoses of PTSD, Mr. Lough was told to take the SCC's sexual deviant classes first before

SCC would even contemplate hiring a specialist to treat Mr. Lough. By denying Mr. Lough proper treatment for his PTSD, Mr. Lough's commitment then becomes punitive only, for the rest of his life; as without treatment, no resident can be eligible for release from SCC once committed. Mr. Lough is now the only resident in Washington State to ever have been committed for Post Traumatic Stress Disorder and Anti Social Disorder only, neither of which has anything to do with sexual deviancy whatsoever. And this on top of Mr. Lough having only one conviction for which he has now served "over" thirty years in prison for; the average sentence for murder is 15-17 years.

When the juvenile son of Mr. Lough's witness doctor/patient confidentiality was violated by the State, and Mr. Lough objected, Judge Shaffer's response was to say "well, the cat's out of the bag, now, objection overruled;" Not allowing Mr. Lough to speak with his expert witnesses about what the State's expert witness was saying to discuss rebuttal arguments; Allowing Brady violations on behalf of three of the State's witnesses; Allowing the State to make negligent and inappropriate comments about Mr. Lough and his witnesses, etc. "The Appearance of Fairness Doctrine requires that administration proceedings are procedurally 'fair' and conducted by impartial decision makers." U.S.C.A. Const. Amend. 14.

"The Washington State's appearance of fairness doctrine not only requires a judge to be impartial, it also requires that the judge 'appear' to be impartial." *State v. Finch*, 137 Wash.2d 792, 808, 975 P.2d 967 (1999). An abuse of discretion is found if the trial court relies on unsupported facts, takes a view that no reasonable person would take, applies the wrong legal standard, or basis its ruling on an erroneous view of the law. *Mayer v. Sto Indust., Inc.*, 156 Wash.2d 677, 684, 132 P.3d 115 (2006).

"The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242, 100 S.Ct. 1610, 64 L.Ed.2d 182 (1980). The U.S. Supreme Court has reprised the right to a "'fair trial in a fair tribunal.'" *Withrow v. Larkin*, 421 U.S. 35, 46, 95 S.Ct. 1456, 43 L.Ed.2d 712 (1975)(quoting *In re Murchinson*, 349 U.S.

133, 136, 75 S.Ct. 623, 99 L.Ed. 942 (1955).

The due process clause incorporated the common law rule that judges must recuse themselves when they have "a doubt, personal, substantial pecuniary interest in a case." *Tumey v. Ohio*, 273 U.S. 510, 523, 47 S.Ct. 437, 71 L.Ed. 749 (1927).

Washington State cases have long recognized that judges must recuse themselves when the facts suggest that they are actually or potentially biased. *Diimmel v. Campbell*, 68 Wash.2d 697, 699, 414 P.2d 1022 (1996)("It is incumbent upon members of the judiciary to avoid even a cause for suspicion of irregularity in the discharge of their duties." In *State ex. rel. McFerran v. Justice Court of Evangeline Starr*, 32 Wash.2d 544, 202 P.2d 927 (1949), the court stated "[t]here can be no question but that the common law, the Federal and our State Constitutions, guarantee to a defendant a trial before an impartial tribunal, be it judge or jury."

In *State v. Post*, 118 Wash.2d 596, 826 P.2d 172, 837 P.2d 599 (1992), the Supreme Court has characterized a judge's failure to recuse himself or herself when required to do so by the judicial cannons as a violation of the appearance of fairness doctrine. The Court also narrowed the scope of the appearance of fairness doctrine from one under which a party could challenge whether a decision-making procedure created an appearance of unfairness to a reformulated threshold: Whether there is "evidence of a judge's or decision maker's actual or potential bias." 118 Wash.2d at 619 n.9, 826 P.2d 172, 837 P.2d 599.

Like the protections of due process, Washington State's appearance of fairness doctrine seeks to prevent the problem of a biased or potentially interested judge. *State v. Carter*, 77 Wn.App. 8, 12, 888 P.2d 1230 (1995). Under this doctrine, evidence of a judge's actual bias is not required; it is enough to present evidence of a judge's actual or potential bias. *Post*, 118 Wash.2d at 619 n.9, 826 P.2d 172, 837 P.2d 599. "The CJC recognizes that where a trial judge's decisions are tainted be even a mere suspicion of partiality, the effect on the public's confidence in our judicial system can be debilitating ." *Sherman*

v. State, 128 Wash.2d 164, 205, 905 P.2d 355 (1995). Such bias by the court constitutes irreparable harm to Mr. Lough, thus mandatory dismissal of the SVP petition against Mr. Lough.

11. MR. LOUGH'S CONSTITUTIONAL AND STATUTORY DUE PROCESS RIGHTS WERE VIOLATED WHEN THE STATE COMMITTED PROSECUTORIAL MIS-CONDUCT BY REFUSING TO PROVIDE DISCOVERY INFORMATION ON ONE OF IT'S WITNESSES.

a. The State committed prosecutorial misconduct in denying Mr. Lough requested discovery information.

The State's case was built primarily upon on a key witness's multiple statements/depositions as she continued to give detailed back ground information on Mr. Lough, much of it outright false. Mr. Lough, reading so much documentation from this unnamed witness, requested this witness's name and address, etc., per discovery rules, so as to conduct a meaningful back ground check as well as be able to depose this witness. The State outright denied the request and every one there after by Mr. Lough. When the court finally intervened, rather than give the necessary information as requested, the State pulled this witness from the witness list, yet, continued to utilize all of this witness's information and allegations which were then used against Mr. Lough at his commitment trial without the "right to confront his accuser" as is a right guaranteed by the United States Constitution. The Sixth Amendment right to confront witnesses is a fundamental right made obligatory on the State by the Fourteenth Amendment. *Pointer v. Texas*, 380 U.S. 400, 403, 85 S.Ct. 1065, 13 L.Ed. 923 (1965).

Mr. Lough feels this falls, in part, under the Unclean Hands Doctrine. In this context, all of this witness's information and allegations are fruit from the tainted tree, thus inadmissible. Mr. Lough should therefore be released from confinement or remanded back to court with a warrant issued for this witness to take the stand to be cross-examined by Mr. Lough. "One who has defrauded his adversary in the subject matter of the action will not be heard to assert right in court." Under this doctrine, a court must deny relief to a party whose conduct has been inequitable, unfair, and deceitful, but doctrine applies only when the reprehensible conduct complained of pertains to the controversy at issue, as was

done in Mr. Lough's case here. *Goben v. Barry*, 234 Kan. 721, 676 P.2d 90, 97. See also, *State v. Brooks*, 149 Wn.App. 373 (2009)(Dismissal is a remedy where State inexcusably fails to provide discovery or evidence.).

Mr. Lough has the right to obtain access to evidence necessary to prepare his defense. *Britton v. State*, 44 Wis.2d 109, 170 N.W.2d 785, 789; and also, the Fifth and Fourteenth Amendments require the State to disclose evidence to defendant. *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

Aside from exculpatory evidence, the State is also obligated to disclose information that could be used to impeach State's witness, especially where the witness's testimony is an important part of the States' case. *Giglio v. U.S.*, 405 U.S. 150 (1972)(Defendant discovers evidence post-trial that the State had failed to disclose a promise of immunity made to the defendant's co-conspirator, the only witness. *Id.* at 150-51; *Gonzalez v. Wong*, 667 F.3d 965, 982-84 (9th Cir. 2012)(Undisclosed psychological reports on prison informant could have provided new grounds on which to impeach informant.).

The State must disclose the identity of their informant/witness if it is "relevant and helpful to the defense...or is essential to a fair determination of a cause." *Roviaro v. United States*, 353 U.S. 53, 60 (1957)(disclosure required because informant and defendant were sole participants in criminal transaction and informant was only witness in position to amplify or contradict testimony of government witness), at 64-65. See also, *U.S. v. Tucker*, 552 F.2d 202, 209 (7th Cir. 1977)(Disclosure required because informant was present for all essential elements of prosecutions case and was in unique position to illuminate a factual controversy raised at trial).

The State stoutly refused to provide Mr. Lough with it's key primary witness's name and address due to the multiple inconsistencies in witness's various depositions to the point of taking witness off their witness list to prevent this witness from being cross-examined at Mr. Lough's trial. *Smith v. Ill.*, 390 U.S. 129, 131 (1968)(Cross-examination of informant regarding name and address is essential to challenging credibility.).

For the above reasons, Mr. Lough's commitment should be reversed and remanded back to court to either have access to this witness in court or Mr. Lough's petition dismissed with prejudice.

12. THE STATE COMMITTED PROSECUTORIAL MISCONDUCT BY REPEATEDLY REPRODUCING THE SAME INFLAMMATORY EVIDENCE OF VIOLENCE, THE PROBATIVE VALUE OF WHICH WAS OUTWEIGHED BY IT'S PREJUDICIAL EFFECT AGAINST MR. LOUGH.

a. *The State showed over and over the same video of the last fight Mr. Lough was in to show the jury how violent Mr. Lough could be in a fight.*

b. *The State showed over and over, letter after letter, of Mr. Lough repeating the same denial of his conviction, in the State's efforts to prove what a liar Mr. Lough was.*

c. *Absolutely none of the fights Mr. Lough was ever in over his 30 years of incarceration involved sex, nor did any of the letters contain anything remotely sexual in nature.*

Mr. Lough's trial was 90% about what a violent person Mr. Lough is today, and the remaining 10% containing an honorable mention of Mr. Lough's single rape conviction that he has already served 30 years for, and the remaining 10% spent arguing statistical actuarials that NOBODY could agree on or ANYBODY on the jury could understand, much less how any of it could prove that Mr. Lough would re-offend in a sexually violent manner if released from total confinement. This of course is why Mr. Lough requested a bench trial, and why the State demanded and received a jury trial.

Mr. Lough has asked himself time and time again how he has been labeled a sexually violent predator with only one single conviction that he has already served 30 years for? With there being a 3 strikes law for repeat criminals, and a 2 strikes law for repeat sex offenders, how is it conceivably possible to commit someone with only one conviction, just because they have been involved in multiple fights during his 30 years of incarceration? What's important is that NONE of them were sexual in nature. At 5'7", 140lbs., and being a convicted rapist, Mr. Lough was targeted throughout his entire incarceration in his maximum security prison and very violent environment. This would not be the case if Mr. Lough were released from custody. If Mr. Lough gets into another fight, be it in a restaurant or grocery store, then the police are called and he goes back to prison....not be committed

indefinitely as a sexually violent predator on a rape committed 30 years ago when Mr. Lough was a drug addict and an alcoholic. Having been clean and sober since that horrible day of April 11, 1986, how can anyone say with any certainty Mr. Lough "will" commit another sexual assault within 10 years if released from custody? By the State's own admission of their scientific methodology, at 57 years of age and counting, Mr. Lough's ability to re-offend is becoming less and less by the day....virtually 0% by 60; yet, the State told the jury Mr. Lough will absolutely commit another sexually violent assault within 10 years or more, when Mr. Lough is in his 70's and in a wheelchair.

"On May 11, 2016, Mr. Lough received his copy of the record from the Washington Appellate Project so Mr. Lough could file an amended pro se supplemental statement of additional grounds to add to their appeals brief they have already filed. Unfortunately, there was no discovery or exhibits with it, just the trial transcripts."

Mr. Lough spent the first few days counting how many times the State returned to the same argument, just to reargue it again and again:

1. Ms. J.I.'s April 11, 1986, Rape: The State spent1½ hours on the "morning 'only'" of the very first day of Mr. Lough's trial trying to make Ms. J.I. cry in front of the jury, for a total of 17 pages of trial transcripts of testimony.

2. Mr. Lough's various letters (approximately 100): The State mentioned and/or read one after another of Mr. Lough's letters to call Mr. Lough a liar 96 times for denying his conviction on 12 different days, for a total of 57 pages of trial transcripts of testimony. *U.S. v. Mueller*, 74 F.3d 1152, 1157 (11th Cir. 1996)(prosecutor's statement that defendant lied in various forms improper).

3. Mr. Lough's fight with Mr. Bennett Titus: The State showed the 40 second long video of the fight and/or mentioned the fight 260 times on 16 different days, for a total of 128 pages of trial transcripts of testimony.

Mr. Lough's trial lasted a total of 17 days, leaving only "one single day" that the 40 second long

video of the fight or discussions of the fight with Mr. Titus was not the main topic of the day in the State's efforts to convince the jury how "violent" Mr. Lough is. *People v. Sigal*, 249 Ca.2d 299, 57 Cal.Rptr. 541, 549 (Prosecutorial misconduct when State attempts to persuade jury by use of deceptive or reprehensible methods.).

The level of prosecutorial misconduct allowed by the court to be conducted throughout Mr. Lough's trial was as shameless as it is deplorable, especially when the State told the jury in closing arguments that "the reason Mr. Lough committed this rape of Ms. J.I. was:

MS.VITALICH: "....Dr. Packard had it right, that, essentially, what Mr. Lough was doing, from a psychological standpoint, was stabbing his own mother in the vagina."

MR. MORRISON: "Objection!"

JUDGE SHAFFER: "Overruled."

Date 2.12.15/page 82/lines 10-15.

This wholly inflammatory remark was also a fabrication by the State in saying that it was Dr. Packard who had originated this horrific statement first. Dr. Packard never said any such thing, ever, involving Mr. Lough's mother at all, and clearly leaving the jury in shock afterwards as they all internalized what the State had just said to them. *State v. Oughton*, 26 Wn.App. 74, 85, 612 P.2d 812 (1980)(When defendant can prove cumulative errors on State's warrant, then Cumulative Errors Rule applies and dismissal is mandatory.).

F. CONCLUSION

For all of the above reasons in Mr. Lough's pro se supplemental statement of additional grounds, adding to those filed by the Washington Appellate Project on behalf of Mr. Lough in their brief, Mr. Lough humbly requests this Honorable Court to order his release from total confinement, please.

I swear under penalty of perjury under the laws of the State of Washington, that all of the forgoing is true and correct. Dated this 30th day of January, 2017.

Respectfully submitted,

ROBERT LOUGH
Pro Se Appellant

EXHIBIT # 1

STATE OF WASHINGTON

WASHINGTON STATE SEX OFFENDER RISK LEVEL CLASSIFICATION REVISED 1999

NAME: LOUGH, ROBERT EUGENE

AGENCY: DOC/LEVR

DATE OF BIRTH OF OFFENDER: 08/23/1959

DSHS/DOC #: 272122

COMPLETED BY: K. DAUGHERTY

DATE REVIEWED: 01/25/2009

RELEASE DATE: 08/07/2009

MAX DATE: 08/01/2016

PART I: RISK ASSESSMENT

1. Number of sex/sex related **convictions:**
(include all juvenile adjudications, and adult gross misdemeanor, and felony convictions).
   a. None 0
   b. One 1
   (c.) Two 4
   d. Three or more 8
   Actual #: 2 Score: 4

2. Number of **felony convictions:**
(exclude sex/sex related convictions):
   a. None 0
   (b.) One or two 2
   c. Three or more 5
   Actual #: 2 Score: 2

3. Other sex/sex related **arrests or charges** NOT resulting in conviction (exclude charges where offender was found guilty):
   (a.) None 0
   b. One or more 1
   Actual #: 0 Score: 0

4. Age at first sex/sex related **conviction** or **adjudication:**
   (a.) 24 or older 0
   b. 20 to 23 2
   c. 19 or younger 4
   Actual #: 27 Score: 0

5. Use or threat of weapon in sex/sex related **convictions** (most severe across all convictions):
   a. None present 0
   b. Displayed/implied during offense 4
   (c.) Used to inflict injury 6
   Score: 6

6. Use of force in sex/sex related **convictions:**
(most severe across all convictions)
   a. None 0
   b. Manipulative 1
   c. Coercive/position of authority 2
   d. Threats of violence 3
   e. Physical force or violence 5
   (f.) Substantial/great bodily harm 8
   Score: 8

7. Total number of victims of all sex/sex related **offenses:**
   a. None 0
   b. One 1
   (c.) Two or three 4
   d. Four or more 8
   Actual #: 2 Score: 4

8. Age of victims of sex/sex related **offenses**
at time of offense (circle all that apply):
   a. Six or younger 2
   b. Seven to 12 years 2
   c. 13 to 15 years; offender not five years older than victim 1
   d. 13 to 15 years; offender five or more years older than victim 2
   (e.) 16 or older 2
   Add a through e: ____ Score: 2

SUBTOTAL 1 – 8: 26

POLICY 350.200
POLICY 350.250

9. Other characteristics of all **offense(s)**, circle all that apply:
   a. Victim tied up 4
   b. Duration of offense more than three hours 4
   (c.) Victim transported forcefully to another location.....4
   (d.) Victim torture/mutilated 4
   e. Does not apply 0

Add a through e: ___ **Score:** 8

10. Length of sexual offending history: (beginning with first offense)
   a. Less than one 0
   b. One to five years 1
   (c.) Five years or more 3

Score: 3

04/86 - 02/96

11. Any felony committed upon previous release from institution/secure facility/halfway house:
   a. Not applicable 0
   b. More than 12 months after release 2
   (c.) Seven to 12 months after release 4
   d. Three to six months after release.....6
   e. Less than three months after release.....8

Score: 4

ARRESTED 07/11/85
RAPE 1 / ATT. MURDER 04/11/86

12. Alcohol/drug use pattern (12 months prior to most recent conviction):
   a. No interference with functioning 0
   (b.) Occasional abuse; some disruption of functioning.....2
   c. Frequent abuse; serious disruption of functioning.....4

Score: 2

13. Prior sex offender treatment/programming:
   (a.) No involvement in sex offender treatment prior to current offense 0
   b. Involvement in sex offender treatment prior to current offense 6

Score: 0

14. Number of significant/marital relationships:
   a. Under the age of 25 0
   (b.) One or two after the age of 25 0
   c. Three or four after the age of 25 1
   d. Five or more after the age of 25 2
   e. None and age 25 or older 3

Score: 0

Complete only 15a. or 15b.

15a. **(Adult)** Employment history pattern:
   a. Full time employed.....0
   b. Student, retired, disabled/unable work 1
   (c.) Part-time, seasonal/unstable or in need of additional employment.....2
   d. Unemployed or history of Unemployment 4

Score: 2

15b. **(Juvenile)** Early school history pattern (Grades K through 6 only):
   a. Generally satisfactorily 0
   b. Moderate adjustment problems/multiple disciplinary actions and/or suspensions 1
   c. Severe adjustment problems/frequent disciplinary actions and/or one permanent expulsion.....2
   d. Multiple expulsions/chronic inability to be maintained in the school setting.....4

Score: N/A

16. Presence of multiple paraphilias, check all that apply:

___ Fetishism	___ Exhibitionism
___ Pedophilia	___ Frotteurism/Frottage
___ Voyeurism	___ Sexual Sadism
___ Zoophilia	___ Sexual Masochism
___ Coprophilia	___ Telephone Scatologia
___ Urophilia	___ Rape NOS
___ Transvestism	___ Necrophilia

   (a.) None 0
   b. One 2
   c. Two or three 4
   d. Four or more 6
   e. Offender is under 16 years 0

Score: 0

SUBTOTAL 9 – 16: 19

The remaining items refer to the offender's CURRENT term of incarceration:

17. Release environment:
    a. Relatively stable 0
    (b.) Moderate disorganization/stress 2
    c. Major disorganization/stress 4
    Score: 2

18. Age at release from institution/confinement:
    (a.) 30 or older 0
    b. 24 to 29 years 2
    c. 23 or younger 4
    Score: 0

19. Discipline history while incarcerated (most serious):
    a. No major discipline reports 0
    b. History of major discipline report not involving violence 4
    (c.) History of major discipline report involving Violence 8
    Score: 8

20. Chemical dependency treatment during current incarceration:
    (a.) Not recommended/unknown 0
    b. Recommended and successfully Completed 2
    c. Recommended and currently in program, or on a waiting list, or recommended but insufficient time get into a program 2
    d. Recommended and refused/quit, or deemed non-amenable to treatment 4
    e. Recommended and terminated from Program 6
    Score: 0

21. Sex offender treatment during current incarceration:
    a. Not recommended/unknown 0
    b. Recommended and successfully completed 2
    c. Recommended and currently in program, Or on waiting list, or recommended but insufficient time to get into program 2
    (d.) Recommended and refused/quit or Deemed non-amenable to treatment.....4
    e. Recommended and terminated from Program 6
    Score: 4

PART II: OTHER NOTIFICATION CONSIDERATIONS

A. Victim(s) of the non-familial sex conviction(s) were Particularly vulnerable or incapable of resistance due to Physical or mental disability or ill health. Y (N)

B. Sex conviction(s) was/were of a predatory nature or the non-familial offender used a position of community trust, (i.e., coach, teacher, group leader, or police officer), or professional relationship to facilitate the commission of non-familial sex offense(s). (Y) N

C. Offender continued to act out his/her sexual deviancy during incarceration. (Y) N

D. Adult male offender has a RRASOR score of 4 to 6 Y (N)

Rapid Risk Assessment for Sexual Offense Recidivism

1. Prior sex offenses (not including index offenses):
   a. None 0
   b. 1 conviction; 1-2 charges 1
   (c.) 2-3 convictions; 3-5 charges 2
   d. 4 or more convictions; 6 + charges 3

   Actual #: 2 **Score:** 2

2. Age at release (current age):
   (a.) More than 25 0
   b. Less than 25 1

   Actual #: 49 **Score:** 0

3. Victim gender:
   (a.) Only females..... 0
   b. Any males 1

   Score: 0

4. Relationship to victim:
   a. Only related 0
   (b.) Any non-related 1

   Score: 1

RRASOR TOTAL: 3

SUBTOTAL 17-21: 14

Total Notification Considerations: 2

PART III: DEPARTURE LANGUAGE

The risk level is calculated from aggregating the risk facts and other standard notification considerations is "presumptive" because the Department/Committee may depart from it if special circumstances warrant. The ability to depart is premised on a recognition that an objective instrument, no matter how well designed, will not fully capture the nuances of every case. Not to allow for departures would therefore deprive the Department/Committee of the ability to exercise sound judgment and to apply its expertise to the offender. Of course, were there to be a departure in every case, the objective instrument would be of minimal value. The expectation is that the instrument will result in the proper classification in most cases so that departures will be the exception not the rule.

Scientific literature demonstrates that intrafamilial sex offenders pose a lower risk of recidivism than other types of sex offenders. Additionally, the group of persons to whom they pose a risk upon release (judged by the identity of their past victim (s) is very small compared with other offenders. Therefore, in order to effectuate the goal of the notification statute, offenders who are strictly intrafamilial offenders will presumptively be classified as Risk Level I.

Generally, the Department/Committee may not depart from the presumptive risk level unless it concludes that there exists an aggravating or mitigating factor of a kind, or to a degree, not otherwise adequately taken into account by the guidelines. Circumstances that may warrant a departure cannot by their nature be comprehensively listed in advance. The departure must be justified in writing and have the support of the majority of Department/Committee members.

Subtotals 1 – 8: 26

Subtotals 9 – 16: 19

Subtotals 17 – 21: 14

Grand Total = 59

Total Number of Notification Considerations: 2

Level 1 = Assessment score 46 or less and no notification considerations.
Level 2 = Assessment score 46 or less and/or 1 - 2 notification considerations.
Level 3 = Assessment score 46 or less and/or 3 or 4 notification considerations, or assessment score 47 or higher.

RISK LEVEL: III

DEPARTURE JUSTIFICATION:

ESR CHAIR OR DESIGNATED AGENCY STAFF: 2/6/09

AGENCY WITH JURISDICTION:

FINAL RISK LEVEL (circle one only): I, II, III

Note: If the Risk Level by the ESRC is different from the final Risk Level, the departure justification of this form must be completed.

EXHIBIT #2

IN THE SUPERIOR COURT
OF WASHINGTON STATE
DIVISION I

STATE OF WASHINGTON,	)	
	)	Cause No. 86-1-01595-3
vs.	)	Cause No. 09-2-29232-9
	)	
ROBERT LOUGH,	)	
	)	**AFFIDAVIT OF ROBERT LOUGH**
APPELLANT.	)	
	)	

County)
of) ss
King)

I, ROBERT LOUGH, am over 18, and the defendant in this case, hereby declare:

That, the State's agent, Ms. Kim Acker, has deliberately erred at least 9 times in rescoring my Risk Assessment. The scoring is a follows: In each column of numbers the first number is the correct number which is followed by a /. The number following the / is Ms. Acker's version. Ms. Acker waited until the end of my prison sentence of 24 years to change my original score of 28 points and level 1 assessment, to 59 points and a level 3 assessment; a deliberate miscalculation of 31 points.

PAGE 1	PAGE 2	PAGE 3	PAGE 4
1. 1/4	9. 4/8	17. 2/2	TOTAL
2. 2/2	10. 0/3	18. 0/0	28/59
3. 0/0	11. 0/4	19. 0/8	
4. 0/0	12. 2/2	20. 0/0	
5. 6/6	13. 0/0	21. 0/4	
6. 8/8	14. 0/0		
7. 1/4	15a 0/2		
8. 2/2	15b 0/0		
	16. 0/0		

#1. Ms. Acker circled 'c' indicating two convictions of rape. There is only one conviction which I was in prison from April 10, 1986, until August 8, 2009. One conviction equals 1 point, thus an error of 3 points added.

#7. Ms. Acker circled 'c' indicating two or three victims in rape convictions. There is only 1 rape conviction of only 1 victim. This equals 1 point, thus an error of 3 points added.

#9. Ms. Acker circled 'c' & 'd' that I forced victim into my car; victim's statement says she got into my car willingly to go to a different bar, thus an error of 4 points added.

#10. Ms. Acker circled 'c' that I had raped again between 1986 – 1996. This is a bold face lie! I have been in prison April 10th, 1986, todate, never having been released, nor did I ever assault anyone in prison. Thus, this score should be 0, not the 3 points Ms. Acker added.

#11. Ms. Acker circled 'c' for 4 points for being arrested and charged for tax fraud. My ex-wife stole my income tax check and forged my signature and cashed it at her dad's bank. When I applied for a check when the first check did not arrive I was questioned, not arrested. I took a polygraph and passed, and a multiple signature test and passed it too. My ex-wife was then charged and she pleaded guilty. Thus an error of 4 points added.

#15a. Ms. Acker circled 'c' that I was only a part time employee. I was a full time employee with two jobs (Seattle Seafoods & Kirby of Everett) for over a year at the time of my arrest; which is easily verified in my trial transcripts, thus an error of 2 points added.

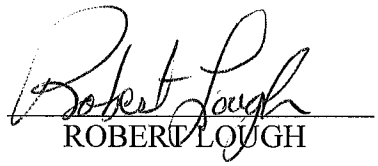
#16. Ms. Acker circled 'a' None.....0, for having any presence of any paraphilias. Yet, now has Dr. Packard, who is the State's expert, lying that I now have many, even though he has never once talked to me.

#19. Prison is a hostile environment and fights occur almost daily, especially for a convicted rapist who is only 5'7" tall and only weighs 140 lbs., thus an easy target. To survive, you must fight to defend yourself from being raped or killed. Since NONE of these fights were ever sexually motivated by me, these points should not be allowed to count as relevant to being committed as a sexually violent predator, thus an error of 8 points added.

#21. Ms. Acker Circled 'd' that I refused treatment. This is a lie. The report states I was non-amenable to treatment. The 'non' was underlined as I had never been asked to do any treatment in the entire 24 years of my incarceration for this conviction, thus an error of 4 points added.

I was assessed as a level 1 and "No Referral to SCC" by the End Of Sentence Review Board for my entire 24 years in prison. Yet, on February 6, 2009, Ms. Acker independently reassesses me to a level 3 a few months prior to my release from prison using documents she fabricated; See Exhibits 1 – 4(Washington State Sex Offender Risk Level Classification; signed and dated 2/6/09).

I swear under penalty of perjury of Washington State Laws that all of the foregoing is true and correct. Dated this 25th day of January 2014.



ROBERT LOUGH

EXHIBIT #3

WWCICUPDTDKOC .PAGE 1
QR.WA017443A.PUR/C.ATN/JSNELSO.FBI/195896W8
ATN/JSNELSO
WASHINGTON STATE CRIMINAL HISTORY RECORD FOR SID/WA11726726
WASHINGTON STATE PATROL
IDENTIFICATION AND CRIMINAL HISTORY SECTION
P.O. BOX 42633
OLYMPIA, WASHINGTON 98504-2633

****

NOTICE

THE FOLLOWING TRANSCRIPT OF RECORD IS FURNISHED FOR OFFICIAL USE ONLY. SECONDARY DISSEMINATION OF THIS CRIMINAL HISTORY RECORD INFORMATION IS PROHIBITED UNLESS IN COMPLIANCE WITH THE WASHINGTON STATE CRIMINAL RECORDS PRIVACY ACT, CHAPTER 10.97 RCW.
POSITIVE IDENTIFICATION CAN ONLY BE BASED UPON FINGERPRINT COMPARISON. BECAUSE ADDITIONS OR DELETIONS MAY BE MADE AT ANY TIME, A NEW COPY SHOULD BE REQUESTED FOR SUBSEQUENT USE. WHEN EXPLANATION OF A CHARGE OR DISPOSITION IS NEEDED, COMMUNICATE DIRECTLY WITH THE AGENCY THAT SUPPLIED THE INFORMATION TO THE WASHINGTON STATE PATROL.

****

SID NUMBER	NAME	FBI NUMBER	DOC NUMBER
WA11726726	LOUGH,ROBERT E	195896W8	272122

PERSON INFORMATION

SEX	RACE	HEIGHT	WEIGHT	EYES	HAIR	PLACE OF BIRTH	CITIZENSHIP
M	W	509	150	BLU	BRO	CA	

NAMES USED	DATES OF BIRTH	SOC SEC NUMBER	MISC NUMBER
LOUGH,BOB	08/23/1959	534-68-9271	

DNA TAKEN: Y DNA TYPED: Y

SCARS, MARKS, TATTOOS, AMPUTATIONS

LOCATION	DESCRIPTION	LOCATION	DESCRIPTION
SC LF ARM		SC UL ARM	
TAT L ARM		TAT UR ARM	

CONVICTION AND/OR ADVERSE FINDING SUMMARY

3 FELONY(S)		DISPOSITION DATE
POSSESS STOLEN PROPERTY-2	CLASS C FELONY	10/27/1980
MURDER-1	CLASS A FELONY	11/20/1986
RAPE-1	CLASS A FELONY	11/20/1986

0 GROSS MISDEMEANOR(S)
0 MISDEMEANOR(S)
0 CLASSIFICATION(S) UNKNOWN

NO KNOWN SEX/KIDNAPPING OFFENDER REGISTRATIONS

NO KNOWN APPLICANT DETAILS

CRIMINAL HISTORY INFORMATION

THE ARRESTS LISTED MAY HAVE BEEN BASED ON PROBABLE CAUSE AT THE TIME OF ARREST OR ON A WARRANT. PROBABLE CAUSE ARRESTS MAY OR MAY NOT RESULT IN THE FILING OF CHARGES. CONTACT THE ARRESTING AGENCY FOR INFORMATION ON THE FORMAL CHARGES AND/OR DISPOSITIONS.

ARREST 1 DATE OF ARREST: 06/11/1980

NAME USED: LOUGH,ROBERT E
CONTRIBUTING AGENCY: WASPD0000 SEATTLE POLICE DEPARTMENT
LOCAL ID: 92027 PCN: N/A

ARREST OFFENSES

02802 POSSESS STOLEN PROPERTY-1
RCW: 9A.56.150
CLASS B FELONY
ORIGINATING AGENCY: WASPD0000
SEATTLE POLICE DEPARTMENT
DISPO RESPONSIBILITY: WASPD0000
DATE OF OFFENSE: 06/11/1980

DISPOSITION

CONTRIBUTOR OR RESPONSIBLE AGENCY:
WASPD0000 SEATTLE POLICE DEPARTMENT

STATUS: GUILTY
02812 POSSESS STOLEN PROPERTY-2
RCW: 9A.56.160
CLASS C FELONY
STATUS DATE: 10/27/1980

SENTENCE: SENT. DESC.:
CHG 01: JAIL - 3 MOS/SUSPENDED 5 YRS, COMM SUPV - 3 YRS PROB

ARREST 2 DATE OF ARREST: 01/07/1982

NAME USED: LOUGH,ROBERT E
CONTRIBUTING AGENCY: WA0270000 PIERCE COUNTY SHERIFF
LOCAL ID: 56736 PCN: N/A

ARREST OFFENSES

02812 POSSESS STOLEN PROPERTY-2
RCW: 9A.56.160
CLASS C FELONY
ORIGINATING AGENCY: WA0270000
PIERCE COUNTY SHERIFF
DISPO RESPONSIBILITY: WA0270000
DATE OF OFFENSE: 01/07/1982

DISPOSITION

CONTRIBUTOR OR RESPONSIBLE AGENCY:
WA0270000 PIERCE COUNTY SHERIFF

STATUS: DISMISSED
02812 POSSESS STOLEN PROPERTY-2
RCW: 9A.56.160
CLASS C FELONY
STATUS DATE: 04/15/1982

ARREST 3 DATE OF ARREST: 07/11/1985

NAME USED: LOUGH,ROBERT E
CONTRIBUTING AGENCY: WA0270000 PIERCE COUNTY SHERIFF
LOCAL ID: 56736 PCN: N/A

ARREST OFFENSES

02652 THEFT-3
RCW: 9A.56.050
GROSS MISDEMEANOR
ORIGINATING AGENCY: WA0270000
PIERCE COUNTY SHERIFF
OIN: 85192022
DISPO RESPONSIBILITY: WA0270000
DATE OF OFFENSE: 07/11/1985

DISPOSITION

CONTRIBUTOR OR RESPONSIBLE AGENCY:
WA0270000 PIERCE COUNTY SHERIFF

STATUS: NOT RECEIVED

ARREST 4 DATE OF ARREST: 04/12/1986

NAME USED: LOUGH,ROBERT E
CONTRIBUTING AGENCY: WA0170700 KENT POLICE DEPARTMENT
LOCAL ID: 8601995 PCN: N/A

ARREST OFFENSES

00312 ASSAULT-1
RCW: 9A.36.010
CLASS A FELONY
ORIGINATING AGENCY: WA0170700
KENT POLICE DEPARTMENT
OIN: 8601995
DISPO RESPONSIBILITY: WA017013A
DATE OF OFFENSE: 04/12/1986

00700 RAPE
RCW: 9A.44.000
FELONY
ORIGINATING AGENCY: WA0170700
KENT POLICE DEPARTMENT
OIN: 8601995
DISPO RESPONSIBILITY: WA017013A
DATE OF OFFENSE: 04/12/1986

DISPOSITION

CONTRIBUTOR OR RESPONSIBLE AGENCY:
WA017013A KING COUNTY PROSECUTOR
COURT CASE NO: 861015953

STATUS: GUILTY
00124 MURDER-1
RCW: 9A.32.030(1)(A)
CLASS A FELONY
STATUS DATE: 11/20/1986

SENTENCE: SENT. DESC.:
CHG 01: PRISON - 30 YRS,
APPEAL DT - 11/20/1986 **CHG
02: PRISON - 126 MOS,
CONCURRENT, APPEAL DT -
11/20/1986

STATUS: GUILTY
00714 RAPE-1
RCW: 9A.44.040(1)(A)
WEAPON
CLASS A FELONY
STATUS DATE: 11/20/1986

ARREST 5 DATE OF ARREST: 04/16/1986

NAME USED: LOUGH,ROBERT E
CONTRIBUTING AGENCY: WAKCS0000 KING COUNTY SHERIFFS OFFICE
LOCAL ID: 130627 PCN: N/A

ARREST OFFENSES

05009 OBSTRUCTING A PUBLIC SERVANT
RCW: 9A.76.020
MISDEMEANOR
ORIGINATING AGENCY: WAKCS0000
KING COUNTY SHERIFFS OFFICE
OIN: 4471291
DISPO RESPONSIBILITY: WA017053J
DATE OF OFFENSE: 04/16/1986

DISPOSITION

CONTRIBUTOR OR RESPONSIBLE AGENCY:
WA017053J FEDERAL WAY DISTRICT
COURT
COURT CASE NO: 4471291

STATUS: DISMISSED
05009 OBSTRUCTING A PUBLIC
SERVANT
RCW: 9A.76.020
MISDEMEANOR
STATUS DATE: 07/03/1986

END OF PAGE 1 - PAGE 2 TO FOLLOW

WASHINGTON STATE CRIMINAL HISTORY RECORD FOR SID/WA11726726
STATE DEPARTMENT OF CORRECTIONS

CUSTODY STATUS INFORMATION

NAME:	LOUGH,ROBERT E
DATE:	04/28/2009
DOC NUMBER:	272122
CUSTODY STATUS:	RESIDENT
TYPE:	INMATE
LOCATION:	CBCC-IMU

VIOLENT OFFENDER **SEX/KIDNAPPING OFFENDER**
(NON-VERIFIED CUSTODY STATUS INFORMATION-PROVIDED BY DEPARTMENT OF CORRECTIONS)

CUSTODY HISTORY

COMMITMENT DATE: 12/03/1986

NAME USED:	LOUGH,ROBERT E
DOC NUMBER:	272122
CONTRIBUTING AGENCY:	WA023025C WASHINGTON CORRECTIONS CENTER
COURT CASE NO:	861015953 COUNTY/STATE: KING
CHARGE:	00712 RAPE-1 CLASS A FELONY 9A.44.040(1)
DOO:	12/03/1986
COURT CASE NO:	861015953 COUNTY/STATE: KING
CHARGE:	10112 MURDER-1 CLASS A FELONY 9A.32.030(1) ATTEMPT
DOO:	12/03/1986

****

GLOSSARY

CONTRIBUTING AGENCY: A LOCAL SHERIFF'S OFFICE, POLICE DEPARTMENT, JAIL OR CORRECTIONAL FACILITY THAT SUBMITS FINGERPRINT CARDS TO THE SECTION.

CONTRIBUTOR OR RESPONSIBLE AGENCY: THE AGENCY THAT SUBMITTED THE INFORMATION OR, PRIOR TO OCTOBER 1999, PRESUMED TO BE THE DISPOSITION REPORTER.

CONVICTION AND/OR ADVERSE FINDING SUMMARY: THE NUMBER AND TYPE OF CONVICTIONS AND/OR ADVERSE FINDINGS PERTAINING TO AN INDIVIDUAL. DETAILS ARE INCLUDED UNDER CRIMINAL HISTORY INFORMATION.

CUSTODY STATUS INFORMATION: CURRENT CUSTODY STATUS INFORMATION PROVIDED ONLINE BY THE STATE DEPARTMENT OF CORRECTIONS.

DISPOSITION RESPONSIBILITY: AN INDICATION OF THE PROSECUTOR, COURT, OR LAW ENFORCEMENT AGENCY WHICH MAY BE RESPONSIBLE FOR REPORTING THE DISPOSITION.

DNA SAMPLE: DNA SAMPLE AND TYPE, CONTACT WSP CRIME LABORATORY, CODIS, AT (206) 262-6020 IF OTHER CONTACT INFORMATION NOT AVAILABLE

DLO: DNA LOCATION

DOC NUMBER: WASHINGTON STATE DEPARTMENT OF CORRECTIONS NUMBER.

LOCAL ID: LOCAL IDENTIFICATION NUMBER USED BY CONTRIBUTING AGENCY.

NOT RECEIVED: DISPOSITION OF ARREST OFFENSES THAT HAVE NOT BEEN SUBMITTED TO THE WASHINGTON STATE PATROL IDENTIFICATION SECTION.

OIN: OTHER IDENTIFYING NUMBER. A TRACKING NUMBER ASSIGNED BY THE CONTRIBUTING OR ORIGINATING AGENCY.

ORIGINATING AGENCY: THE ORIGINAL LAW ENFORCEMENT AGENCY HANDLING THE CASE, WHICH MAY BE DIFFERENT FROM THE CONTRIBUTING AGENCY.

PCN: PROCESS CONTROL NUMBER USED BY CRIMINAL JUSTICE AGENCIES TO LINK ARRESTS TO DISPOSITIONS.
RCW: REVISED CODE OF WASHINGTON; STATUTE REFERRING TO ARREST OFFENSE OR THE CHARGE.
SEARCH PARAMETERS: REFERENCE INFORMATION USED BY SECTION STAFF.
SID NUMBER: UNIQUE STATE IDENTIFICATION SECTION RECORD NUMBER.
END OF RECORD

EXHIBIT #4

STATE OF WASHINGTON
DEPARTMENT OF CORRECTIONS

APO9 SCCC

END OF SENTENCE REVIEW/COMMUNITY PROTECTION UNIT REFERRAL

8/7/09

OFFENDER NAME	DOC NUMBER	SID NUMBER	ERD AND MAX DATE
Lough, Robert	272122	11726726	~~08/28/08~~ -- 04/01/16
CURRENT OFFENSE	**ISRB/SRA/OAA**	**COUNTY OF CONVICTION**	**DATE OF BIRTH**
Attempted Murder 1st, Rape 1st	ISRB	King County	08/23/59

LSI-R Score 38 MNSOST RRASOR VRAG Other

Reason for referral: ☒ Sex offender ☐ DMIO ☐ LSI-R 41+ and violent conviction ☒ Violence ☐ Current threats

HISTORY OF SEX AND VIOLENCE

RECEIVED
MAR 03 2008
ESRC/LEN PROGRAMS

YES	NO	DON'T KNOW		
			1.	Documented history of the following:
☒	☐	☐	a.	Committed an act of violence involving a victim who was unknown to the offender.
☐	☐	☒	b.	Committed a predatory act of violence.
☐	☒	☐	c.	Committed a violent act where the victim was vulnerable due to age (5 years or younger), physical condition, mental disability, or ill health where the victim was incapable of resisting the offense, or was significantly impaired and unable to protect him/herself.
☐	☒	☐	d.	Committed violent acts or made threats of violence directed toward institutions or groups in the community including but not limited to religious, ethnic, or racial groups.
☐	☒	☐	e.	Continues to exhibit behavior, demonstrates a current threat to the victim(s) including but not limited to domestic violence or sexual offenses.

Brief explanation of any "yes, or don't know" from above section: He met his victim in a bar, offered her, a ride to another bar for another drink.

Number of all arrests 7 Number of prior convictions 6 Number of violent offenses 0
Number of serious violent offenses 2 Age at first arrest 14 Expected age at release 49
Number of alcohol or drug related arrests 1 Was instant offense drug or alcohol related yes
Number of drug or alcohol related infractions 0

HISTORY OF MENTAL ILLNESS OR DEVELOPMENTAL DISABILITY

Current diagnosis None Date
History of psychiatric hospitalizations ☐ YES ☒ NO If Yes, number
Dates
Where
History of community mental health treatment ☐ YES ☒ NO If Yes, number
Dates
Where
Number of DOC mental health program placements None Dates
History of involuntary medications ☐ YES ☒ NO
Is the offender currently on involuntary medication ☐ YES ☒ NO
History of violence while medication compliance and stabilized ☐ YES ☒ NO
History of noncompliance with medications ☐ YES ☒ NO
History of DDD services ☐ YES ☐ NO

DTO7 ✓
log ✓

TREATMENT HISTORY

Sexual deviancy ☐ YES ☒ NO If yes, Dates

Where		
Substance abuse	☐ YES ☒ NO	If yes, Dates
Where		
Stress and anger management	☐ YES ☒ NO	If yes, Dates
Where		
Other	☐ YES ☒ NO	If yes, Types/Dates
Where		
Comments:		

RELEASE PLAN OR ATTACHED OAP

Address: None at this time.
Does the offender have confirmed community resources? ☐ Yes ☐ No
If yes, please explain Unknown
Does the offender have a need for continued mental health treatment, or DDD services ☐ YES ☒ NO
If yes, please explain how these needs will be met::
Are there victims or potential victims living in the residence? ☐ Yes ☒ No
Additional comments:

COMPLETED BY	DATE	CORRECTIONAL UNIT SUPERVIOSR / WORK RELEASE SUPERVISOR	DATE
T Bowers	2/25/08	John D. Smith	2/25/09

END OF SENTENCE REVIEW COMMITTEE/COMMUNITY PROTECTION UNIT DECISION

02/06/2009. THE ESRC HAS DETERMINED THAT THIS OFFENDER SHOULD BE CLASSIFIED AS A RISK LEVEL III FOR NOTIFICATION PURPOSES AND WILL FORWARD SUCH NOTIFICATION TO LAW ENFORCEMENT.

COMMITTEE CHAIR / DESIGNEE	DATE
	3/2/09

Distribution: **ORIGINAL** – Review Committee **COPY** – Central File, Assignment Officer (if appropriate), CPM / WR Supervisor, Classification Counselor / CCO

EXHIBIT #5

Bright, Norman W. (DOC)

From: Acker, Kimberly M. (DOC)
Sent: Thursday, January 15, 2009 12:28 PM
To: Williams, Jennifer J. (DOC)
Cc: Bright, Norman W. (DOC)
Subject: RE: Lowe, Robert 272122

Jennifer, can you please order his criminal history and bump this one up as potential 71.09 for assignment? With a current Murder 1/Rape 1, he'll be an auto Subcommittee review, so we need all the time we can get.

Thanks for contacting us Norm! You did just the right thing. Keep checking chrono's and check dates, as we will update when this case has been reviewed and any ESRC decisions. I'm guessing this will come up for review 3/5 or 3/6, or potentially 2/18.

From: Williams, Jennifer J. (DOC)
Sent: Thursday, January 15, 2009 11:56 AM
To: Acker, Kimberly M. (DOC)
Cc: Bright, Norman W. (DOC)
Subject: RE: Lowe, Robert 272122

We have received his referral. He has not been reviewed to date due to his ERD being 8/09. We are currently working on 5/09 cases.

Sorry for the inconvience.

Jennifer Williams
Correctional Records Supervisor
End of Sentence Review Program
Washington State Department of Corrections
P.O. Box 41127
Olympia, WA 98504-1127

Phone: 360-725-8653 Fax: 360-664-0355

From: Acker, Kimberly M. (DOC)
Sent: Thursday, January 15, 2009 11:05 AM
To: Williams, Jennifer J. (DOC)
Subject: Lowe, Robert 272122

Just got message from cc at Clallam Bay. Can you check ESR referral status and review for me? Currently serving on Rape 1/Murder 1 and releasing in 6 mos. CC doesn't think he's been referred or reviewed?

Kimberly M. Acker
Department of Corrections
End of Sentence Review/Civil Commitment Program Manager
360-725-8651

EXHIBIT #6

UNIT MEMO

DATE: 07/23/09

TO: Ms. Jennifer Williams

FROM: Norman Bright CCII

SUBJECT: Information on Offender Lough, Robert 272122, ERD 8/7/09.

Good morning Ms. Williams: These are all the materials I have on Lough in general. I do have kites from him but they were more on a day to day business so did not copy them. Please contact me if you have questions. Regards Norman Bright CCII

EXHIBIT # 7

NO. 09-2-29232-9

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Plaintiff,

v.

ROBERT LOUGH,

Defendant.

ON APPEAL FROM THE SUPERIOR COURT OF THE

STATE OF WASHINGTON FOR KING COUNTY

WRIT OF MANDAMUS

ROBERT LOUGH
Defendant/Pro Se

ROBERT LOUGH
Airway Heights Corrections Center
P.O. Box 2049
Airway Heights, WA 99001

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES

CONSTITUTIONAL PROVISIONS

EXHIBITS

IN THE SUPERIOR COURT OF
THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON,	)	
	)	
Plaintiff,	)	Cause No. 09-2-29232-9
vs.	)	
	)	**WRIT OF MANDAMUS**
ROBERT LOUGH,	)	
	)	
Defendant.	)	

County)
of) ss
King)

I. IDENTITY OF PETITIONER

1.1 Petitioner, ROBERT E. LOUGH, Pro Se, seeks the permission of this Court for an issuance of a Writ of Mandamus to compel the dismissal of the stay/warrant against Mr. Lough.

II. JURISDICTION AND AUTHORITY

2.1 Superior Court in county where prisoner has been convicted of underlying offenses has authority to issue a Writ of Mandamus.

III. FACTS RELEVANT TO CASE

3.1 Mr. Lough is a prisoner presently incarcerated at the Airway Heights Corrections Center.

3.2 Mr. Lough's present release date is October 22, 2013.

3.3 State's prosecutor (Ms. C.J. Murray) has petitioned for and was granted a warrant for Mr. Lough's

re-arrest upon his release from prison.

3.4 Ms. Murray knowingly presented altered documents to the Court saying Mr. Lough has multiple rape convictions when there is only one single conviction in an attempt to civilly commit him by procuring a warrant against Mr. Lough under Cause No. 86-1-01595-3 that Mr. Lough was convicted of and has completed his entire sentence of 23 years back in August 2009.

3.5 This constitutes prosecutorial misconduct by abusing her authority as an officer of the State of Washington.

3.6 This constitutes Double Jeopardy and violates Mr. Lough's constitutional guarantee against being twice sentenced for the same crime that has been adjudicated and sentence served in it's entirety.

IV. ARGUMENT AND GROUNDS FOR RELIEF PROSECUTORIAL MISCONDUCT

4.1 State's prosecutor, Ms. Murray, knowingly presented altered and falsified documents to the Court at the initial probable cause hearing to obtain a warrant for Mr. Lough's arrest upon completion of his current incarceration. With multiple cumulative errors, this warrant should be dismissed so Mr. Lough can be released from his unlawful incarceration at the SCC. *State v. Oughton*, 26 Wn.App. 74, 85, 612 (1980)(When defendant can prove cumulative errors on States warrant, then Cumulative Errors Rule applies and dismissal is mandatory.); *State v. Halsworth*, 93 Wn.2d 148 (1980)(State needs to prove existence of priors by a preponderance of evidence.); *Curtis v. United States*, 128 L.Ed.2d 517 (1994); *State v. Lopez*, 147 Wn.2d 515 (2002), RCW 9.94A.500(1)(State was obligated to obtain judgments and sentences to prove proper convictions.); *State v. Ford*, 137 Wn.2d 472, 480-82 (1999); *State v. Mendoza*, 165 Wn.2d 913 (2009); *State v. Allen*, 150 Wn.App. 300, 314-17 (2009). Failure to do so, precludes remand to allow State a further opportunity to meet it's burden. *State v. McCorkle*, 137 Wn.2d 490, 497 (1999); c.f. *State v. Bergstrom*, 162 Wn.2d 87 (2007)(Affirms *State v. Lopez*, 107 Wn.App. 270 (2001).

4.2 PERJURY: 9A.72.010(1) "Materially False Statements" means any false statement, oral or written, regardless of it's admissibility under the Rules of Evidence, which could have affected the course or outcome of the proceeding;

(2) "Oath" includes an affirmation and every other made authorized by law of attesting to the truth of that which is stated;

(a) The statement was made on or pursuant to instructions on an official form bearing notice, authorized by law, to the effect that false statements made therein are punishable;

(b) The statement recites that it was made under oath, the declarant was aware of such recitation at the time he or she made the statement, intended that the statement should be represented as a sworn statement and the statement was in fact so represented by it's delivery or utterance with the signed jurat of an officer authorized to administer oaths appended thereto; or

(c) It is a statement, declaration, verification, or certificate, made within or outside the State of Washington, which is certified or declared to be true under penalty of perjury as provided in RCW 9A.72.085.

4.3 To establish probable cause, the "Affidavit in Support" of warrant must set forth sufficient facts to convince a reasonable person of the probability the defendant is engaged in criminal activity. U.S.C.A. Const. Amend. 4; West's RCWA Const. Art. I, §7; *State v. Ferro*, 64 Wn.App. 195, 823 P.2d 526 (1992)(Charging Documents)(Claims that under *State v. Leach* , 113 Wn.2d 679, 782 P.2d 552 (1989), the complaint filed against him was constitutionally deficient.). The Court of Appeals agreed.

4.4 "A warrant may issue only upon evidence which would be competent in trial of the offense charged before a jury, and the facts must be sufficient to lead a man of prudence to believe the offense had been committed." *Pallett v. Thompkins*, 10 Wn.2d 697, 118 P.2d 190 (1941).

4.5 Under the "REAL FACTS DOCTRINE" the trial court was precluded from relying on facts "constituting uncharged crime" of malicious mischief to justify taking motor vehicle without owner's

permission. West's RCWA 9.94A.210, 9.94A.370, 9A.56.070(1).

4.6 "Real Facts Doctrine," which provides that facts that establish elements of additional crimes may not be used to go outside presumptive sentence range. West's RCWA 9.94A.370(.... defendant's will be held accountable for those crimes of which they are convicted, but not for crimes the prosecutor could not, or chose not to prove. *State v. Harp*, 43 Wn.App. 340, 342-43, 717 P.2d 282 (1986)).

4.7 "If a defendant can be sentenced for uncharged crimes, this will undermine the Accountability Act's purpose of providing sentences proportionate to the seriousness of the offense and the criminal history, and commensurate with the punishment imposed on others committing similar offenses." RCW 9.94A.010(1) and (3); *State v. Wood*, 42 Wn.App. 78, 709 P.2d 1209 (1985)(The record must support a course of treatment or duration of confinement in excess of the standard range; The length of an exceptional sentence cannot come out of thin air.); *State v. P.*, 37 Wn.App. 773, 686 P.2d 488 (1984).

DOUBLE JEOPARDY

4.8 In *State v. Kirk*, 64 Wn.App. 788, 828 P.2d 1128 (1992), it was held that the Double Jeopardy clause protects against second prosecution for same offense after conviction and completion of sentence, and protects against multiple punishments for same offense as well as protecting valued right to have trial completed by particular tribunal. U.S.C.A. Const. Amend. 5; *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S.Ct. 2072, 2076, 23 L.Ed.2d 656 (1969)(Multiple punishments); *Alabama v. Smith*, 490 U.S. 794, 109S.Ct. 2201, 104 L.Ed.2d865 (1989)(Particular tribunal).

4.9 In *State v. Walters*, 146 Wn.App. 138, 188 P.2d 540 (2008), it was held that fairness and justice dictate that an individual who has served his sentence, should not be retried by the State for the same offense. U.S.C.A. Const. Amend. 5; Wests Const. Art. I, §9.

4.10 The Fifth Amendment to the United States Constitution provides that "[n]o person shall be... subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. Amend. 5. Similarly, the Washington Constitution does not allow a person to "be twice put in jeopardy for the

same offense." West's Const. Art. I, §9. Both federal and state double jeopardy clauses are "identical in thought, substance, and purpose." *State v. Ervin*, 158 Wn.2d 746, 752, 147 P.3d 567 (2006)(Quoting *In re Personal Restraint of Davis*, 142 Wn.2d 165, 171, 12 P.3d 603 (2000).

4.11 The Supreme Court holds: "The Double Jeopardy Clause applies when (1) Jeopardy had previously attached, (2) That previous jeopardy has terminated, and (3) The defendant is in jeopardy a second time for same offense in fact and law; if all three elements are present, the double jeopardy clause bars the State from retrying the defendant."U.S.C.A. Const. Amend. 5, West's Const. Art. I, §9.

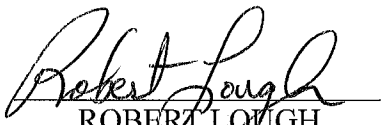
4.12 The constitutional protection against double jeopardy is an individual right, which, as a general proposition, is invoked by the defendant seeking protection against retrial or Civil Commitment. See *Oregon v. Kennedy*, 456 U.S. 667, 681-82, 102 S.Ct. 2083, 72 L.Ed. 416 (1982)("The Double Jeopardy Clause represents a constitutional policy of 'finality' for the defendant's benefit in criminal proceedings." See *State v. Hall*, 162 Wn.2d 901, 177 P.3d 680 (2008); *United States v. Arrellano-Rios*, 799 F.2d 520, 524 (9th Cir. 1986)(Expectation of finality arises upon completion of sentence.); *Sharf v. Municipal Court*, 56 Wn.2d 589, 354 P.2d 692 (1960)(The Supreme Court held: "Fulfillment of a 'correct' sentence divested the Court of the power to impose a greater sentence."); RCW 9A.32.010, RCW 9A.32.050(1)(b), RCW 46.61.520(1)(b).

V. CONCLUSION

5.1 For the reasons set forth above petitioner Lough requests that the warrant filed by State's prosecutor C.J. Murray be dismissed with prejudice and Mr. Lough be released from confinement.

I swear under penalty of perjury that all of the foregoing is true and correct under the laws of the State of Washington. Dated this 19th day of June 2013.

Respectfully submitted,



ROBERT LOUGH
Pro Se Litigant

APO9 SCCC

STATE OF WASHINGTON
DEPARTMENT OF CORRECTIONS

END OF SENTENCE REVIEW/COMMUNITY PROTECTION UNIT REFERRAL

8/7/09 ~~8-8-09~~

OFFENDER NAME	DOC NUMBER	SID NUMBER	ERD AND MAX DATE
Lough, Robert	272122	11726726	~~08/29/08~~ -- 04/01/16
CURRENT OFFENSE	**ISRB/SRA/OAA**	**COUNTY OF CONVICTION**	**DATE OF BIRTH**
Attempted Murder 1st, Rape 1st	ISRB	King County	08/23/59

LSI-R Score 38 MNSOST RRASOR VRAG Other

Reason for referral: ☒ Sex offender ☐ DMIO ☐ LSI-R 41+ and violent conviction ☒ Violence ☐ Current threats

HISTORY OF SEX AND VIOLENCE

RECEIVED
MAR 03 2008
ESRC/LEN PROGRAMS

YES	NO	DON'T KNOW		
			1.	Documented history of the following:
☒	☐	☐	a.	Committed an act of violence involving a victim who was unknown to the offender.
☐	☐	☒	b.	Committed a predatory act of violence.
☐	☒	☐	c.	Committed a violent act where the victim was vulnerable due to age (5 years or younger), physical condition, mental disability, or ill health where the victim was incapable of resisting the offense, or was significantly impaired and unable to protect him/herself.
☐	☒	☐	d.	Committed violent acts or made threats of violence directed toward institutions or groups in the community including but not limited to religious, ethnic, or racial groups.
☐	☒	☐	e.	Continues to exhibit behavior, demonstrates a current threat to the victim(s) including but not limited to domestic violence or sexual offenses.

Brief explanation of any "yes, or don't know" from above section: He met his victim in a bar, offered her, a ride to another bar for another drink.

Number of all arrests 7 Number of prior convictions 6 Number of violent offenses 0
Number of serious violent offenses 2 Age at first arrest 14 Expected age at release 49
Number of alcohol or drug related arrests 1 Was instant offense drug or alcohol related yes
Number of drug or alcohol related infractions 0

HISTORY OF MENTAL ILLNESS OR DEVELOPMENTAL DISABILITY

Current diagnosis None Date
History of psychiatric hospitalizations ☐ YES ☒ NO If Yes, number
Dates
Where
History of community mental health treatment ☐ YES ☒ NO If Yes, number
Dates
Where
Number of DOC mental health program placements None Dates
History of involuntary medications ☐ YES ☒ NO
Is the offender currently on involuntary medication ☐ YES ☒ NO
History of violence while medication compliance and stabilized ☐ YES ☒ NO
History of noncompliance with medications ☐ YES ☒ NO
History of DDD services ☐ YES ☐ NO

DTO7 ✓
log

TREATMENT HISTORY

Sexual deviancy ☐ YES ☒ NO If yes, Dates

Where		
Substance abuse	☐ YES ☒ NO	If yes, Dates
Where		
Stress and anger management	☐ YES ☒ NO	If yes, Dates
Where		
Other	☐ YES ☒ NO	If yes, Types/Dates
Where		
Comments:		

RELEASE PLAN OR ATTACHED OAP

Address: None at this time.
Does the offender have confirmed community resources? ☐ Yes ☐ No
If yes, please explain Unknown
Does the offender have a need for continued mental health treatment, or DDD services ☐ YES ☒ NO
If yes, please explain how these needs will be met::
Are there victims or potential victims living in the residence? ☐ Yes ☒ No
Additional comments:

COMPLETED BY	DATE	CORRECTIONAL UNIT SUPERVIOSR / WORK RELEASE SUPERVISOR	DATE
T Bowers	2/25/08	John D. Smith	2/25/09

END OF SENTENCE REVIEW COMMITTEE/COMMUNITY PROTECTION UNIT DECISION

02/06/2009. THE ESRC HAS DETERMINED THAT THIS OFFENDER SHOULD BE CLASSIFIED AS A **RISK LEVEL III** FOR NOTIFICATION PURPOSES AND WILL FORWARD SUCH NOTIFICATION TO LAW ENFORCEMENT.

COMMITTEE CHAIR / DESIGNEE	DATE
	3/2/09

Distribution: **ORIGINAL** – Review Committee **COPY** – Central File, Assignment Officer (if appropriate), CPM / WR Supervisor, Classification Counselor / CCO

OPO9 SCCC

STATE OF WASHINGTON
DEPARTMENT OF CORRECTIONS

END OF SENTENCE REVIEW/COMMUNITY PROTECTION UNIT REFERRAL

8/7/09

OFFENDER NAME	DOC NUMBER	SID NUMBER	ERD AND MAX DATE
Lough, Robert	272122	11726726	~~08/28/08~~ -- 04/01/16
CURRENT OFFENSE	**ISRB/SRA/OAA**	**COUNTY OF CONVICTION**	**DATE OF BIRTH**
Attempted Murder 1st, Rape 1st	ISRB	King County	08/23/59

LSI-R Score 38 MNSOST RRASOR VRAG Other

Reason for referral: ☒ Sex offender ☐ DMIO ☐ LSI-R 41+ and violent conviction ☒ Violence ☐ Current threats

HISTORY OF SEX AND VIOLENCE

RECEIVED
MAR 03 2008
ESRC/LEN PROGRAMS

YES	NO	DON'T KNOW		
			1.	Documented history of the following:
☒	☐	☐	a.	Committed an act of violence involving a victim who was unknown to the offender.
☐	☐	☒	b.	Committed a predatory act of violence.
☐	☒	☐	c.	Committed a violent act where the victim was vulnerable due to age (5 years or younger), physical condition, mental disability, or ill health where the victim was incapable of resisting the offense, or was significantly impaired and unable to protect him/herself.
☐	☒	☐	d.	Committed violent acts or made threats of violence directed toward institutions or groups in the community including but not limited to religious, ethnic, or racial groups.
☐	☒	☐	e.	Continues to exhibit behavior, demonstrates a current threat to the victim(s) including but not limited to domestic violence or sexual offenses.

Brief explanation of any "yes, or don't know" from above section: He met his victim in a bar, offered her, a ride to another bar for another drink.

Number of all arrests 7 Number of prior convictions 6 Number of violent offenses 0
Number of serious violent offenses 2 Age at first arrest 14 Expected age at release 49
Number of alcohol or drug related arrests 1 Was instant offense drug or alcohol related yes
Number of drug or alcohol related infractions 0

HISTORY OF MENTAL ILLNESS OR DEVELOPMENTAL DISABILITY

Current diagnosis None Date
History of psychiatric hospitalizations ☐ YES ☒ NO If Yes, number
Dates
Where
History of community mental health treatment ☐ YES ☒ NO If Yes, number
Dates
Where
Number of DOC mental health program placements None Dates
History of involuntary medications ☐ YES ☒ NO
Is the offender currently on involuntary medication ☐ YES ☒ NO
History of violence while medication compliance and stabilized ☐ YES ☒ NO
History of noncompliance with medications ☐ YES ☒ NO
History of DDD services ☐ YES ☐ NO

DTO? ✓
log ✓

TREATMENT HISTORY

Sexual deviancy ☐ YES ☒ NO If yes, Dates

Where		
Substance abuse	☐ YES ☒ NO	If yes, Dates
Where		
Stress and anger management	☐ YES ☒ NO	If yes, Dates
Where		
Other	☐ YES ☒ NO	If yes, Types/Dates
Where		
Comments:		

RELEASE PLAN OR ATTACHED OAP

Address: None at this time.
Does the offender have confirmed community resources? ☐ Yes ☐ No
If yes, please explain Unknown
Does the offender have a need for continued mental health treatment, or DDD services ☐ YES ☒ NO
If yes, please explain how these needs will be met::
Are there victims or potential victims living in the residence? ☐ Yes ☒ No
Additional comments:

COMPLETED BY	DATE	CORRECTIONAL UNIT SUPERVIOSR / WORK RELEASE SUPERVISOR	DATE
P Bowers	2/25/08	John D. Smith	2/25/09

END OF SENTENCE REVIEW COMMITTEE/COMMUNITY PROTECTION UNIT DECISION

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COMMITTEE CHAIR / DESIGNEE	DATE
	3/2/09

Distribution: **ORIGINAL** – Review Committee **COPY** – Central File, Assignment Officer (if appropriate), CPM / WR Supervisor, Classification Counselor / CCO

WWCICUPDTDKOC .PAGE 1
QR.WA017443A.PUR/C.ATN/JSNELSO.FBI/195896W8
ATN/JSNELSO
WASHINGTON STATE CRIMINAL HISTORY RECORD FOR SID/WA11726726

WASHINGTON STATE PATROL
IDENTIFICATION AND CRIMINAL HISTORY SECTION
P.O. BOX 42633
OLYMPIA, WASHINGTON 98504-2633

****

NOTICE

THE FOLLOWING TRANSCRIPT OF RECORD IS FURNISHED FOR OFFICIAL USE ONLY. SECONDARY DISSEMINATION OF THIS CRIMINAL HISTORY RECORD INFORMATION IS PROHIBITED UNLESS IN COMPLIANCE WITH THE WASHINGTON STATE CRIMINAL RECORDS PRIVACY ACT, CHAPTER 10.97 RCW.
POSITIVE IDENTIFICATION CAN ONLY BE BASED UPON FINGERPRINT COMPARISON. BECAUSE ADDITIONS OR DELETIONS MAY BE MADE AT ANY TIME, A NEW COPY SHOULD BE REQUESTED FOR SUBSEQUENT USE. WHEN EXPLANATION OF A CHARGE OR DISPOSITION IS NEEDED, COMMUNICATE DIRECTLY WITH THE AGENCY THAT SUPPLIED THE INFORMATION TO THE WASHINGTON STATE PATROL.

****

SID NUMBER	NAME	FBI NUMBER	DOC NUMBER
WA11726726	LOUGH,ROBERT E	195896W8	272122

PERSON INFORMATION

SEX	RACE	HEIGHT	WEIGHT	EYES	HAIR	PLACE OF BIRTH	CITIZENSHIP
M	W	509	150	BLU	BRO	CA	

NAMES USED	DATES OF BIRTH	SOC SEC NUMBER	MISC NUMBER
LOUGH,BOB	08/23/1959	534-68-9271	

DNA TAKEN: Y DNA TYPED: Y

SCARS, MARKS, TATTOOS, AMPUTATIONS

LOCATION	DESCRIPTION	LOCATION	DESCRIPTION
SC LF ARM		SC UL ARM	
TAT L ARM		TAT UR ARM	

CONVICTION AND/OR ADVERSE FINDING SUMMARY

3 FELONY(S)

		DISPOSITION DATE
POSSESS STOLEN PROPERTY-2	CLASS C FELONY	10/27/1980
MURDER-1	CLASS A FELONY	11/20/1986
RAPE-1	CLASS A FELONY	11/20/1986

0 GROSS MISDEMEANOR(S)
0 MISDEMEANOR(S)
0 CLASSIFICATION(S) UNKNOWN

NO KNOWN SEX/KIDNAPPING OFFENDER REGISTRATIONS

NO KNOWN APPLICANT DETAILS

CRIMINAL HISTORY INFORMATION

THE ARRESTS LISTED MAY HAVE BEEN BASED ON PROBABLE CAUSE AT THE TIME OF ARREST OR ON A WARRANT. PROBABLE CAUSE ARRESTS MAY OR MAY NOT RESULT IN THE FILING OF CHARGES. CONTACT THE ARRESTING AGENCY FOR INFORMATION ON THE FORMAL CHARGES AND/OR DISPOSITIONS.

ARREST 1 DATE OF ARREST: 06/11/1980

NAME USED: LOUGH,ROBERT E
CONTRIBUTING AGENCY: WASPD0000 SEATTLE POLICE DEPARTMENT
LOCAL ID: 92027 PCN: N/A

ARREST OFFENSES

02802 POSSESS STOLEN PROPERTY-1
RCW: 9A.56.150
CLASS B FELONY
ORIGINATING AGENCY: WASPD0000
SEATTLE POLICE DEPARTMENT
DISPO RESPONSIBILITY: WASPD0000
DATE OF OFFENSE: 06/11/1980

DISPOSITION

CONTRIBUTOR OR RESPONSIBLE AGENCY:
WASPD0000 SEATTLE POLICE DEPARTMENT

STATUS: GUILTY
02812 POSSESS STOLEN PROPERTY-2
RCW: 9A.56.160
CLASS C FELONY
STATUS DATE: 10/27/1980

SENTENCE: SENT. DESC.:
CHG 01: JAIL - 3 MOS/SUSPENDED 5 YRS, COMM SUPV - 3 YRS PROB

ARREST 2 DATE OF ARREST: 01/07/1982

NAME USED: LOUGH,ROBERT E
CONTRIBUTING AGENCY: WA0270000 PIERCE COUNTY SHERIFF
LOCAL ID: 56736 PCN: N/A

ARREST OFFENSES

02812 POSSESS STOLEN PROPERTY-2
RCW: 9A.56.160
CLASS C FELONY
ORIGINATING AGENCY: WA0270000
PIERCE COUNTY SHERIFF
DISPO RESPONSIBILITY: WA0270000
DATE OF OFFENSE: 01/07/1982

DISPOSITION

CONTRIBUTOR OR RESPONSIBLE AGENCY:
WA0270000 PIERCE COUNTY SHERIFF

STATUS: DISMISSED
02812 POSSESS STOLEN PROPERTY-2
RCW: 9A.56.160
CLASS C FELONY
STATUS DATE: 04/15/1982

ARREST 3 DATE OF ARREST: 07/11/1985

NAME USED: LOUGH,ROBERT E
CONTRIBUTING AGENCY: WA0270000 PIERCE COUNTY SHERIFF
LOCAL ID: 56736 PCN: N/A

ARREST OFFENSES

02652 THEFT-3
RCW: 9A.56.050
GROSS MISDEMEANOR
ORIGINATING AGENCY: WA0270000
PIERCE COUNTY SHERIFF
OIN: 85192022
DISPO RESPONSIBILITY: WA0270000
DATE OF OFFENSE: 07/11/1985

DISPOSITION

CONTRIBUTOR OR RESPONSIBLE AGENCY:
WA0270000 PIERCE COUNTY SHERIFF

STATUS: NOT RECEIVED

ARREST 4 DATE OF ARREST: 04/12/1986

NAME USED: LOUGH,ROBERT E
CONTRIBUTING AGENCY: WA0170700 KENT POLICE DEPARTMENT
LOCAL ID: 8601995 PCN: N/A

ARREST OFFENSES

00312 ASSAULT-1
RCW: 9A.36.010
CLASS A FELONY
ORIGINATING AGENCY: WA0170700
KENT POLICE DEPARTMENT
OIN: 8601995
DISPO RESPONSIBILITY: WA017013A
DATE OF OFFENSE: 04/12/1986

00700 RAPE
RCW: 9A.44.000
FELONY
ORIGINATING AGENCY: WA0170700
KENT POLICE DEPARTMENT
OIN: 8601995
DISPO RESPONSIBILITY: WA017013A
DATE OF OFFENSE: 04/12/1986

DISPOSITION

CONTRIBUTOR OR RESPONSIBLE AGENCY:
WA017013A KING COUNTY PROSECUTOR
COURT CASE NO: 861015953

STATUS: GUILTY
00124 MURDER-1
RCW: 9A.32.030(1)(A)
CLASS A FELONY
STATUS DATE: 11/20/1986

SENTENCE: SENT. DESC.:
CHG 01: PRISON - 30 YRS, APPEAL DT - 11/20/1986 **CHG 02: PRISON - 126 MOS, CONCURRENT, APPEAL DT - 11/20/1986

STATUS: GUILTY
00714 RAPE-1
RCW: 9A.44.040(1)(A)
WEAPON
CLASS A FELONY
STATUS DATE: 11/20/1986

ARREST 5 DATE OF ARREST: 04/16/1986

NAME USED: LOUGH,ROBERT E
CONTRIBUTING AGENCY: WAKCS0000 KING COUNTY SHERIFFS OFFICE
LOCAL ID: 130627 PCN: N/A

ARREST OFFENSES

05009 OBSTRUCTING A PUBLIC SERVANT
RCW: 9A.76.020
MISDEMEANOR
ORIGINATING AGENCY: WAKCS0000
KING COUNTY SHERIFFS OFFICE
OIN: 4471291
DISPO RESPONSIBILITY: WA017053J
DATE OF OFFENSE: 04/16/1986

DISPOSITION

CONTRIBUTOR OR RESPONSIBLE AGENCY:
WA017053J FEDERAL WAY DISTRICT COURT
COURT CASE NO: 4471291

STATUS: DISMISSED
05009 OBSTRUCTING A PUBLIC SERVANT
RCW: 9A.76.020
MISDEMEANOR
STATUS DATE: 07/03/1986

END OF PAGE 1 - PAGE 2 TO FOLLOW

QR.WA017443A.PUR/C.ATN/JSNELSO.FBI/195896W8
ATN/JSNELSO
WASHINGTON STATE CRIMINAL HISTORY RECORD FOR SID/WA11726726
STATE DEPARTMENT OF CORRECTIONS

CUSTODY STATUS INFORMATION

NAME:	LOUGH,ROBERT E
DATE:	04/28/2009
DOC NUMBER:	272122
CUSTODY STATUS:	RESIDENT
TYPE:	INMATE
LOCATION:	CBCC-IMU

VIOLENT OFFENDER **SEX/KIDNAPPING OFFENDER**
(NON-VERIFIED CUSTODY STATUS INFORMATION-PROVIDED BY DEPARTMENT OF CORRECTIONS)

CUSTODY HISTORY

COMMITMENT DATE: 12/03/1986

NAME USED:	LOUGH,ROBERT E
DOC NUMBER:	272122
CONTRIBUTING AGENCY:	WA023025C WASHINGTON CORRECTIONS CENTER
COURT CASE NO:	861015953 COUNTY/STATE: KING
CHARGE:	00712 RAPE-1 CLASS A FELONY 9A.44.040(1)
DOO:	12/03/1986
COURT CASE NO:	861015953 COUNTY/STATE: KING
CHARGE:	10112 MURDER-1 CLASS A FELONY 9A.32.030(1) ATTEMPT
DOO:	12/03/1986

****

GLOSSARY

CONTRIBUTING AGENCY: A LOCAL SHERIFF'S OFFICE, POLICE DEPARTMENT, JAIL OR CORRECTIONAL FACILITY THAT SUBMITS FINGERPRINT CARDS TO THE SECTION.

CONTRIBUTOR OR RESPONSIBLE AGENCY: THE AGENCY THAT SUBMITTED THE INFORMATION OR, PRIOR TO OCTOBER 1999, PRESUMED TO BE THE DISPOSITION REPORTER.

CONVICTION AND/OR ADVERSE FINDING SUMMARY: THE NUMBER AND TYPE OF CONVICTIONS AND/OR ADVERSE FINDINGS PERTAINING TO AN INDIVIDUAL. DETAILS ARE INCLUDED UNDER CRIMINAL HISTORY INFORMATION.

CUSTODY STATUS INFORMATION: CURRENT CUSTODY STATUS INFORMATION PROVIDED ONLINE BY THE STATE DEPARTMENT OF CORRECTIONS.

DISPOSITION RESPONSIBILITY: AN INDICATION OF THE PROSECUTOR, COURT, OR LAW ENFORCEMENT AGENCY WHICH MAY BE RESPONSIBLE FOR REPORTING THE DISPOSITION.

DNA SAMPLE: DNA SAMPLE AND TYPE, CONTACT WSP CRIME LABORATORY, CODIS, AT (206) 262-6020 IF OTHER CONTACT INFORMATION NOT AVAILABLE

DLO: DNA LOCATION

DOC NUMBER: WASHINGTON STATE DEPARTMENT OF CORRECTIONS NUMBER.

LOCAL ID: LOCAL IDENTIFICATION NUMBER USED BY CONTRIBUTING AGENCY.

NOT RECEIVED: DISPOSITION OF ARREST OFFENSES THAT HAVE NOT BEEN SUBMITTED TO THE WASHINGTON STATE PATROL IDENTIFICATION SECTION.

OIN: OTHER IDENTIFYING NUMBER. A TRACKING NUMBER ASSIGNED BY THE CONTRIBUTING OR ORIGINATING AGENCY.

ORIGINATING AGENCY: THE ORIGINAL LAW ENFORCEMENT AGENCY HANDLING THE CASE, WHICH MAY BE DIFFERENT FROM THE CONTRIBUTING AGENCY.

PCN: PROCESS CONTROL NUMBER USED BY CRIMINAL JUSTICE AGENCIES TO LINK ARRESTS TO DISPOSITIONS.
RCW: REVISED CODE OF WASHINGTON; STATUTE REFERRING TO ARREST OFFENSE OR THE CHARGE.
SEARCH PARAMETERS: REFERENCE INFORMATION USED BY SECTION STAFF.
SID NUMBER: UNIQUE STATE IDENTIFICATION SECTION RECORD NUMBER.
END OF RECORD

STATE OF WASHINGTON

WASHINGTON STATE SEX OFFENDER RISK LEVEL CLASSIFICATION REVISED 1999

NAME: LOUGH, ROBERT EUGENE AGENCY: DOC/LCNRC

DATE OF BIRTH OF OFFENDER: 08/23/1959 DSHS/DOC #: 272122

COMPLETED BY: K. DAUGHERTY DATE REVIEWED: 01/25/2009

RELEASE DATE: 08/07/2009 MAX DATE: 08/01/2016

PART I: RISK ASSESSMENT

1. Number of sex/sex related **convictions:**
(include all juvenile adjudications, and adult gross misdemeanor, and felony convictions).
a. None 0
b. One 1
(c.) Two 4
d. Three or more 8
Actual #: 2 Score: 4

2. Number of **felony convictions:**
(exclude sex/sex related convictions):
a. None 0
(b.) One or two 2
c. Three or more 5
Actual #: 2 Score: 2

3. Other sex/sex related **arrests or charges** NOT resulting in conviction (exclude charges where offender was found guilty):
(a.) None 0
b. One or more 1
Actual #: 0 Score: 0

4. Age at first sex/sex related **conviction** or **adjudication:**
(a.) 24 or older 0
b. 20 to 23 2
c. 19 or younger 4
Actual #: 27 Score: 0

5. Use or threat of weapon in sex/sex related **convictions** (most severe across all convictions):
a. None present 0
b. Displayed/implied during offense 4
(c.) Used to inflict injury 6
Score: 6

6. Use of force in sex/sex related **convictions:**
(most severe across all convictions)
a. None 0
b. Manipulative 1
c. Coercive/position of authority 2
d. Threats of violence 3
e. Physical force or violence 5
(f.) Substantial/great bodily harm 8
Score: 8

7. Total number of victims of all sex/sex related **offenses:**
a. None 0
b. One 1
(c.) Two or three 4
d. Four or more 8
Actual #: 2 Score: 4

8. Age of victims of sex/sex related **offenses**
at time of offense (circle all that apply):
a. Six or younger 2
b. Seven to 12 years 2
c. 13 to 15 years; offender not five years older than victim 1
d. 13 to 15 years; offender five or more years older than victim 2
(e.) 16 or older 2
Add a through e: ____ Score: 2

SUBTOTAL 1 – 8: 26

POLICY 350.200
POLICY 350.250

REL000973

9. Other characteristics of all **offense(s)**, circle all that apply:
   a. Victim tied up 4
   b. Duration of offense more than three hours 4
   (c.) Victim transported forcefully to another location.....4
   (d.) Victim torture/mutilated 4
   e. Does not apply 0

Add a through e: ___ **Score:** 8

10. Length of sexual offending history: (beginning with first offense)
   a. Less than one 0
   b. One to five years 1
   (c.) Five years or more 3

Score: 3

04/86 - 02/96

11. Any felony committed upon previous release from institution/secure facility/halfway house:
   a. Not applicable 0
   b. More than 12 months after release 2
   (c.) Seven to 12 months after release 4
   d. Three to six months after release.....6
   e. Less than three months after release.....8

Score: 4

ARRESTED 07/11/85

RAPE I / ATT. MURDER 02/11/86

12. Alcohol/drug use pattern (12 months prior to most recent conviction):
   a. No interference with functioning 0
   (b.) Occasional abuse; some disruption of functioning.....2
   c. Frequent abuse; serious disruption of functioning.....4

Score: 2

13. Prior sex offender treatment/programming:
   (a.) No involvement in sex offender treatment prior to current offense 0
   b. Involvement in sex offender treatment prior to current offense 6

Score: 0

14. Number of significant/marital relationships:
   a. Under the age of 25.....0
   (b.) One or two after the age of 25 0
   c. Three or four after the age of 25 1
   d. Five or more after the age of 25 2
   e. None and age 25 or older 3

Score: 0

Complete only 15a. or 15b.

15a. **(Adult)** Employment history pattern:
   a. Full time employed.....0
   b. Student, retired, disabled/unable work 1
   (c.) Part-time, seasonal/unstable or in need of additional employment.....2
   d. Unemployed or history of Unemployment 4

Score: 2

15b. **(Juvenile)** Early school history pattern (Grades K through 6 only):
   a. Generally satisfactorily 0
   b. Moderate adjustment problems/multiple disciplinary actions and/or suspensions 1
   c. Severe adjustment problems/frequent disciplinary actions and/or one permanent expulsion.....2
   d. Multiple expulsions/chronic inability to be maintained in the school setting.....4

Score: N/A

16. Presence of multiple paraphilias, check all that apply:

___ Fetishism	___ Exhibitionism
___ Pedophilia	___ Frotteurism/Frottage
___ Voyeurism	___ Sexual Sadism
___ Zoophilia	___ Sexual Masochism
___ Coprophilia	___ Telephone Scatologia
___ Urophilia	___ Rape NOS
___ Transvestism	___ Necrophilia

   (a.) None 0
   b. One 2
   c. Two or three 4
   d. Four or more 6
   e. Offender is under 16 years 0

Score: 0

SUBTOTAL 9 – 16: 19

The remaining items refer to the offender's CURRENT term of incarceration:

17. Release environment:
    a. Relatively stable 0
    (b.) Moderate disorganization/stress 2
    c. Major disorganization/stress 4
    Score: 2

18. Age at release from institution/confinement:
    (a.) 30 or older 0
    b. 24 to 29 years 2
    c. 23 or younger 4
    Score: 0

19. Discipline history while incarcerated (most serious):
    a. No major discipline reports 0
    b. History of major discipline report not involving violence 4
    (c.) History of major discipline report involving Violence 8
    Score: 8

20. Chemical dependency treatment during current incarceration:
    (a.) Not recommended/unknown 0
    b. Recommended and successfully Completed 2
    c. Recommended and currently in program, or on a waiting list, or recommended but insufficient time get into a program 2
    d. Recommended and refused/quit, or deemed non-amenable to treatment 4
    e. Recommended and terminated from Program.....6
    Score: 0

21. Sex offender treatment during current incarceration:
    a. Not recommended/unknown 0
    b. Recommended and successfully completed 2
    c. Recommended and currently in program, Or on waiting list, or recommended but insufficient time to get into program 2
    (d.) Recommended and refused/quit or Deemed non-amenable to treatment.....4
    e. Recommended and terminated from Program 6
    Score: 4

PART II: OTHER NOTIFICATION CONSIDERATIONS

A. Victim(s) of the non-familial sex conviction(s) were Particularly vulnerable or incapable of resistance due to Physical or mental disability or ill health. Y (N)

B. Sex conviction(s) was/were of a predatory nature or the non-familial offender used a position of community trust, (i.e., coach, teacher, group leader, or police officer), or professional relationship to facilitate the commission of non-familial sex offense(s). (Y) N

C. Offender continued to act out his/her sexual deviancy during incarceration. (Y) N

D. Adult male offender has a RRASOR score of 4 to 6 Y (N)

Rapid Risk Assessment for Sexual Offense Recidivism

1. Prior sex offenses (not including index offenses):
   a. None 0
   b. 1 conviction; 1-2 charges 1
   (c.) 2-3 convictions; 3-5 charges 2
   d. 4 or more convictions; 6 + charges 3

   Actual #: 2 **Score:** 2

2. Age at release (current age):
   (a.) More than 25 0
   b. Less than 25 1

   Actual #: 49 **Score:** 0

3. Victim gender:
   (a.) Only females.....0
   b. Any males 1

   Score: 0

4. Relationship to victim:
   a. Only related 0
   (b.) Any non-related 1

   Score: 1

RRASOR TOTAL: 3

SUBTOTAL 17-21: 14

Total Notification Considerations: 2

PART III: DEPARTURE LANGUAGE

The risk level is calculated from aggregating the risk facts and other standard notification considerations is "presumptive" because the Department/Committee may depart from it if special circumstances warrant. The ability to depart is premised on a recognition that an objective instrument, no matter how well designed, will not fully capture the nuances of every case. Not to allow for departures would therefore deprive the Department/Committee of the ability to exercise sound judgment and to apply its expertise to the offender. Of course, were there to be a departure in every case, the objective instrument would be of minimal value. The expectation is that the instrument will result in the proper classification in most cases so that departures will be the exception not the rule.

Scientific literature demonstrates that intrafamilial sex offenders pose a lower risk of recidivism than other types of sex offenders. Additionally, the group of persons to whom they pose a risk upon release (judged by the identity of their past victim (s) is very small compared with other offenders. Therefore, in order to effectuate the goal of the notification statute, offenders who are strictly intrafamilial offenders will presumptively be classified as Risk Level I.

Generally, the Department/Committee may not depart from the presumptive risk level unless it concludes that there exists an aggravating or mitigating factor of a kind, or to a degree, not otherwise adequately taken into account by the guidelines. Circumstances that may warrant a departure cannot by their nature be comprehensively listed in advance. The departure must be justified in writing and have the support of the majority of Department/Committee members.

Subtotals 1 – 8: 26

Subtotals 9 – 16: 19

Subtotals 17 – 21: 14

Grand Total = 59

Total Number of Notification Considerations: 2

Level 1 = Assessment score 46 or less and no notification considerations.
Level 2 = Assessment score 46 or less and/or 1 - 2 notification considerations.
Level 3 = Assessment score 46 or less and/or 3 or 4 notification considerations, or assessment score 47 or higher.

RISK LEVEL: III

DEPARTURE JUSTIFICATION:

ESR CHAIR OR DESIGNATED AGENCY STAFF: 2/6/09

AGENCY WITH JURISDICTION:

FINAL RISK LEVEL (circle one only): I, II, III

Note: If the Risk Level by the ESRC is different from the final Risk Level, the departure justification of this form must be completed.

IN THE SUPERIOR COURT
OF WASHINGTON STATE
DIVISION I

STATE OF WASHINGTON,	)	
	)	Cause No. 86-1-01595-3
vs.	)	Cause No. 09-2-29232-9
	)	
ROBERT LOUGH,	)	
	)	**AFFIDAVIT OF ROBERT LOUGH**
APPELLANT.	)	
	)	

County)
of) ss
King)

I, ROBERT LOUGH, am over 18, and the defendant in this case, hereby declare:

That, the State's agent, Ms. Kim Acker, has deliberately erred at least 9 times in rescoring my Risk Assessment. The scoring is a follows: In each column of numbers the first number is the correct number which is followed by a /. The number following the / is Ms. Acker's version. Ms. Acker waited until the end of my prison sentence of 24 years to change my original score of 28 points and level 1 assessment, to 59 points and a level 3 assessment; a deliberate miscalculation of 31 points.

PAGE 1	**PAGE 2**	**PAGE 3**	**PAGE 4**
1. 1/4	9. 4/8	17. 2/2	TOTAL
2. 2/2	10. 0/3	18. 0/0	28/59
3. 0/0	11. 0/4	19. 0/8	
4. 0/0	12. 2/2	20. 0/0	
5. 6/6	13. 0/0	21. 0/4	
6. 8/8	14. 0/0		
7. 1/4	15a 0/2		
8. 2/2	15b 0/0		
	16. 0/0		

#1. Ms. Acker circled 'c' indicating two convictions of rape. There is only one conviction which I was in prison from April 10, 1986, until August 8, 2009. One conviction equals 1 point, thus an error of 3 points added.

#7. Ms. Acker circled 'c' indicating two or three victims in rape convictions. There is only 1 rape conviction of only 1 victim. This equals 1 point, thus an error of 3 points added.

#9. Ms. Acker circled 'c' & 'd' that I forced victim into my car; victim's statement says she got into my car willingly to go to a different bar, thus an error of 4 points added.

#10. Ms. Acker circled 'c' that I had raped again between 1986 – 1996. This is a bold face lie! I have been in prison April 10th, 1986, todate, never having been released, nor did I ever assault anyone in prison. Thus, this score should be 0, not the 3 points Ms. Acker added.

#11. Ms. Acker circled 'c' for 4 points for being arrested and charged for tax fraud. My ex-wife stole my income tax check and forged my signature and cashed it at her dad's bank. When I applied for a check when the first check did not arrive I was questioned, not arrested. I took a polygraph and passed, and a multiple signature test and passed it too. My ex-wife was then charged and she pleaded guilty. Thus an error of 4 points added.

#15a. Ms. Acker circled 'c' that I was only a part time employee. I was a full time employee with two jobs (Seattle Seafoods & Kirby of Everett) for over a year at the time of my arrest; which is easily verified in my trial transcripts, thus an error of 2 points added.

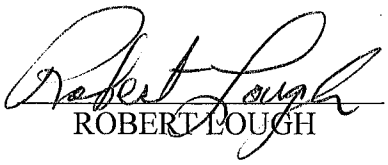
#16. Ms. Acker circled 'a' None.....0, for having any presence of any paraphilias. Yet, now has Dr. Packard, who is the State's expert, lying that I now have many, even though he has never once talked to me.

#19. Prison is a hostile environment and fights occur almost daily, especially for a convicted rapist who is only 5'7" tall and only weighs 140 lbs., thus an easy target. To survive, you must fight to defend yourself from being raped or killed. Since NONE of these fights were ever sexually motivated by me, these points should not be allowed to count as relevant to being committed as a sexually violent predator, thus an error of 8 points added.

#21. Ms. Acker Circled 'd' that I refused treatment. This is a lie. The report states I was non-amenable to treatment. The 'non' was underlined as I had never been asked to do any treatment in the entire 24 years of my incarceration for this conviction, thus an error of 4 points added.

I was assessed as a level 1 and "No Referral to SCC" by the End Of Sentence Review Board for my entire 24 years in prison. Yet, on February 6, 2009, Ms. Acker independently reassesses me to a level 3 a few months prior to my release from prison using documents she fabricated; See Exhibits 1 – 4(Washington State Sex Offender Risk Level Classification; signed and dated 2/6/09).

I swear under penalty of perjury of Washington State Laws that all of the foregoing is true and correct. Dated this 25th day of January 2014.



ROBERT LOUGH

Supreme Court No. 93953.5
(COA No. 73223-4-I)

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ROBERT LOUGH,

Petitioner.

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

PETITION FOR REVIEW

TRAVIS STEARNS
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
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A. IDENTITY OF PETITIONER

Robert Lough, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision terminating review pursuant to RAP 13.3 and RAP 13.4.

B. COURT OF APPEALS DECISION

Mr. Lough seeks review of the Court of Appeals decision dated November 7, 2016, a copy of which is attached as Appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. Whether Mr. Lough's statutory and constitutional rights to a speedy trial were violated by the nearly four year stay of his trial.

2. Whether due process is satisfied by proof Mr. Lough suffered from post-traumatic stress disorder and substance abuse disorder.

3. Whether the State's evidence that Mr. Lough suffered from an anti-social personality disorder and other disorders which do not cause a person to lack the control to commit a sexually violent act justifies commitment under RCW 71.09.

4. Whether due process requires the State to prove Mr. Lough was likely to commit a sexually violent act rather than merely a violent act if released from custody.

5. Whether Mr. Lough's right to a fair trial was violated where the State introduced actuarial evidence without proof it has been generally accepted in the scientific community.

6. Whether Mr. Lough's right to a fair trial was violated by the State's use of irrelevant and prejudicial actuarial evidence which established Mr. Lough's likelihood to commit a future violent offense.

7. Whether Mr. Lough's right to a present a defense was violated when the trial court prohibited Mr. Lough from consulting with his expert during trial.

D. STATEMENT OF THE CASE

In 1986, Mr. Lough raped and attempted to murder R.I.[1] CP 12.[2]. Mr. Lough was convicted of those charges and sentenced to 30 years in prison. CP 3, 2/10/15 RP 132.

The State moved to commit Mr. Lough under RCW 71.09 prior to the completion of his sentence. CP 1. Before Mr. Lough could be brought to trial, he was charged with an assault. 1/26/15 RP 50. Over

[1] Because R.I. is a victim of rape and attempted murder, this brief will only refer to her by initials.

[2] The transcript consists of multiple volumes which are not labelled except by date. The pages are not sequential and every volume begins at page one. This brief will refer to the transcript by the date of the volume and then the referenced page number. *E.g.* "1/8/15 RP 41." For days where multiple volumes were created, the volume will also be designated by AM or PM to indicate which volume is being referred to. *E.g.* "1/12/15 AM RP 27."

Mr. Lough's objection, the court stayed Mr. Lough's commitment trial during both the pendency of his criminal case and for the nearly four years he spent completing his sentence after pleading guilty. CP 300, 323, 326. When the stay was lifted, Mr. Lough moved to dismiss the commitment based upon the speedy trial violation.

Mr. Lough's behavior improved after he returned to the special commitment center. 2/3/15 RP 13, 28; 2/4/15 RP 10, 21. Security officers recognized Mr. Lough was "trying to find a better way to handle things." 2/4/15 RP 10. He lived in a less restricted ward. 2/3/15 RP 12. He engaged with his case manager. 2/3/15 RP 28. He participated in Native American rituals and found better ways to deal with his anger. 2/5/15 RP 15, 48; 2/4/15 RP 5-6.

Although the State's expert was unable to diagnose Mr. Lough with a paraphilic disorder when he reevaluated Mr. Lough after Mr. Lough's return from prison. CP 1029. Instead, Dr. Richard Packard found Mr. Lough suffered from an anti-personality disorder. 1/27/15 AM RP 41; CP 1029. Importantly, the doctor found Mr. Lough was "willing" to commit sexually violent crimes. 1/15/15 RP 143, *see also id.* at 109, 112, 147-48, 153, 1/26/15 RP 43, 1/27/15 AM RP 32. Dr. Packard also found Mr. Lough suffered from post-traumatic stress

disorder and multiple substance abuse disorders. 1/27/15 AM RP 65; CP 1029.

Dr. Packard also testified that there was no scientifically derived tool available which could answer the question of whether Mr. Lough was likely to commit a sexually violent offense if released from custody. 1/29/15 RP 96. Even so, Dr. Packard opined on Mr. Lough's likelihood to commit a sexually violent offense based upon his interpretation of the Static 99-R and the Violence Risk Appraisal Guide-R (VRAG-R). 1/27/15 PM RP 16.

Dr. Packard agreed these tools could not establish Mr. Lough was likely to commit a sexually violent offense if released from custody. 1/29/15 RP 96. The Static 99-R determined Mr. Lough was only 37 percent likely to commit a sexual offense in the next ten years if not in custody. 1/27/15 PM RP 20. The VRAG-R only established Mr. Lough was likely to commit a violent offense if released from custody. 1/27/15 PM RP 25.

Likewise, the State's expert agreed clinical judgment is not a reliable measure for determining future likelihood to commit a crime. 2/2/15 RP 28. The defense expert described clinical judgment as no better than a coin toss. 2/2/15 RP 95. Dr. Packard nevertheless asserted

it was his belief Mr. Lough was likely to commit a sexually violent offense if released from custody. 1/26/15 RP 76.

A jury found Mr. Lough met the definition of RCW 71.09.020(18) and he was ordered committed indefinitely. CP 1730.

E. ARGUMENT

1. The stay of Mr. Lough's civil commitment trial for nearly four years merits review by this Court.

The Court of Appeals found the trial court's order staying Mr. Lough's trial for nearly four years pending the completion of a criminal sentence did not violate his right to a speedy trial. Slip Op at 5. Mr. Lough asks this court to take review of the question of whether this stay violated his statutory and constitutional rights. This question satisfies RAP 13.4(b) because the Court of Appeals decision is in conflict with *King v. Olympic Pipeline*, 104 Wn. App. 338, 362, 16 P.3d 45 (2000), *review denied* 143 Wn.2d 1012 (2001). Review is also justified because this issue involves a significant question of law under the state and federal constitutions and is an issue of substantial public interest.

"The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) (citing *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187,

14 L.Ed.2d 62 (1965); *Grannis v. Ordean*, 234 U.S. 385, 394, 34 S.Ct. 779, 783, 58 L.Ed. 1363 (1914)). Extensive pretrial delay following the filing of a commitment petition creates a presumption of prejudice. *People v. Litmon*, 162 Cal. App. 4th 383, 405, 76 Cal. Rptr. 3d 122, 139 (2008). Due process requires the State to comply with speedy trial obligations and dismissal is remedy for the failure to comply. *State v. Goode*, 830 So.2d 817, 825-26 (Fla. 2002).

The Court of Appeals analyzed the stay of Mr. Lough's trial as a continuance. Slip Op. at 3. This is an improper analysis. Mr. Lough's matter was not simply continued to a future court date. Instead, the proceedings were stayed and no future date was set. CP 300, 326-27. Mr. Lough objected to this stay when it was granted and moved to dismiss within ten days of when the stay was lifted. CP 301.

No provisions exists within RCW 71.09 which authorize a trial court to stay a civil commitment trial. *King*, however, does analyze when a civil matter may be stayed because of a criminal case. Although a civil matter may be stayed, the mere pendency of related civil and criminal proceedings does not prevent the civil proceedings from going forward. King, 104 Wn. App. at 352. To determine when a civil matter may be stayed, *King* created a balancing test. This test requires the trial

court to conduct a case-by-case analysis "in light of the particular circumstances and competing interests involved in the case." *King*, 104 Wn. App. at 353 (citing *Fed. Sav. & Loan Ins. Corp. v. Molinaro*, 889 F.2d 899, 901 (9th Cir. 1989)). The moving party must establish a clear case of hardship or inequity in being required to go forward. *King*, 104 Wn.App. at 350.

While the Court of Appeals engaged in this balancing test to justify the initial stay while criminal proceedings were pending, it failed to do so with regard to the stay while Mr. Lough was returned to prison. Slip Op. at 4. After Mr. Lough had pled guilty, the justifications for his staying his case no longer existed. There was no justification for the continued stay and the trial court granted to stay in error. The failure to engage in this analysis is inconsistent with the balancing test established in *King*. This court should take review to resolve this inconsistency. RAP 13.4(b).

RAP 13.4(b) is also met because of the due process implications of allowing a trial court to stay a commitment trial for such an extended period of time. While this is a case of first impression in Washington, other courts that have addressed this issue have found due process to have been violated. *See, e.g. Litmon*, 162 Cal. App. 4th at 405; *Goode*,

830 So.2d at 825-26. Further, review may be granted because this is an issue of substantial public interest. RAP 13.4(b).

2. The Court of Appeals focus upon post-traumatic stress syndrome and substance abuse to find that the State had met its due process burdens justifies review.

The Court of Appeals found the State presented sufficient evidence of a mental abnormality to satisfy due process, focusing upon the expert's opinion that Mr. Lough suffers from post-traumatic stress disorder and substance abuse disorder. Slip Op. at 13. Not only are these insufficient reasons for continued confinement, but this analysis fails to address significant issues addressed at trial and on appeal. The reliance by the Court of Appeals upon only a portion of Mr. Lough's diagnosis and not the analysis presented to the trial court reduces the burden of proof required to satisfy due process. This opinion is in conflict with state and federal precedence, is a significant question of law under the state and federal constitutions, and involves an issue of substantial public interest. Review is warranted under RAP 13.4(b).

Due process requires the State to prove Mr. Lough has a mental abnormality which causes him to have difficulty controlling his sexually violent behavior. *In re Det. of Thorell*, 149 Wn.2d 724, 736, 740-41, 72 P.3d 708 (2003). In concluding there was sufficient

evidence, the Court of Appeals focuses upon only Mr. Lough's diagnosis of post-traumatic stress disorder and substance abuse disorder to find the State presented sufficient evidence to satisfy due process. Slip Op. at 13. The court does not address anti-social personality disorder. No case law exists which would suggest either of these disorders, separately or in combination, provide sufficient basis for finding Mr. Lough has serious difficulty controlling his sexually violent behavior. *See Kansas v. Crane*, 534 U.S. 407, 410, 122 S.Ct. 867, 151 L.Ed.2d 856 (2002) (Due process requires commitment be based upon "serious mental disorders").

Separately, or in combination, the diagnoses of post-traumatic stress disorder and substance abuse that the Court of Appeals relies upon fails to meet the requirements of due process. Civil commitment is limited to those who suffer from a "volitional impairment rendering them dangerous beyond their control." *Kansas v. Hendricks*, 521 U.S. 346, 358, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997). Neither post-traumatic stress disorder nor substance abuse disorder demonstrate a propensity for sexual violence. The Court of Appeals reliance upon these diagnoses to find Mr. Lough's due process rights were satisfied sets a dangerous standard, reducing Mr. Lough's due process rights and

those who might reference this case in the future.[3] It is in conflict with *Thorell*, *Hendricks* and their progency.

And although the Court of Appeals states that it does not hold that "a recidivist sex offender may be committed as a sexual predator solely on the basis of evidence that he has post-traumatic stress disorder or a substance abuse disorder," a ruling nonetheless upholding commitment upon such a finding cannot imply anything else. This Court should accept review to make clear that due process and the constitution requires more. RAP 13.4(b)

3. The Court of Appeals failure to address whether anti-social personality disorder may be a basis for continued confinement also warrants review.

Mr. Lough asks this Court to take review of the question of whether the expert's diagnosis that Mr. Lough suffered from an anti-social personality disorder and other disorders which do not cause a person to lack the control to commit a sexually violent act justifies commitment under RCW 71.09. Although this issue was briefed by the parties, the Court of Appeals did not reach it, instead relying upon Mr. Lough's diagnosis for post-traumatic stress disorder and substance

[3] Although GR 14.1 states unpublished opinions have no precedential value, current rules make clear they may be accorded such persuasive value as a court deems appropriate.

abuse disorder to find the State had satisfied its due process burden. Slip Op. at 13.

To satisfy due process, the State must demonstrate not only that Mr. Lough suffers from a personality disorder, but that that it is a mental abnormality which causes him to have difficulty controlling his sexually violent behavior. *Thorell*, 149 Wn.2d at 736. This required the State to prove that Mr. Lough had a serious mental disorder which causes him to have difficulty controlling his behavior. *Id.* at 740-41. While the Court of Appeals is correct in finding that continued confinement does not need to be justified based upon one personality disorder or mental abnormality. Slip Op. at 13. However, where the evidence establishes, at best, that a person who suffers from those disorders makes willful choices to commit violent acts, the evidence is insufficient. *See* 1/15/15 RP 143, *see also id.* at 109, 112, 147-48, 153, 1/26/15 RP 43, 1/27/15 AM RP 32.

While the Court of Appeals does not address it, Mr. Lough's primary diagnosis was for anti-social personality disorder. CP 1029, 1/1/5/15 RP 42; 1/27/15 RP 41. Justice Kennedy's caution that anti-social personality disorder is an insufficient basis for commitment rings true on the testimony presented against Mr. Lough. *See Hendricks*, 521

U.S. at 373 (Kennedy, J., concurring). The State was able to establish Mr. Lough had "an attitude" where he could "violate the boundaries and spaces of others". 1/27/15 AM RP 61. The State's expert concluded Mr. Lough had an inability to control his behavior, but his testimony demonstrated otherwise as he frequently stated Mr. Lough was willing the break the law. 1/15/15 RP 143, *see also id.* at 109, 112, 147-48, 153, 1/26/15 RP 43, 1/2/7 RP 32.

The Court of Appeals focuses upon the other disorders to find Mr. Lough could be confined. Slip Op. at 13. That Mr. Lough suffers from other disorders which do not cause a person to commit sexually violent acts does not change what should be the ultimate conclusion. None of the diagnoses the State identifies Mr. Lough suffers from meet the requirements of due process. This Court should grant review to address whether the diagnosis argued at trial and unaddressed in the Court of Appeals justifies continued confinement. RAP 13.4(b).

4. Due Process is violated when confinement is based upon proof a person is likely to commit a future violent offense and warrants review.

The Court of Appeals found the State presented sufficient evidence Mr. Lough was likely to engage in predatory acts of sexual violence if not confined to a secure facility. Slip Op. at 12. The State,

however, only proved Mr. Lough is likely to engage in future acts of violence if released from custody. Because the Court of Appeals decision is in conflict with Supreme Court precedence, raises a significant question under the state and federal constitutions and involves an issue of substantial public interest, review is warranted under RAP 13.4(b).

Due process requires the State to establish a mental abnormality which makes it "difficult, if not impossible, for the person to control his dangerous behavior." *Hendricks*, 521 U.S. at 358; *see also Thorell*, 149 Wn.2d at 732. This definition is further narrowed so that it is only the dangerous sexual offender who is confined and not merely dangerous persons who are more properly dealt with in criminal proceedings. *Crane*, 534 U.S. at 413. This distinction is necessary so that civil commitment does not become a mechanism for "retribution or general deterrence." *Id.; see also Foucha v. Louisiana*, 504 U.S. 71, 82-83, 112 S.Ct. 1780, 118 L.Ed.2d 437 (1992).

a. The actuarial evidence introduced only established a likelihood to commit a future violent offense.

Actuarial instruments may be admitted when they satisfy the requirements of ER 403, ER 702 and ER 703. *Thorell*, 149 Wn.2d at 757. Dr. Packard testified that the actuarial risk assessment instruments

he used could not answer the question of whether Mr. Lough met the definition of a sexually violent predator. 1/29/15 RP 96. He nonetheless testified extensively about his use of actuarial tables in coming to the conclusion Mr. Lough was likely to commit a future crime of sexual violence. 1/27/15 PM RP 16.

Dr. Packard employed two tests to assess Mr. Lough's likelihood to commit a future sexually violent offense. Dr. Packard employed a test known as the Static-99 which the doctor recognized is not used to determine the likelihood a person will commit a sexually violent offense in the future. 1/27/15 PM RP 20. Dr. Packard found the likelihood Mr. Lough would commit a new sexual offense, based upon the Static 99-R, was 20.5 percent within five years of release and 37.3 percent within 10 years of release. 1/27/15 RP 20.

He also employed the VRAG-R, a tool created in 2013 to assess the likelihood a person will commit a future violent offense. 1/27/15 RP 49. This tool does not distinguish between violent and sexually violent offenses. 1/28/15 RP 189. It was not designed to determine whether someone will commit a predatory act of sexual violence if released from custody. 1/28/15 RP 104. The VRAG-R established Mr. Lough was likely to commit a violent offense if released from custody.

1/27/15 PM RP 25. While Dr. Packard was careful to use the phrase "including sexually violent" when he testified, this distinction does not exist within the tool. 1/27/15 RP 49; 1/28/15 RP 189.

The lack of a satisfactory tool to assess Mr. Lough's likelihood to commit a future sexually violent offense should not allow the State to rely upon tools designed to measure other information. Due process is not satisfied when the State presents insufficient evidence of Mr. Lough's likelihood to commit a sexually violent act if released from custody. The finding by the Court of Appeals that this satisfied due process justified review under RAP 13.4(b).

b. Mr. Lough's behavior does not demonstrate a likelihood to commit a sexually violent offense.

The State presented significant evidence of Mr. Lough's dangerous behavior. Mr. Lough had a history of violence as a child. See, e.g. 1/8/15 RP 101. He committed an assault while in the army at age seventeen. 1/1/5/15 RP 105; CP 84. His rape of R.I. also resulted in his conviction for attempted murder. 1/15/15 RP 91. Mr. Lough admitted to having been involved in a great number of fights when he was in prison. 2/9/15 RP 76-77. He was convicted of another assault he committed when he first confined to McNeil Island. 1/1/4/15 RP 36.

The only evidence of Mr. Lough's sexual misconduct after his 1986 conviction was an incident which occurred in 1996, when Mr. Lough harassed and made sexually threatening remarks towards a prison guard. 1/12/15 RP 95. Despite being under constant watch since 1986, no other evidence of sexual compulsion was ever presented in either prison or the special commitment center.

In fact, while Mr. Lough received numerous infractions and reports over that time, there is no record of sexual misconduct and certainly no evidence of an attempt or threat by Mr. Lough to commit a sexually violent assault. Instead, the State focused on Mr. Lough's disrespect for women, within a lifetime of disrespect toward anyone in authority, presenting evidence of the way he treated an administrative assistant at a disciplinary hearing. 1/12/15 RP 65.

There is no link between Mr. Lough's anger and a lack of volitional control to not commit a sexually violent offense. This is a critical requirement for indefinite commitment. The failure of the State to establish this element requires dismissal. *Crane*, 534 U.S. at 413. RAP 13.4(b) is satisfied and review should be granted.

5. The improper use of the VRAG-R by the State justifies a new trial and review by this Court.

The Court of Appeals found that admission of actuarial results from the VRAG-G were properly admitted. Slip Op. at 16. This test, which only establishes a person is likely to commit a future violent offense, and which is not scientifically grounded should have been excluded by the trial court. The Court of Appeals decision holding otherwise merits review.

a. The VRAG-R fails to meet standards for scientific reliability.

The Court of Appeals found trial counsel did not raise scientific reliability before the trial court. Slip Op. at 14. To the contrary, Mr. Lough moved to exclude the use of the VRAG-R arguing it did not meet the standards for reliability, was not relevant, and had the potential to mislead the jury. CP 905. The court considered the issue and denied Mr. Lough's motion to exclude this testimony. CP 1291; 1/26/15 RP 57-58. While trial counsel only addressed this in a page of his trial brief, the trial court heard argument and had an opportunity to correct the error. *State v. Scott*, 110 Wn.2d 682, 685-86, 757 P.2d 492 (1988). Because of the focus upon the VRAG-R's findings by the State at trial and because Mr. Lough raised the reliability of this test, the Court of Appeals erred in not addressing its reliability. As this is a tool

frequently relied upon by the State to establish the likelihood of a person to commit a future sexually violent offense, this Court should accept review of the reliability of this test.

b. The VRAG-R was not relevant and its prejudicial effect outweighed it probative value.

The VRAG-R should not have been admitted because it lacked relevance. ER 402. In a RCW 71.09 commitment trial, evidence is only relevant if it increases or decreases the likelihood that a fact exists that is consequential to the jury's determination of whether the respondent meets the definition of RCW 71.09.020(18). *In re Det. of West*, 171 Wn.2d 383, 397, 256 P.3d 302 (2011).

The VRAG-R is not designed to determine whether someone will commit a predatory act of sexual violence if released from custody. 1/28/15 RP 104. Although the State always included the phrase "including sexually violent," there is no evidence that VRAG-R distinguishes between violent and sexually violent offenses. 1/29/15 RP 96. Because the VRAG-R fails to provide any distinction between violent and sexually violent offenses, the VRAG-R fails to meet the test for minimal relevance.

The VRAG-R should have been excluded pursuant to ER 403. Actuarial tools which have been admitted have assessed the likelihood

a person would commit a future sexually violent offense. *See Thorell*, 149 Wn.2d at 758. The VRAG-R does not assess the likelihood a person will commit a future sexually violent offense, but rather the likelihood they will commit a future violent offense. 1/27/15 RP 24.

The results of the VRAG-R instead put squarely before the jury the likelihood that, if released, Mr. Lough is likely to commit a violent crime. The evidence created the likelihood the jury would find the State met its burden not because the State proved its case, but because Mr. Lough is a dangerous man. The failure of the trial court to restrict this testimony unfairly prejudiced the jury and resulted in a compromised verdict. Review is warranted under RAP 13.4(b).

6. Mr. Lough's right to present a defense was infringed when the trial court denied him the ability to consult with his expert during trial.

The Court of Appeals found the inability to communicate with defense experts during the course of the trial was not an abuse of discretion. Slip Op. at 4. The restriction regarding communication with the defense expert during trial is a due process violation which warrants review under RAP 13.4(b).

The Court of Appeals applied the wrong standard to this issue. Instead of determining whether the trial court abused its discretion in

refusing to allow defense counsel to confer with their expert during trial, the question should have been whether Mr. Lough had a meaningful opportunity to present a defense. *Ake v. Oklahoma*, 470 U.S. 68, 76, 105 S. Ct. 1087, 1092, 84 L. Ed. 2d 53 (1985). This basic right includes the ability to cross examine witnesses and to offer testimony. *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010) (citing *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S. Ct. 1038, 1045, 35 L. Ed. 2d 297 (1973)). It is only made meaningful where defense counsel is able to consult with their experts. The restriction was an unconstitutional restraint upon the right to present a defense. The decision by the Court of Appeals merits review. RAP 13.4(b).

F. CONCLUSION

Based on the foregoing, Mr. Lough respectfully requests this that review be granted pursuant to RAP 13.4 (b).

DATED this 8th day of December 2016.

Respectfully submitted,

TRAVIS STEARNS (WSBA 29935)
Washington Appellate Project (91052)
Attorneys for Appellant

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In the Matter of the Detention of	)	No. 73223-4-I
	)	
ROBERT LOUGH,	)	DIVISION ONE
	)	
Petitioner.	)	UNPUBLISHED OPINION
	)	
	)	FILED: November 7, 2016

BECKER, J. — The State's evidence was sufficient to civilly commit the appellant as a sexually violent predator. The appellant's rights were not violated when his sexually violent predator trial was stayed pending the resolution of criminal proceedings against him and while he served the resulting criminal sentence. We affirm.

FACTS

In 1986, appellant Robert Lough was convicted of first degree rape and attempted murder of a young woman he picked up in a tavern and left to die on the side of the road after stabbing her repeatedly through her vagina. He was sentenced to 30 years in prison.

On August 5, 2009, two days before Lough's scheduled release from prison, the State filed a petition to commit him as a sexually violent predator. The court found that probable cause existed to believe Lough is a sexually

violent predator. The court ordered him remanded to the custody of the special commitment center.

Lough was detained at the special commitment center pending his trial. On May 22, 2010, while awaiting trial, Lough assaulted one of his fellow detainees at the special commitment center. Lough was charged with assault in the second degree in Pierce County and was transferred from the special commitment center to county jail. The court granted the State's motion to stay Lough's sexually violent predator proceedings pending the outcome of the criminal case in Pierce County.

In Pierce County, Lough pleaded guilty to assault in the third degree. He was returned to prison. On November 9, 2011, upon motion of the State, the court continued the stay of the sexually violent predator proceedings "until such time Lough is released from the Department of Corrections and appears before this court." Lough was released from prison and returned to the special commitment center on October 17, 2013.

On February 4, 2014, Lough moved to dismiss the sexually violent predator petition on the ground that the delay in his trial violated his statutory and constitutional rights to a speedy trial. The trial court denied the motion.

After a trial in January and February 2015, the jury unanimously found that Lough is a sexually violent predator. The court ordered him civilly committed. Lough appeals the order of commitment.

STAY OF PROCEEDINGS

Lough contends that his constitutional and statutory rights were violated when the court stayed the sexually violent predator proceedings while the criminal proceedings in Pierce County were pending and again while he was serving the resulting sentence.

Under Washington's sexually violent predator statute, the court shall, within 45 days after the probable cause hearing, conduct a trial to determine whether the person is a sexually violent predator. RCW 71.09.050(1). But the trial "may be continued upon the request of either party and a showing of good cause, or by the court on its own motion in the due administration of justice, and when the respondent will not be substantially prejudiced." RCW 71.09.050(1).

Because Lough is claiming his rights under RCW 71.09.050 were violated, we will analyze the "stays" as continuances under this statute. We can affirm the trial court on any basis supported by the record and the law. Bldg. Indus. Ass'n of Wash. v. McCarthy, 152 Wn. App. 720, 744, 218 P.3d 196 (2009).

An order granting a continuance of a sexually violent predator trial beyond the statutory 45-day period is reviewed for an abuse of discretion. In re Det. of Marshall, 122 Wn. App. 132, 140, 90 P.3d 1081 (2001), aff'd, 156 Wn.2d 150, 125 P.3d 111 (2005).

The court first stayed Lough's proceedings on August 26, 2010, pending resolution of the criminal proceedings against him in Pierce County. At the time, the State pointed out that Lough would have had a Fifth Amendment privilege not to answer questions about the assault in forensic interviews if the civil proceeding

had gone forward. This could have created problems for Lough if his refusal to answer was used as an adverse inference in the civil trial. Also, if Lough had been convicted of second degree assault as charged, he would have faced a sentence of life without parole, rendering the civil commitment proceedings moot. The State also pointed out that Lough was being held at the Pierce County jail until completion of his criminal case and that Pierce County had refused to comply with a recent transport order. Under these circumstances, the trial court did not abuse its discretion in finding good cause for the continuance.

Lough was convicted of third degree assault in Pierce County and was returned to prison. At that time, the trial court continued the stay of the sexually violent predator proceedings until Lough completed his sentence and was released from the Department of Corrections. This procedure is authorized by the pertinent statutes. A criminal defendant sentenced to over one year in custody must serve that sentence in a state prison facility. RCW 9.94A.190(1). On the other hand, a person facing civil commitment as a sexually violent predator must be held at the special commitment center in the custody of the Department of Social and Health Services pending trial. RCW 71.09.040(4). The sexually violent predator statute provides that "a person subject to court order under the provisions of this chapter who is thereafter convicted of a criminal offense remains under the jurisdiction of the department and shall be returned to the custody of the department following: (1) completion of the criminal sentence; or (2) release from confinement in a state, federal, or local correctional facility." RCW 71.09.112. Consistent with these statutes, Lough was properly

returned to the department's custody after he completed his sentence and was released from state prison.

Lough does not point to any prejudice that resulted from either stay of proceedings. In March 2014, Lough stated that he was not ready to proceed with the trial and asked for a continuance. We conclude Lough's statutory right to a prompt trial under RCW 71.09.050(1) was not violated.

The Washington Constitution provides that "justice in all cases shall be administered . . . without unnecessary delay." WASH. CONST. art. 1, § 10. To the extent that Lough argues this provision was violated, the stay in Lough's sexually violent proceedings was necessary, for the reasons detailed above. See, e.g., King v. Olympic Pipeline Co., 104 Wn. App. 338, 362, 16 P.3d 45 (2000) (emphasizing the word "*unnecessary*"), review denied, 143 Wn.2d 1012 (2001). Lough's constitutional rights were not violated when the court ordered that the sexually violent predator proceedings be stayed.

WITNESS EXCLUSION

The State moved in limine to exclude witnesses. Lough did not object, and the court granted the motion. Lough then asked the court for approval to "apprise our experts" of testimony given by Dr. Richard Packard, the State's expert witness, "so they can comment on things he may have raised." The court responded, "I don't think so. I don't think it is productive. At this point, I think Dr. Packard's opinions are out there. His reports are out there. His long, long, long deposition is out there. They can read those things. I don't think they need to be

[in] this court." Lough contends that the court's denial of his request to apprise his experts of Dr. Packard's testimony denied him his right to present a defense.

"At the request of a party the court may order witnesses excluded so that they cannot hear the testimony of other witnesses." ER 615. The exclusion of witnesses from the courtroom is a matter within the discretion of the trial court, and any decision to exclude witnesses will not be disturbed absent a manifest abuse of discretion. State v. Weaver, 60 Wn.2d 87, 90, 371 P.2d 1006 (1962). Specifically, the exemption of certain witnesses from the exclusion is a question within the discretion of the trial court. Weaver, 60 Wn.2d at 90.

Given that Dr. Packard's opinions had already been made available to Lough and his experts, Lough has not persuasively explained how the ruling denied him his right to present a defense. Lough's expert witnesses testified at length about Dr. Packard's opinions, including his diagnosis of Lough, his clinical judgment and the actuarial instruments that he used. The trial court did not abuse its discretion in denying Lough's request to apprise his experts of Dr. Packard's testimony.

DIFFICULTY CONTROLLING BEHAVIOR

A sexually violent predator is defined as "any person who has been convicted of or charged with a crime of sexual violence and who 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 71.09.020(18). Lough contends the record contains insufficient evidence to support the various components of this definition.

As a matter of constitutional due process, a finding of dangerousness required by a sexually violent predator statute must be linked to the existence of a mental abnormality or personality disorder that makes it seriously difficult for the person with the abnormality or disorder to control his behavior. Kansas v. Crane, 534 U.S. 407, 410, 413, 122 S. Ct. 867, 151 L. Ed. 2d 856 (2002).

To be consistent with Crane, the Washington Supreme Court holds that the fact finder in a sexually violent predator trial must determine that the person facing commitment has serious difficulty controlling behavior, although there need not be a separate finding to that effect. In re Det. of Thorell, 149 Wn.2d 724, 731, 742, 72 P.3d 708 (2003), cert. denied, 541 U.S. 990 (2004).

> If the existence of this link is challenged on appeal, this case specific approach requires the reviewing court to analyze the evidence and determine whether sufficient evidence exists to establish a serious lack of control, as we do below.
>
> We base our conclusion on the Supreme Court's lengthy discussion of the impracticability of giving "lack of control" a narrow or technical meaning, and the Court's recognition of the need to proceed contextually.

Thorell, 149 Wn.2d at 736. Lough contends the diagnoses discussed by Dr. Packard—antisocial personality disorder, post-traumatic stress disorder, and a substance abuse disorder—are all constitutionally insufficient to support commitment because they do not cause a person to lose the ability to choose to commit sexually violent acts.

To determine the sufficiency of the evidence, the test in criminal cases is used: "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." Thorell, 149 Wn.2d at 744-45. The evidence need not rise to the level of demonstrating the person is completely unable to control his behavior. Thorell, 149 Wn.2d at 742; see also In re Det. of Audett, 158 Wn.2d 712, 727-28, 147 P.3d 982 (2006).

Dr. Packard testified that Lough suffered from a personality disorder and a mental abnormality as defined in RCW 71.09.020(18). Dr. Packard diagnosed Lough with antisocial personality disorder with paranoid traits. He diagnosed Lough with post-traumatic stress disorder and several substance abuse disorders, including cannabis, alcohol, stimulant and opioid abuse.

Dr. Packard explained how antisocial personality disorder, when combined with the triggering that occurs with post-traumatic stress disorder and the disinhibition that occurs with substance abuse, can result in serious difficulty controlling sexually violent behavior:

> One of the characteristics of post-traumatic stress disorder is that people can get triggered and they have the reactions that result from that.
>
> One of those reactions can be an intense outpouring of emotion, and can be a rage directed towards the person who may have triggered that.
>
> With the substance abuse problems, that further results in disinhibiting his behavior. Even the controls he may have had are otherwise also influenced when the presence of substances are there.
>
> The role of the personality disorder is that even people who may have such experiences but are properly inhibited and are properly socialized, they will not act those out on other people.
>
> People with antisocial personality disorder don't have those barriers and inhibitions. Characterization of the disorder is the willingness to violate the boundaries of other people and to be irritable, hostile, and aggressive.

Dr. Packard testified that sex offenders with post-traumatic stress disorder "often report that it's uncontrolled; that the emotional response takes them over. One of the other phenomena with post-traumatic stress disorder is the tendency to dissociate. . . . so they then are engaging in the behavior sort of automatically, . . . and not necessarily being able to control it."

Dr. Packard testified that the brutal crime committed by Lough in 1986 and the assault Lough committed on another detainee in 2010 were, by Lough's own description, consistent with uncontrollable behavior triggered by post-traumatic stress disorder:

> If someone is stimulated, if they have associated a particular trigger or a set of triggers. Perhaps a person rejects them—and this is how Mr. Lough has talked about it—so maybe the trigger was when [the victim in the 1986 rape and attempted murder] rejected him and then that resulted in the anger and the outpouring of the emotion and the rage, and then that became expressed in the violent rape and assault of [the victim] and then the subsequent mutilation of [the victim] taking place in a way that was automatic as a result of the trigger.
>
> He describes himself at one point, in one of the instances with the person at SCC [special commitment center], that, "I was like on auto-pilot." That's a very common expression of people with post-traumatic stress disorder when they're engaging in behavior that they feel they have little control over. It's, "I was on auto-pilot. I can't explain why I did that."

Dr. Packard also explained the connection between substance abuse and lack of control. He testified that substance abuse results in disinhibition because the substances affect parts of the brain that otherwise would have prevented certain behaviors. He testified that "the effectiveness of the brain to stop it from happening is actually decreased."

According to Dr. Packard's testimony quoted above, these disorders affected Lough by making it seriously difficult for him to control his behavior. The jury was entitled to believe the testimony of the State's expert witness. In re Det. of Post, 145 Wn. App. 728, 757, 187 P.3d 803 (2008), aff'd, 170 Wn.2d 302, 241 P.3d 1234 (2010). To the extent that Lough's expert witnesses disagreed with Dr. Packard, this conflict was for the jury to resolve. See Thorell, 149 Wn.2d at 756 (differences in expert testimony go to the weight of the evidence).

Lough contends the evidence showed him to be a person who has the ability to control his sexually violent impulses and chooses not to. Viewed in the light most favorable to the State, the evidence was sufficient for the jury to find, beyond a reasonable doubt, that Lough has seriously difficulty controlling his behavior. We reject Lough's argument that the evidence shows only that he is a person who willingly chooses to violate social norms.

RISK ASSESSMENT

A sexually violent predator is defined, in relevant part, as a person who is "likely to engage in predatory acts of *sexual* violence if not confined in a secure facility." RCW 71.09.020(18) (emphasis added). Lough again challenges the sufficiency of the evidence. He argues that the State proved only that he was likely to engage in acts of general violence, not specifically acts of sexual violence as the statute requires.

Dr. Packard testified that Lough is likely to engage in predatory acts of sexual violence if not confined in a secure facility. He came to this opinion based

on actuarial assessments, dynamic risk factors, and a clinical assessment of Lough.

Regarding the actuarial assessments, the Static-99 predicted that Lough would have a 20.5 percent chance of being reconvicted for a new sexual offense within 5 years and 37.3 percent within 10 years. Results of the Violence Risk Appraisal Guide-Revised (VRAG-R) showed that 76 percent of the people who were in the same scoring bin as Lough were returned to a secure facility for a new violent offense, including sexual offenses, within 5 years, and 90 percent were returned within 15 years.

In assessing the risk, Dr. Packard also considered dynamic risk factors, which are not included in the actuarial assessments and are subject to change. Dr. Packard testified that the dynamic risk factors present in Lough's case include sexualized violence (in this case describing an interest or preference for coercive sex over consenting sex), a lack of emotionally intimate relationships with adults, lifestyle impulsiveness, poor problem solving, resistance to rules and supervision, and negative social interactions.

When asked directly how it can be known that Lough is likely to commit an act of sexual violence rather than just violence, Dr. Packard explained: "I don't see those as a mutually exclusive circumstance. I would—so his possibility of violence is certainly there. The possibility of sexual violence is also very likely there. It depends on the matter of what kind of stimuli, what kind of triggers may be present, and who would be around him at the time. If a male is doing that and

is there, it will probably be violence. If it's a female, it would more likely be manifested as sexual violence."

Lough argues that the actuarial assessments were insufficient to meet the State's burden. But the State did not rely on the actuarial instruments alone. Dr. Packard explained that no actuarial instrument is specifically designed to predict whether a person is likely to commit future predatory acts of sexual violence over a lifetime, so he could not rely solely on actuarial instruments. The State relied on the testimony of Dr. Packard, who, as described above, formed his clinical judgment based on the actuarial instruments along with consideration of the dynamic risk factors and a clinical evaluation.

Lough also argues that Dr. Packard's clinical judgment was insufficient. However, experts may resort to their clinical judgment when assessing the risk that a sexual offender will reoffend. See In re Pers. Restraint of Meirhofer, 182 Wn.2d 632, 645-46, 343 P.3d 731 (2015); Thorell, 149 Wn.2d at 755-56.

Viewed in the light most favorable to the State, the evidence was sufficient for the jury to find that Lough was likely to engage in predatory acts of sexual violence if not confined in a secure facility as required by RCW 71.09.020(18).

INSUFFICIENT DIAGNOSIS

Lough contends that the State failed to establish that he "suffered from a medically recognized disorder which justifies commitment." "Sexually violent predator" is defined, in relevant part, as a person "who 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 71.09.020(18).

Lough argues that any one of his diagnoses, standing alone, is insufficient to justify commitment, so the State should not be able to add them all together and commit him on that basis. He contends that neither post-traumatic stress disorder nor substance abuse may serve as a basis for commitment because they are not the kind of abnormality or disorder that causes sexual violence.

As detailed in the sections above, the State presented sufficient evidence that Lough's diagnosed mental abnormalities and personality disorder worked together to make him likely to engage in predatory acts of sexual violence if not confined in a secure facility and that he had serious difficulty controlling his behavior. He cites no authority for the proposition that an alleged sexually violent predator must be committed based on one personality disorder or mental abnormality alone. We agree with the State's assessment that sufficient evidence is found in Dr. Packard's testimony that it was "the combination of disorders and other psychological and neurological features that comprise Lough's mental abnormality." Dr. Packard's testimony does not imply, nor do we hold, that a recidivist sex offender may be committed as a sexual predator solely on the basis of evidence that he has post-traumatic stress disorder or a substance abuse disorder.

We conclude the evidence is sufficient to prove Lough suffers from a mental abnormality that justifies commitment.

ADMISSIBILITY OF VRAG-R

Lough unsuccessfully moved in limine to exclude the VRAG-R, arguing that its admission violated Evidence Rules 401, 403, and 702. Lough now contends that the trial court should have excluded the use of the VRAG-R actuarial instrument because it is inadmissible under Frye v. U.S., 293 F. 1013 (D.C. Cir. 1923). When a party fails to raise a Frye argument below, a reviewing court need not consider it on appeal. In re Det. of Post, 145 Wn. App. at 755-56; In re Det. of Taylor, 132 Wn. App. 827, 134 P.3d 254 (2006), review denied, 159 Wn.2d 1006 (2007). Because Lough did not raise a Frye argument below, we decline to consider it.

Lough also contends that the VRAG-R is inadmissible under Evidence Rules 402 and 403. He takes issue with the fact that the VRAG-R includes all violent offenses, not just predatory acts of sexual violence as the sexually violent predator statute requires. For this reason, he argues, the VRAG-R is not relevant, and even if relevant, its probative value is outweighed by the danger of unfair prejudice or misleading the jury. This court reviews a trial court's evidentiary rulings for abuse of discretion. State v. Stenson, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997), cert. denied, 523 U.S. 1008 (1998).

Evidence must be relevant to be admissible. ER 402. In a sexually violent predator civil commitment trial, evidence is relevant only if it increases or decreases the likelihood that a fact exists that is consequential to the jury's determination whether the respondent is a sexually violent predator. In re Det. of West, 171 Wn.2d 383, 397, 256 P.3d 302 (2011). This determination includes,

among other elements, whether the person is "likely to engage in predatory acts of sexual violence if not confined in a secure facility." RCW 71.09.020(18).

According to Dr. Packard's testimony, the VRAG-R measures the risk that an offender will return to a secure facility for a new violent offense, including a sex offense. The risk that Lough would reoffend by committing a sexually violent offense is consequential to the jury's determination of whether Lough is likely to engage in predatory acts of sexual violence if not confined in a secure facility. It is therefore relevant. The fact that the VRAG-R also includes other violent offenses that are not sex offenses does not make it irrelevant, but rather potentially prejudicial or misleading to the jury, addressed by Evidence Rule 403.

Relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." ER 403. Dr. Packard explained to the jury that the VRAG-R results measured the risk that an offender would return to a secured facility for a new violent offense, including sex offenses. Dr. Packard explicitly explained that the VRAG-R results were "limited, because they don't really address the question that the statute is asking. . . . The VRAG-R is giving an estimate or an actual count of something else, the violent, including sexual reoffending. And while that's related, it is not the same thing as what the statute is asking for." In addition, Lough cross-examined Dr. Packard at length about the fact that VRAG-R includes violent offenses that are not sex offenses. In view of Dr. Packard's thorough explanation of the limitations of the VRAG-R, Lough has not

demonstrated that the trial court abused its discretion in determining that the VRAG-R evidence need not be excluded under ER 403.

In denying Lough's motion to exclude the VRAG-R, the trial court stated, "The specific criticisms by the respondents to experts, of Dr. Packard's use of the VRAG-R, and of the VRAG-R itself, can be assessed by the jury, just like they assess this kind of attack on other actuarial instruments." This ruling was entirely proper. The trial court acted within its discretion in admitting the VRAG-R.

Affirmed.

Becker, J.

WE CONCUR:

Spearman, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 73223-4-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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