NO. 44575-1-II

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

IN RE THE DETENTION OF

CHARLES H. ROBINSON

STATE OF WASHINGTON, Respondent,

vs.

CHARLES H. ROBINSON, Appellant.

APPELLANT'S BRIEF

James L. Reese, III
WSBA #7806
Attorney for Appellant

612 Sidney Avenue
Port Orchard, WA 98366
(360)876-1028

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

TABLE OF CASES

CONSTITUTIONAL PROVISIONS

STATUTES

REGULATIONS AND RULES

OTHER AUTHORITIES

A. Assignments of Error

Assignments of Error

1. The trial court erred when it admitted the video deposition of the respondent into evidence.

2. The sexual violent predator statute violates the petitioner's Fifth Amendment right against self incrimination.

3. The sexual violent predator statute violates the appellant's substantive due process rights guaranteed by the Fourteenth Amendment.

4. The trial court erred when it ordered "...that the Respondent, Charles Robinson, is a sexually violent predator as defined in RCW 71.09.020(18)."

5. The trial court erred when it entered finding of fact 4. (See appendix where the trial court's findings of fact and conclusions of law are set forth in full.)

6. The trial court erred when it entered finding of fact 5.

7. The trial court erred when it entered finding of fact 12.

8. The trial court erred when it entered finding of fact 13.

9. The trial court erred when it entered finding of fact 15.

10. The trial court erred when it entered finding of fact 16.

11. The trial court erred when it entered finding of fact 23.

12. The trial court erred when it entered finding of fact 28.

13. The trial court erred when it entered finding of fact 29.

14. The trial court erred when it entered finding of fact 30.

15. The trial court erred when it entered finding of fact 31.

16. The trial court erred when it entered finding of fact 33.

17. The trial court erred when it entered finding of fact 34.

18. The trial court erred when it entered finding of fact 35.

19. The trial court erred when it entered finding of fact 36.

20. The trial court erred when it entered finding of fact 37.

21. The trial court erred when it entered finding of fact 40.

22. The trial court erred when it entered finding of fact 41.

23. The trial court erred when it entered finding of fact 42.

24. The trial court erred when it entered finding of fact 43.

25. The trial court erred when it entered finding of fact 44.

26. The trial court erred when it entered finding of fact 45.

27. The trial court erred when it entered finding of fact 47.

28. The trial court erred when it entered finding of fact 48.

29. The trial court erred when it entered finding of fact 49.

30. The trial court erred when it entered finding of fact 50.

31. The trial court erred when it entered finding of fact 51.

32. The trial court erred when it entered finding of fact 52.

33. The trial court erred when it entered finding of fact 53.

34. The trial court erred when it entered conclusion of law 2. (See appendix).

35. The trial court erred when it entered conclusion of law 5.

36. The trial court erred when it entered conclusion of law 6.

37. The trial court erred when it entered conclusion of law 7.

38. The trial court erred when it entered conclusion of law 8.

39. The trial court erred when it entered conclusion of law 9.

40. The trial court erred when it entered conclusion of law 10.

Issues Pertaining to Assignments of Error

1. Whether the trial court abused its discretion when it authorized the state to introduce into evidence and play the video deposition of the appellant in its case in chief pursuant to CR 32(a) when Mr. Robinson was present at the time of trial? (Assignment of Error 1.)

2. Whether the sexual predator statute violates the petitioner's Fifth Amendment and due process rights because it is so punitive in its effect to negate its label that it is a civil statute? (Assignments of Error 2-3.)

3. Whether, after review of all the facts, testimony and exhibits in this case, there was sufficient evidence to support the trial courts conclusion that the appellant was a sexually violent predator (SVP)? (Assignment of Error 4.)

4. Whether there was substantial evidence to support the trial court's

findings of fact to which error was assigned? (Assignments of Error 5-33.)

5. Whether the findings of fact support the conclusions of law? (Assignments of Error 34-40.)

B. Statement of the Case

Prior Procedure

On December 18, 2007, the state filed a petition alleging that the respondent[1] Charles Robinson was a sexually violent predator as defined by RCW 71.09.020(18). CP 70, 497. On December 21, 2007 the trial court entered an order affirming probable cause and directed that the respondent be detained at the Special Commitment Center on McNeil Island. *Id.* Mr. Robinson has been held involuntarily in this secure facility to date.

This is a period of five years after he has finished serving his sentence on the predicate offense of Child Molestation in the First Degree contrary to RCW 9A.44.083.[2] He was convicted of this offense on March 9, 2001 in Jefferson County Superior Court.

Prior to his Washington conviction, Robinson was convicted in

---

[1] Mr. Robinson is referred to as the respondent in the trial court proceedings and as the appellant in this appeal. The state is referred to as the petitioner.

[2] This is a sexually violent offense as defined by RCW 71.09.020 (17). Robinson was initially sentenced to life imprisonment without parole. That sentence was reduced on appeal to 89 months imprisonment. CP 71.

California in 1987 for the crime of Lewd and Lascivious Acts with a Child Under Age 14. CP 72. He was sentenced to six years and was parolled in 1991 for three years. *Id.*

During a home visit on March 23, 1992 Robinson was observed by his parole officer sitting in a lawn chair watching 4 or 5 youngsters playing outside of his back door. The officer also discovered two knives. CP 127. Three days later five knives were discovered. CP 128. During this incident Robinson admitted that he brought a seven year old boy into his bathroom. *Id.* He denied that he molested the child. CP 499. He was sentenced to one year's confinement and released on March 26, 1993. CP 73.

According to Sharon L. Guss' video deposition, she was Mr. Robinson's parole agent in California on September 28, 1993. On that date she went to his house to perform a search. CP 223. Searching his room she found "some magazines that had to do with children." CP 224. Also, located in a trunk in the garage were "Children's clothing. Little boys underpants. Some toys."[3] CP 226. In the interim, Mr. Robinson arrived in a vehicle driven by one of his friends. Inside the vehicle were the driver's

[3] Also included in the trunk was a hospital gown, sweatshirt, numerous toys, marbles and badges from youth organizations. CP 229.

two female daughters, both under the age of 8. CP 224.[4]

According to Mr. Robinson's deposition he served a one year sentence for these violations. CP 230. Guss re-supervised Robinson beginning in September 1994. In December 1994 she observed him walking with the same two girls holding their hands in City of Dinuba, Tulare County, California. CP 234-5. According to the exhibits to Guss' deposition, Mr. Robinson was released on September 28, 1994. CP 241, CP 278-Ex. 3.

Mr. Robinson's parole time in California lapsed on January 16, 1995. CP 74. He moved to Port Townsend in 2000 with his girlfriend Heather Taylor when she moved in with her parents. CP 342.
He was arrested in Jefferson County, Washington in July 2000 for his involvement with WB, when he was being baby-sat by Robinson. He was convicted in March 2001. I RP 52.

Trial Testimony

Mr. Robinson's video deposition was objected to by his attorney but was admitted into evidence.[5] I RP 35-6, ex. 21. It was played intermittently

---

[4] One of the conditions of Robinson's parole was not have contact with minor children. CP 225; 274- Ex. 1.

[5] Also admitted was exhibit 20: the video disk of the 11/15/12 deposition and exhibit 22 a transcript of the video deposition. I RP 40-1.

during the trial.

Dr. Ronald D. Page

The petitioner called Ronald D. Page, a clinical psychologist, who interviewed Mr. Robinson while he was in prison in 2006. I RP 46,49. His report and interview was nearly six years old. This lapse of time was reflected in the witness's statement regarding identification: "Well, I wouldn't recognize him from 2006, during my single contact with him. But I take your word for it." I RP 49. Page previously diagnosed Robinson with pedophilia, polysubstance dependence in remission and borderline personality disorder. I RP 52. Dr. Page was of the general opinion that: "Robinson is ego based in his reference and is manipulative and pursued a lifestyle of a predatory pedophile." FF 15, CP 600.

Dr. Harry Goldberg

The state called its primary expert witness Dr. Harry Goldberg of California. II RP 87. He was called to testify on the issue of whether Mr. Robinson suffers from a mental abnormality or personality disorder that would cause him serious difficulty in controlling his alleged sexually violent behavior. II RP 102, 135-40. He diagnosed Mr. Robinson as pedophilia, personality disorder NOS[6] with antisocial personality traits and

---

[6] NOS was described as meaning "not otherwise specified" used in the *Diagnostic and Statistics Manual Version 4, Text Revision.* It is a

more recently with psychotic disorder NOS. II RP 106. Moreover, he was of the opinion that Mr. Robinson's pedophilia effected his emotional or volitional capacity to control his behavior. II RP 135-6.

Secondly, he was called to testify whether Mr. Robinson's current condition makes him more likely than not to commit "predatory acts of sexual violence" unless he is confined in a secure facility for treatment. CP 75, II RP 141. He testified that after reviewing the instruments he was of the opinion that Mr. Robinson was "...likely to engage in sexually violent predatory behavior, as a result of his diagnosed mental disorder." III RP 192, 196. He concluded his testimony by stating his opinion that Mr. Robinson suffers from a mental abnormality and from a personality disorder that causes his serious difficulty in controlling his sexually violent behavior. II RP 196. And was likely to engage in predatory acts of sexual violence if he was not confined in a secure facility. *Id.*

In support of his opinions Dr. Goldberg testified that he evaluated Mr. Robinson by reviewing records relating to Mr. Robinson including "criminal, sexual, incarceration, educational, medical, mental health, family and treatment history." *Id.*, II RP 96-7. In addition, Dr. Goldberg used actuarial instruments and risk calculations to support his opinions. II

---

catch-all category describing an unusual type of disorder. II RP 123.

RP 99.

Among the actuarial instruments used by Dr. Goldberg were the MnSOST-R, Static-99 Revised, Static 2002R, the SORAG (Sex Offender Risk Appraisal Guide), the Hare Psycopathy Check List Revised (PCL-R) and the SRA-FV.[7] CP 83, II RP 146, 170. As described by the petitioner: "The MnSOST-R is based on a study of over 200 male sex offenders released from Minnesota prisons." CP 83. The SORAG was developed in Canada. III RP 165. And the SRA-FV has been developing over the past four years. II RP 178.

Dr. James C. Manley

James C. Manley was the clinical psychologist expert for the respondent. III RP 260. He had been licensed since 2000 and had previously been employed at the Special Commitment Center (SCC) in 1999 for two years performing annual reviews and commitment evaluations. III RP 261. Since then he has been in private practice, except for another four years of re-employment at the SCC in the forensic unit. III RP 263. After performing extensive research into Mr. Robinson's case profile he was of the opinion that Mr. Robinson's diagnosis was

---

[7] MnSOST-R (ex. 29, CP 572-73, RP 162); Static-99 Revised (ex.17; CP 565-66; RP 149); SORAG (ex. 28, RP 164); PCL-R (ex. 30, CP 578-79, RP 170); SRA-FV (ex. 19, CP 572-73, RP 179).

pedophilia non-exclusive type. The second diagnosis was major depression, moderate chronic, with intermittent psychotic features. RP 311.

Robinson was described as being at the "lower level of intellect and thus illiterate." III RP 318. Dr. Manley did not render an axis II diagnosis for Mr. Robinson. He felt that he did not suffer from a personality disorder. He was also of the opinion that Mr. Robinson was not a substance abuser.

Dr. Manley agreed with Dr. Goldberg that Mr. Robinson was of moderate to high risk to re-offend based on the Static-99, but did not meet the criteria for RCW 71.09. III RP 333, 356. Although he diagnosed Mr. Robinskion with pedophilia, he did not find that he suffered from a mental abnormality. FF 46, CP 609.

The trial court found and concluded that "The evidence presented at the Respondent's trial proves beyond a reasonable doubt that the Respondent is a sexually violent predator, as that term is defined by RCW 71.09.020(18)." CP 611, CL 9, 1/18/13 RP 26. On February 22, 2013 the Respondent filed a notice of appeal to the Court of Appeals. CP 474.

C. Argument

I. THE TRIAL COURT ERRED WHEN IT ALLOWED THE PETITIONER TO INTRODUCE INTO EVIDENCE A VIDEO DEPOSITION IT TOOK OF THE RESPONDENT.

Prior to trial the appellant's attorney argued:

"...I would object to the admissibility of the video deposition. Mr. Robinson is present. He's available, if he does so testify. The deposition was taken at a time when–in the Special Commitment Center, when he was –part of his confinement was that he didn't have any real knowledge that it could be –that he had an alternative to present his own testimony live. So at this time, we would just simply object to the admissibility of the video deposition." I RP 36.[8]

The state cited *In re Detention of Stout,* 159 Wn.2d 357, 150 P.3d 86 (2007). Actually, *Stout* is distinguishable from the issues at bench. *Stout* addressed the constitutional rights of Stout to be present at the video-deposition of an adverse witness: the sexual victim of a predicate burglary conviction. There was no argument presented that addressed the issue of a person's ability to object to the offer of their own video-deposition into evidence by the state in its case in chief.

The holding in *Stout* was simply: "...we hold that an SVP detainee does not have a due process right to confront a live witness at a commitment trial, nor does he have a due process right to be present at a deposition." *Id.* at 374. The state introduced two depositions to prove that Stout was a sexually violent predator. Stout was not present at either deposition and did not request to be present.

---

[8] After further argument the record shows: "THE COURT: All right. And so is there any basis under the rule or any other authority that makes presentation and publication or admission of the deposition inappropriate. MS. JARDINE: No, Your Honor." I RP 37.

Here, the state was allowed by the trial court to bootstrap that holding as justification for admission of the video-deposition over Mr. Robinson's initial objection that he was present and available. I RP 36.

Abuse of Discretion

The trial court abused its discretion when it admitted the video deposition of the respondent. The standard of review is abuse of discretion. An abuse of discretion is discretion manifestly unreasonable or exercised on untenable grounds or for untenable reasons." *State ex. Rel. Carroll v. Junker,* 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

CR 43(a)(1)[9] states in part as follows: "In all trials the testimony of witnesses shall be taken orally in open court unless otherwise directed by the court or provided by rule or statute." According to the concurring opinion in *Stout:* "The rule presupposes that witnesses must be physically present in the courtroom to give live, oral testimony." *Id.* at 386. In the case at bench, the trial court allowed the state to introduce and show- at intervals between "live" testimony- Mr. Robinson's video deposition. He was present in the courtroom for the majority of the trial.[10]

Examination of evidentiary rules supports the preference for

---

[9] See appendix for complete text of CR 43(a)(1).

[10] After Dr. Manley testified on direct examination, Mr. Robinson waived his right to be present for the remainder of the testimony. RP 359.

testimony to be conducted in the courtroom as established by precedent and especially by CR 43. Also, ER 804(b)(1)[11] indicates the court's "strong preference for live testimony." *Stout,* concurring opinion at 386. That rule, indicates that a declarant's statement against interest is admissible "...if the declarant is unavailable as a witness." Here, Robinson argued that he was available as a witness. I RP 36.

The state also argued that the video deposition of Mr. Robinson should be admitted pursuant to CR 30((b)(6); CR 31 and CR 32(a)(2). I RP 36-7. Cr 30(b)(6) does not appear to be in point. That rule is directed to service of notice of examination on a "public or private corporation or a partnership or association or governmental agency...." CR 31 is not in point either. That rule is entitled " Deposition upon Written Questions."

State Court Precedent

Under the circumstances of *State v. Scott*, 48 Wn.App. 561, 739 P.2d 742 (Div. I 1987), *aff'd*, 110 Wn.2d 682 (1988) the court found that the admission of the witness's deposition was in error. Sung, the victim of

---

[11] If a deponent is unavailable to testify at trial ER 804 allows deposition testimony to be introduced. ER 804(b)(1) states: "*Former Testimony*. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination."

a burglary informed the prosecutor that he planned to be gone on a trip to Korea to visit his sick wife and would not be able to attend the trial. The prosecutor preserved his testimony by pretrial deposition. Defense counsel was provided notice, attended the deposition and cross-examined Sung. At trial the defense objected to Sung's deposition and argued that he was not unavailable as mandated and required by ER 804(b)(1). The trial court admitted Sung's deposition.

The Court of Appeals held that this was error where Sung was released from his subpoena. There must be a showing by the State that a good faith effort was made to obtain the witnesses' presence at trial through a subpoena.

The Court of Appeals cited several cases including *State v. Sanchez*, 42 Wn.App. 225,230, 711 P.2d 1029 (1985) that confirmed that the admission of Sung's deposition was error. In *Sanchez* the testimony of a witness was preserved by video deposition. The witness was allowed to go on vacation. The appellate court "...held that because the prosecution failed to show a good faith effort to obtain the presence of the witness at trial, the videotaped deposition was improperly admitted. *State v. Scott,* 48 Wn.App. At 565.

See also, *State v. Sweeney*, 723 P.2d 5511 (1986) and *State v. Goddard*, 38 Wn.App. 509, 685 P.2d 674 (1984) (Both cases concluded it

was error to admit the deposition of a witness and then permit them to return to California. In both cases the court held that a good faith effort should have been made to obtain the presence of the witness at trial through the Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings. RCW 10.55.010, et seq. The courts held that this showing was necessary before unavailability could be established under ER 804. The failure to do so is reversible error.

Federal Precedent

Federal courts also support the rule favoring live testimony. In *Klepal v. Pennsylvania Railroad Co.*, 229 F.2d 610 (2d Cir. 1956) (Clark C.J.) the trial judge admitted depositions of the defendant employees which were offered by the plaintiff pre-trial to establish a prima facie case. These witnesses, although hostile, were available.

F.R. 32(a)(4)(E) [formerly F.R. 26] expressly authorizes the use of depositions only if the judge finds: "That such exceptional circumstances exist as to make it desirable in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used." *Id.* 611-2. (see appendix for copy of current rule.)

According to *G.E.J. Corp. v. Uranium Aire, Inc.*, 311 F.2d 749, 755 (9th Cir. 1962) ("We see no reason why the pre-trial deposition of a

witness should be admissible when the witness is himself present.") The court went on to hold:

> "Depositions may only be used where the witness is unavailable or where exceptional circumstances necessitate their use. Rule 26(d) contemplates such use and was not intended to permit depositions to substitute at the trial for the witness himself. The Appellant could have secured Gould's continued presence at the trial in order to later elect his oral testimony on the matter in question." *Id.*

The goal is to give solicitude to the rules' preference for oral testimony and to avoid trial by deposition alone. See also, *Martinez v. City of Stockton, Cal.*, 12 F.3d 1107 (9th Cir. 1993).

CR 32(a)

The state also cited and argued CR 32 (a). I RP 36-7. That rule states:

> "(2) The deposition of a party or of anyone who at the time of taking the deposition was an officer, director, or managing agent, of a person designated under rule 30(b)(6) or 31(a) to testify on behalf of a public or private corporation, partnership or association or governmental agency which is a party may be used by an adverse party for any purpose."

However, CR 32(a)(3) authorizes depositions at trial under certain circumstances, not present in the case at bench. See *Kingsman v. Englander*, 140 Wn.App. 835, 167 P.3d 627 (Div. II 2007) where a neighbor's predecessor-in-interest was unavailable to testify because she was wheelchair bound and received continuous supplemental oxygen. A

video deposition was admitted because she was both aged and physically infirm.

Kingsman v. Englander noted that use of depositions is not only controlled by CR 32 but it is also controlled by the hearsay rule in ER 804(b). CR 32 permits use of a deposition if a witness is unavailable. CR 32(a)(3)©. According to *State v. Scott*: "The admissibility of the deposition at trial is governed by the Rules of Evidence. CrR 4.6(d)." 48 Wn.App. at 564.

ER 804(b) is more restrictive and applies to both criminal and civil proceedings. It only permits use of a deposition where the witness is unavailable and where the party-against whom the testimony is now being offered-had an opportunity and a similar motive to develop the witness's testimony. ER 804(b)(1).

Mr. Robinson's attorney did not have 'a similar motive to develop the witnesses' testimony by direct, cross, or re-direct examination' at the time the State took his deposition. Indeed, Mr. Robinson's version of the events in California was not fully developed on the record. Also, according to *State v. Scott*: "ER 804(b)(1) requires the proponent of the evidence to establish unavailability of the declarant before deposition testimony may be admitted at the time of trial." 48 Wn. App. at 564.

Here, the trial court did not make a ruling or enter a finding of the

unavailability of Mr. Robinson at the commencement of the trial. The trial court abused its discretion. *Junker,* 79 Wn.2d at 26.

II. THE SVP STATUTE IS A CRIMINAL STATUTE BECAUSE IT IS PUNITIVE IN ITS EFFECT

The SVP statute is so punitive in effect so as to negate a civil label. The statute, in effect, becomes criminal. When the statute is criminal the Fifth amendment privilege against self-incrimination must be applied. Here, Mr. Robinson should have been warned of his Fifth Amendment Right to remain silent before his Video-deposition was taken by members of the Attorney General's Office.[12] Because the SVP proceedings are criminal in nature, Mr. Robinson was entitled to refuse to answer any questions.

Much of the background information about Mr. Robinson, which was subsequently used by the state's experts against him was based on his own incriminating statements or answers provided during questioning by authoritative figures i.e. his video deposition.

According to RAP 2.5(a) entitled "error Raised for Fist Time on Review" states in part:

> " The appellate court may refuse to review any claim or error which was not raised in the trial court. However, a party may

---

[12] Both the examiner and videographer were Assistant Attorney Generals and both represented the State during the ensuing trial. CP 282-3.

> raise the following claimed errors for the first time in the appellate court:...(3) manifest error affecting a constitutional right." (See appendix.)

According to *State v. Curtis,* 110 Wn.App. 6, 11, 37 P.3d 1274 (2002): "This is a claim of manifest constitutional error, which can be raised for the first time on appeal. RAP 2.5(a)(3); *State v. McFarland,* 127 Wn.2d 322, 333, 899 P.2d 1215 (1995); *State v. Neidigh*, 78 Wn. App. 71, 78, 895 P.2d 423 (1995). Review is de novo...."

The following factors or examples clearly show that Washington's SVP statute is a criminal statute, designed with a punitive effect:

Robinson was advised of his "absolute right to be present during the trial when he requested that he be excused at the end of Dr. Manley's direct examination. III RP 359. He was asked by the court to waive any further presence during the proceedings. RP 360, 362.

During the trial he was under the control and surveillance of a corrections officer III RP 361. He was housed in the Kitsap County Jail during the SVP proceedings. His transport orders back to the SCC were "provided to the jail." III RP 363. Mr. Robinson was in the custody of law enforcement throughout the entire trial proceedings. See RCW 71.09.060(3) ("If the proceedings last more than one day, the person may be held in the county jail for the duration of the proceedings...."

Then, after trial, the court found "...that the State has proven

beyond a reasonable doubt that all the elements of the sexually violent predator statute have been met....". CP 611, ff 53.The language used and the terms used are criminal law terms and criminal burdens of proof.

Examination of the SVP statute reveals its criminal nature based on statutory provisions within the Act. For instance, before a person may be found to be an SVP they first must have committed a sexually violent offense. A sexually violent offense is a list of sexual crimes or common law crimes that have been sexually motivated. RCW 71.09.020(15). The State must prove that the sexually violent act was sexually motivated beyond a reasonable doubt. RCW 71.09.060(1).

The SVP proceedings are initiated by a probable cause hearing to believe that the person named in the petition is a SVP. RCW 71.09.040(1).[13] There is a right to be represented by counsel at the probable cause hearing. RCW 71.09.040(3). Like the criminal law, an indigent person will be provided assistance of counsel. *Id.* There is the right to present evidence on his or her own behalf. RCW 71.09.040(3)(a). There is the inherent criminal law right "to cross-examine witnesses who

---

[13] Prior to these proceedings whenever it appears that a person is about to be released from confinement, the agency charged with jurisdiction is mandated to refer a person who meets the criteria of SVP to the prosecuting attorney of the county in which an action may be filed and to the attorney general's office. RCW 71.09.025(1)(a).

testify against him or her." RCW 71.09.040(3)©. And there is the right to view and to copy all petitions and reports at this initial hearing.

The criminal law occupies a central role in the SVFP proceedings. Like the criminal law, the person has a right to assistance of counsel "at all stages of the proceedings under this chapter." RCW 71.09.050(1). Likewise, the statute guarantees rights of indigent persons to appointment of counsel. RCW 71.09.050(1). The highest standard of proof in the law is required: proof beyond a reasonable doubt. RCW 71.09.060(1). As in a criminal trial the person has a right to a unanimous jury verdict and not a 10 person verdict that is employed in a civil trial. RCW 71.09.060(1). Criminal defendant's in Washington also have a right to a unanimous jury verdict. Wash. Const. Art. 1, sec. 21; *State v. Ortega-Martinez*,124 Wn.2d 702, 707, 881 P.2d 2134 (1994).

Mr. Robinson was advised that he had the absolute right to appeal within 30 days of entry of the findings of fact and conclusions of law. 1/18/13 RP 28. He was entitled to an order of indigency to prosecute his appeal. *Id.*, CP 471-2, RAP 15.2(b)(1)© expressly refers to commitment proceedings under RCW 71.09. These are the same safeguards as criminal appellants. RAP 15.2 (b)(1)(a), entitled " Determination of Indigency and Rights of Indigent Party." (See Appendix.)

The test according to whether a statute purported to be civil in

nature is criminal in its effect is set forth in *Allen v. Illinois,* 478 U.S. 364, 106 S.Ct 2988, L.Ed.2d 296 (1986). The SVP statute is unconstitutional because it does not meet the *Allen* test.

The Self-incrimination clause of the Fifth Amendment:

> "...provides that no person "shall be compelled in any criminal case to be a witness against himself." This Court has long held that the privilege against self-incrimination "not only permits a person to refuse to testify against himself at a criminal trial in which he is the defendant, but also 'privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings.'" *Minnesota v. Murphy,* 465 U.S. 420, 426, 104 S.Ct. 1136, 1141, 79 L. Ed.2d 409 (1984) (quoting *Lefkowitz v. Turley,* 414 U.S. 70, 77, 94 S.Ct. 316, 322, 38 L.Ed.2d 274 (1973)); *McCarthy v. Arndstein,* 266 U.S. 34, 40, 45 S.Ct. 16, 17, 69 L.Ed. 158 (1924)."

Allen v. Illinois, 478 U.S. 369, 106 S.Ct. 2991.

In *Allen* the Illinois Sexually Dangerous Persons Act was deemed to be civil in nature primarily because the Illinois legislature under the act provided care and treatment. By contrast the Washington legislature has declared in the SVP Act that long term confinement is contemplated and that treatment is remote::

> "The legislature finds that a small but extremely dangerous groups of sexually violent predators exist who do not have a mental disease or defect that renders then appropriate for the existing involuntary treatment act, chapter 71.05, which is intended to be a short-term civil commitment system that is primarily designed to provide short-term treatment to individuals with serious, mental disorders and then return them to the community

> In contrast to persons appropriate for civil commitment under chapter 71.05 RCW, sexually violent predators generally have personality disorders and/or mental abnormalities which are unamenable to existing mental illness treatment modalities and those conditions render them likely to engage in sexually violent behavior .....The legislature further finds that the prognosis for curing sexually violent offenders is poor, the treatment needs of this population are very long term..."

The legislature's own findings support the argument that the statute promotes either of "the traditional aims of punishment-retribution and deterrence" *Kennedy v. Mendoza-Martinez.* 372 U.S. 144, 168, 83 S.Ct. 554, 567, 9 L.Ed 2d 644 (1963).

The dissenting opinions in *Allen v. Illinois*, supra at 478 U. S. 376, 106 S.Ct. 2995 support the argument that the Fifth Amendment privilege should apply to SVP proceedings. The dissent listed the similar relationship with the Illinois Act to criminal law proceedings. Also, the dissent pointed out that even if a state declared its purpose to be treatment and rehabilitation, the Fifth Amendment would still apply. Otherwise, there would be nothing to prevent a state "...from creating an entire corpus of "dangerous person" statutes to shadow its criminal code." [14] 478 U.S. at

---

[14] In the case at bench the trial court essentially acted as a "dangerousness court" in light of the fact that Mr. Robinson's only sexual crime of any nature since 1987 was a conviction for Child Molestation in the First Degree in 2001.

Justice Johnson wrote the dissenting opinion in *Young:*

"The sexually violent predator statute, RCW 71.09

381, 106 S.Ct. at 2998. Just because a person is considered a sexually dangerous person or a danger to the community cannot justify denial of the privilege against self-incrimination embodied in the Fifth Amendment.

Chief Justice Alexander similarly argued in his dissenting opinion in *In re Detention of Thorell,* 149 Wn.2d 724, 72 P.3d 708 (2003) regarding the majority's holding that lack of control is not a separate element of an SVP commitment:

> "Ultimately, the majority's approach weakens all of our fundamental civil liberties for the sake of confining indefinitely an unpopular group by stripping it of those rights which are due every person and which were secured through the blood and sacrifice of our forefathers This I reject."

Thorell, 149 Wn.2d at 774.

> (hereinafter Statute) is a well-intentioned attempt by the Legislature to keep sex predators off the streets. However, by authorizing the indefinite confinement in mental facilities of persons who are not mentally ill, the Statute threatens not only the liberty of certain sex offenders, but the liberty of us all. By committing individuals based solely on perceived dangerousness, the Statute in effect sets up an Orwellian "dangerousness court", a technique of social control fundamentally incompatible with our system of ordered liberty guaranteed by the constitution and contrary to the recent United States Supreme Court decision in *Foucha v. Louisiana*, 504 U.S. 71, 118 L.Ed.2d 437, 112 S.Ct. 1780 (1992)."

In re Personal Restraint of Young, 122 Wn.2d 1, 60, 857 P.2d 989 (1993).

Matthews v. Eldridge

According to the tests established in *Matthews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) the factors to consider to determine what process is due[15] in any proceeding are:

(1) The private interest that will be affected by the official action.

This factor is in favor of Mr. Robinson's claim to the 5th Amendment privilege.

> (2) The risk of an erroneous deprivation of such interest through the procedures used, and the probative value, if any, of additional or substitute procedural safeguards.

This factor favors allowing the assertion of the 5th Amendment protections in SVP proceedings. The State uses information gleaned from the individual by experts employed by the State. Part of the experts function is to gather incriminating evidence and statements by the individual to be used against him or her in proceedings where the individual faces indefinite confinement and loss of liberty. RCW 71.09.050(1). An issue may arise at which point in the SVP proceedings the 5th Amendment privilege may be asserted i.e, after the probable cause hearing for instance.

---

[15] "[D]ue process is flexible and calls for procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593, 2660, 33 L.Ed.2d 484 (1972).

> (3) The third factor is the government's interest; including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Again, the third factor favors acknowledging the 5th Amendment right against self-incrimination in SVP proceedings. The government would simply conserve its resources by not having its experts extensively interview or video tape individuals if they chose to exercise the privilege. The court stated in *Matthews*: "But the government's interest, and hence that of the public, in conserving scarce fiscal and administrative resources is a factor that must be weighed." *Id.* 424 U.S. 349, 96 S.Ct. 909.

The ultimate consideration is fairness. Like the fundamental right to be heard, even though it does not involve the same stigmas and hardships of a criminal conviction, the fundamental right to remain silent should be a part of the SVP due process. See generally, *Armstrong v. Manzo*, 380 U.S. 545,552, 85 S.Ct. 1187,1191, 14 L.Ed.2d 62 (1965).[16]

---

[16] Compare *In re Det. Of Williams*, 147 Wn.2d 476,491, 55 P.3d 596 (2002) . The court stated: "We hold that the mental examination by the State's experts of a person not yet determined to be a sexually violent predator is limited to the evaluation required under RCW 71.09.040(4)." .

"The Legislature has expressly provided that evaluations by experts are allowed in a proceeding following commitment as a sexually violent predator in the absence of full statutory language for pretrial discovery. It can be inferred that the Legislature did not intent for the State to conduct such evaluations." *Id.* at 491.

See Wis. Stat. Ann. Sec. 980.05(1m)(West 1998) (Wisconsin affords all SVP's the same constitutional rights as criminal defendants.)

III. THE TRIAL COURT ERRED WHEN IT FOUND THAT THE RESPONDENT WAS A SEXUALLY VIOLENT PREDATOR.

The trial court erred when it entered finding of fact 12:

"The court finds, beyond a reasonable doubt, based on the expert psychological testimony presented at trial that Mr. Robinson does suffer from a mental abnormality and a personality disorder; and that his mental condition causes him serious difficulty in controlling his sexually violent behavior...." CP 599-600.[17]

The trial court erred when it entered finding of fact 44:

"The court accepts the evaluations and conclusions of the State's expert, Dr. Goldberg, and finds that Mr. Robinson is a sexually violent predator, as is defined under the statute."[18] CP 608.

The trial court erred when it entered finding of fact 53:

"In conclusion, the Court finds that the State has proven beyond a reasonable doubt that all elements of the sexually violent predator statute have been met as to Mr. Robinson. He does qualify as a sexually violent predator under the law of our state." CP 611.

There was not sufficient evidence to warrant the conclusion that

---

Stout, at 374, n. 14.

[17] See conclusion of law 8: "The Respondent's mental abnormalities and personality disorder make him likely to engage in predatory acts of sexual violence if he is not confined in a secure facility." CP 611.

[18] See finding of fact 45: "The Court did not find the ultimate conclusion of Dr. Manley to be persuasive." CP 608.

Mr. Robinson was a sexually violent predator (SVP). The trial court found and ordered that the respondent was a sexually violent predator pursuant to RCW 71.09.020(18).[19] CP 611. An SVP is 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).

As *Stout* makes clear the burden of proof is on the state to show that an individual is an SVP beyond a reasonable doubt. Id. at 365 (citing *In re Pers. Restraint of Young*, 122 Wn.2d 1, 13, 857 P.2d 989 (1993)). RCW 71.09.060(1) states in part: "The court or jury shall determine whether beyond a reasonable doubt the person is a sexually violent predator." ff. 2, CP 597. (See appendix.)

Standard of Review

The standard of review is set forth in *In re Detention of Thorell,* 149 Wn.2d 724, 72 P. 3rd 708 (2003). In order to uphold Mr. Robinson's commitment on review the appellate that court must find that there was sufficient evidence of the following elements beyond any reasonable doubt:

---

[19] See conclusion of law 9: "The evidence presented at the Respondent's trial proves beyond a reasonable doubt that the Respondent is a sexually violent predator, as that term is defined by RCW 71.09.020(18)." CP 611.

> "(1) That the respondent has been convicted of or charged with a crime of sexual violence; and
> (2) That the respondent suffers from a mental abnormality or personality disorder, which causes him serious difficulty in controlling his sexually violent behavior; and
> (3) That such mental abnormality or personality disorder makes the respondent likely to engage in predatory acts of sexual violence if not confined in a secure facility."

Thorell, 149 Wn.2d at 758-59[20] It was further stated in *Thorell:*

> "As we explained above, as part of this review, we must determine that the mental abnormality or personality disorder, coupled with the person's sexual offense history, supports the finding that the person has serious difficulty controlling his behavior beyond a reasonable doubt." *Id.*

"The Washington sexually violent predator statute is premised on a finding of the present dangerousness of those subject to commitment." *In re Detention of Henrickson,* 140 Wn.2d 686, 692, 2 P.3d 473 (2000). Accord *In re Detention of Turay*, 139 Wn.2d at 424 where the court stated:

""Furthermore, in *Young,* we held that 'before a person can be civilly committed; the state must prove that the individual's mentally ill and dangerous." *Young*, 122 Wn.2d at 37. (footnote omitted)."

In reviewing the sufficiency of the evidence presented by the State,

---

[20] The State is required to establish that a respondent meets the criteria for commitment as a sexually violent predator by presentation of proof beyond a reasonable doubt. *In re Detention of Turay*, 139 Wn.2d 379,407-08, 986 P.2d 790 (1999).

the Court is required to use the standard provided for criminal cases. There proof beyond a reasonable doubt is also required. Failure to meet the constitutional standard of sufficiency as to any required element of proof should result in reversal and dismissal of the petition against the respondent. *State v. Green*, 94 Wn.2d 216, 618 P.2d 628 (1980).

"The constitutional standard for reviewing the sufficiency of the evidence in a criminal case is 'whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *State v. Bingham*, 105 Wn.2d 820, 823, 719 P.2d 109 (1986) (*quoting, Jackson v. Virginia*, 443 U.S. 307, 319, 61 L.Ed.2d 560, 99 S.Ct. 2781 (1979)). Thus, not only do the major elements set forth above need to be proved but the State must also show serious difficulty controlling a person's behavior and present dangerousness. Applied to this case, the State's proof is deficient.

Also, if there is substantial evidence, then appellate review determines whether the findings support the conclusions of law and judgment. Appellate courts review issues of law de novo. *State v. Johnson,* 128 Wn.2d 431, 443, 909 P.2d 293 (1996) (citing *State v. Ford,* 125 Wn.2d 919, 923, 891 P.2d 712 (1995)).

Respondent's Argument

The respondent argued that the state must prove the elements of RCW 71.09.020 beyond a reasonable doubt. CP 449. This would involve proof of the element that "...the person more probably than not will engage in such acts if released unconditionally from detention on the sexually violent predator petition." *Id.*

The respondent's argument is summarized as follows:

> " *Kansas v. Crane,* 534 U.S. 407 (2002), for example, pointed out that a distinction between a dangerous sexual offender subject to civil commitment and 'other dangerous persons who are perhaps more properly dealt with through criminal proceedings...is necessary lest 'civil commitment' become a 'mechanism for retribution or general deterrence' functions properly those of criminal law, not civil commitment.."

CP 450. See *Kansas v. Crane,* 534 U.S. 407, 122 S.Ct 867, 151 L.Ed.2d 856 (2002).[21] This safeguard and reminder, stated by the Untied States Supreme Court in *Crane,* translated into the requirement that the state must show a serious mental disorder that resulted in a special and serious lack of

---

[21] According to the holding in *Crane*, the federal Constitution does not allow civil commitment pursuant to the Kansas SVP act without a determination of the issue whether the sexual offender lacked control over his dangerous behavior. 534 U.S. at 413, 122 S.Ct. at 870.

There must be proof of serious difficulty in controlling behavior. 534 U.S. at 414, 122 S.Ct. at 870. However, there does not have to be a distinguishment between volitional, emotional or cognitive impairments. But, there must be a special and serious lack of ability to control behavior as a critical distinguishing feature of that "serious...disorder." 534 U.S. 413-14, 122 S.Ct. at 870.

ability to control behavior in order to justify indefinite civil commitment. Thus, the respondent argued: "Special and serious lack of ability to control behavior is the true standard for the volitional control criterion in Washington." CP 450.

Respondent's argument is based in part on *Crane's* requirement for the state to prove "special and serious lack of ability to control behavior" in order to distinguish the SVP from any other criminal who has served his sentence and is paroled. This is acknowledged in *In re Detention of Thorell*, 149 Wn.2d 724, 72 P. 3rd 708 (2003). However, In *Thorell,* the court held that the *Crane* standard of "special and serious lack of ability to control behavior" did not require a special finding by the jury or the court.

Thorell perpetuated *Crane's* determination that there is no "bright line" rule to determine the degree to which a person's control over their behavior must be impaired "in favor of a case specific analysis." *Thorell* at 735, CP 451. Applied to the case at bench the respondent argued: "Under the *Crane* standard then, the volitional impairment must be caused by a special feature of the DSM diagnosis, a feature that is not accounted for by the diagnosis itself, and there must be no reasonable doubt that this serious lack of ability to control behavior exists and that it is caused by the special feature of the diagnosis." CP 450-1.

Essentially, the respondent's argument was that there must be

something in the case to distinguish the dangerous sexual offender from the dangerous but typical recidivist that is convicted in the ordinary criminal case such as a child molester.[22]

Here, it was shown by the respondent in his defense:

1. He did not molest any children at any time when he was on parole and in their presence. This included the family for which Mr. Robinson twice served two years of confinement for parole violations for being in the presence of the two sisters.

2. There were no reports from SCC of any loss of ability to control his behavior while confined. Nor any reports of loss of control of Robinson's behavior during the time he served his prison sentence for Child Molestation at McNeil Island.

For example, as is oftentimes the case, Mr. Robinson did not cut out pictures of children from magazines. He did not engage in any inappropriate sexual behavior with youthful looking inmates. Yet, the trial court-as it did in nearly all the respondent's expert's testimony-discounted these significant factors.

---

[22] See conclusion of law 7: "Further, Respondent's prior sexual offenses, parole violations, and the testimony of Dr. Goldberg provided a sufficient link of the Respondent's mental disorders to a serious difficulty controlling his behavior. " CP 611.

IV. THERE WAS NOT SUBSTANTIAL EVIDENCE TO SUPPORT THE FOLLOWING FINDINGS OF FACT

Standard of Review

As a general rule of review:

> "When this court reviews the sufficiency of the evidence in sexually violent predator commitment proceedings the evidence when viewed in the light most favorable to the State must be sufficient to allow a rational trier of fact to conclude that the person has serious difficulty controlling behavior and fits the criteria of a sexually violent predator."

In re Detention of Kelley, 133 Wn.App. 289, 295, 135 P.3d 554 (Div. I 2006) *review denied*, 159 Wn.2d 1019 (2007).

According to *State v. Sommerville,* 111 Wn.2d 524, 760 P.2d 932 (1988):

> "Substantial evidence exists if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise. *State v. Thetford*, 109 Wn.2d 392, 396,745 P.2d 496 (1987)."[23]

Specific Findings of Fact

A. The trial court erred when it entered finding of fact 4:

> "He clearly placed himself in a position of trust and was able to groom WB and build trust between himself and the child as well as WB's mother" CP 597.

---

[23] According to *Thetford*: "...a trial court's findings of fact will be upheld on appeal so long as they are supported by substantial evidence."

There was no evidence of grooming. According to Mr. Robinson's testimony he worked at an apartment complex as a maintenance person. We was asked to baby sit WB on one occasion. CP 344. He met the family when WB's mother moved into the 21 unit apartment complex When Robinson would find something in the storage units he would bring it to her because she did not have much. CP 343.

B. The trial court erred when it entered finding of fact 5:

> "Mr. Robinson inserted himself into a position of trust, involving himself with the church youth group, and the parents consequently trusted the child [AMM] with him." CP 597-8.

According to Mr. Robinson's testimony he taught Bible Studies for a period of two months that involved a class of 12 youngsters. CP 312. A preacher asked him to take over the class that met once a week. CP 312-13. The childrens' parents were present. *Id.*

With regard to the specific incident with AMM, according to Mr. Robinson's testimony his parents left the child at Robinson's church "without asking me, without asking the preacher...." CP 324. "But everybody left, and they left him there at the church with me. The preacher wasn't happy about it and I wasn't happy about it. But they [parents] weren't at home. We had no way to get ahold of them." *Id.*

C. The trial court erred when it entered findings of fact 13:

> "Despite an instance of heterosexual co-habitation, his conviction in 1987 of lewd and lascivious conduct with a child under the age of fourteen and an accusation in 1997, followed by a conviction in 2001 demonstrates that Robinson has an ongoing and recurring interest in children that qualifies him as a pedophile." CP 600.

This is a conclusion of law. If this is denominated a finding of fact there is no data from which the trial court could find or conclude that anyone convicted of two sex crimes and have been involved in one uncharged incident[24] are qualified pedophiles.

D. The trial court erred when it entered Finding of fact 15:

> "Robinson is ego based in his reference and is manipulative and pursued a lifestyle of a predatory pedophile. His choice of work was unstructured and placed him in a situation to permit a lot of contact with children. To accomplish this, Robinson pursued opportunistic relationships, whether in a church setting or in carnival work. His contacts with children and his opportunities to baby-sit were not accidental but predatory." CP 600-601.

There was no other testimony in the trial except that Mr. Robinson testified that he baby-sat whenever he was asked by a parent. With regard to AMM he testified that he did not offer to babysit him. Rather, he was asked by AMM's parents to babysit. CP 322.

With regard to the other victim WB, his mother needed someone to

---

[24] It is unknown what incident the trial court is referring to with regard to "an accusation in 1997." See trial court's finding of fact 20 "There were allegations in the 1980's and in 2000, which were not the subject of criminal prosecution." CP 602.

babysit because the daycare facility was closed and she needed someone to babysit immediately because she had to go to work. Mr. Robinson testified that he volunteered. CP 344. See *State v. Mulder,* 29 Wn. App. 513, 629 P.2d 462 (1981) where the court disallowed expert testimony regarding the alleged propensity of baby-sitting boyfriends to inflict child abuse.

E. The trial court erred when it entered finding of fact 16.

> "Dr. Page opined and felt strongly that Robinson posed a high risk to re-offend." CP 601.

Dr. Page testified that he felt compelled to "gratuitously discuss that and emphasize it in my report. Because that really wasn't the intent of the referral. But you know, he–he was anticipating release in 2007 or 2008...And he was hoping to go back down to California and return to the carnival." I RP 62. No state agency contacted Page for an evaluation of Mr. Robinson or asked him to comment on his personal opinion of risk to offend.. *Id.* There was no other basis upon which this opinion was founded other than assumptions. RP 66.

F. The trial court erred, in part, when it entered finding of fact 23:

> " In addition, there were several allegations reported by children in Mr. Robinson's neighborhood, where a three year old *girl* said that he had performed oral sex on her, and a four year old girl said that Mr. Robinson had touched her and pulled her pants down. There was also an allegation from a twelve-year -old boy arising from an incident in 1984. But the child reported to school officials and it did not go beyond that report." CP 602-3.

According to Dr. Goldberg's testimony: "Another thing I–there was another allegation in 1984, in which he was accused of annoying a 12 year-old boy. He was not charged with this incident. This would not be significant, unless he was convicted of these two incidents."[25] II RP 114.

G. The trial court erred when it entered finding of fact 28.

> "Pedophilia... affects Mr. Robinson's volitional capacity, predisposes him to commit criminal, sexual acts...affects his decisions which drive him to commit sexual crimes repeatedly...." CP 604. (See appendix: set forth in full.)

The trial court erred when it adopted the testimony of Dr. Goldberg set forth in finding of fact 26 and 27. Contrary to these findings Dr. Manley testified that Mr. Robinson does not suffer from a personality disorder. III RP 323-4. Dr. Manley also testified that in his opinion Mr. Robinson does not have a mental abnormality. III RP 325.

Also, contrary to this finding of fact 28 Dr. James C. Manley testified that Mr. Robinson was able to exercise volitional control III RP 328-29. For instance, he testified that during Mr. Robinson's three contacts with children while released on parole there was no report of him reoffending. RP 328. In addition, Mr. Robinson exercised volitional control while being confined at

---

[25] With regard to the three year old, Dr. Goldberg's actual testimony was; "A three year old *boy* accused him of having oral sex with him....." II RP 112. (gender emphasis mine.)

the SCC by not making scrapbooks of children's pictures. Nor were there any reports of Robinson being attracted to youthful appearing residents at the SCC. RP 330-32.

If this finding of fact were established in science then all people who are pedophilic and who are subject to the state's subjective selection for indefinite SVP confinement would never be released. It is against the grain of common sense to find and to declare that everyone who is a pedophile will "drive him to commit sexual crimes repeatedly...." ff. 28, CP 604.

According to Dr. Manley's testimony: "However, being a pedophile doesn't necessarily mean you're going to offend. The diagnosis is not destiny. With the age and recidivism information that we know about and Mr. Robinson's age of 48, there's a large difference when he offended, for example in 1987 and 2000 , of his age and his libidinal drive until now." III RP 326-27.

Finally, contrary to the court's finding of fact 28 and to finding of fact 31,[26] Dr. Manley concluded that Mr. Robinson does not have a mental abnormality. This condition is described by statute-not by the *DSM-* as a congenital or acquired condition, affecting the emotional or volitional capacity, which predisposes the person to the commission of sexual acts in a degree

---

[26] The trial court concluded finding of fact 31 by stating: " Based upon the4se observations, Dr. Goldberg concluded to a reasonable degree of psychological certainty, that Mr. Robinson's pedophilia constitutes a mental abnormality. And the Court accepts that conclusion." CP 605.

constituting such a person a menace to the health and safety of others. RCW 71.09.020 (8).

H. The trial court erred when it entered finding of fact 29.

> "Mr. Robinson's activities during his parole period are a strong indicator of his failure to control his volitional capacity." CP 604.

According to the contrary testimony of Dr. James C. Manley there was no evidence that Mr. Robinson had sexual contact with children during his parole period. III RP 329. Dr. Manley affirmed that if Mr. Robinson had volitional control problems he would have reoffended during his contacts with children at that time. The trial court choose to disregard this lack of evidence in reaching its unsupported finding.

Dr. Manley testified that the legal term volitional has "No clear obstruction about that within the– with the psychological field." III RP 327. Volitional capacity has to do with separating the "common criminal" from a sexual predator. III RP 328.

I. The trial court erred when it entered finding of fact 30, including:

> "However, when he arrived in Washington State, he placed himself in the vicinity of children, and he proceeded to babysit young children, and then he proceeded to molest children... He then told the officer that he masturbates to the thoughts of children, albeit that he tried not to. This shows he lacks volitional control. And this led to his offense in 2000. It is this pedophilia that predisposes Mr. Robinson to commission of criminal sexual acts." CP 604-5.

Contrary to this finding when Mr. Robinson first came to Washington State he had no job. He found employment and a place to live. He became employed as a maintenance person in an apartment complex. CP 300. He lived with Heather Taylor and her family in a mobile home. CP 342.

Recently, he has exercised volitional control while being confined as the SCC. There have been no reports of loss of volitional control by pursuing relationships with younger looking inmates. Also, he does not cut and paste pictures of youngsters from magazines as some other inmates do. III RP 330-32.

Volitional control or volitional capacity is a legal term. According to the respondent's evidence: there is no clear instruction within the psychological field. III RP 327. Dr. Manley testified in part: "But we really aren't clear what the definition of volitional control is." RP 329. The evidence is that during his recent history of confinement over a period of 12 years Mr. Robinson has controlled himself.

J. The trial court erred when it entered finding of fact 31, including:

> "Given the span of time, it is clear that Mr. Robinson has not resolved his sexual urges and his fantasies as it relates to young children, and, if free in the community, he would continue to engage in this behavior." CP 605.

There was no substantial evidence in the case to support the above-stated finding of fact beyond a reasonable doubt. It has been nearly 13 years since Mr. Robinson committed his last sexual offense.

There was no showing by the state that treatment was available to anyone diagnosed with pedophilia to control their behavior. Nor was there evidence that having been diagnosed with pedophilia predisposes anyone to engage in "harmful behavior." If this were the case, no one with that diagnosis who was incarcerated would ever be released from indefinite confinement. According to Dr. Manley: "Well, volitional control is and should be above and beyond the behavior of pedophilia. " III RP 328.

K. The trial court erred when it entered finding of fact 33 which includes:

> "Not only did he offend against children, but he repeatedly did so over a span of years. His failure to exercise self-control is demonstrated by repeated probation violations for contact with children...." CP 605.

Again, according to the evidence presented by Dr. Manley, Mr. Robinson did exercise self control when he was released to the community and was in the presence of children. He did not sexually reoffend while on parole. III RP 328. There was a lack of evidence that Mr. Robinson groomed children.

L. The trial court erred when it entered finding of facts 34, 35,36 and 37.[27]

Firstly, the trial court determined that Mr. Robinson was an SVP and that his mental abnormality and personality disorder, which was contested, made him more likely than not to commit predatory acts of sexual violence if not confined to a secure facility. FF 34, CP 606.

---

[27] CP 606-7. (See appendix).

Contrary to this finding was the testimony of Dr. Manley who testified that Mr. Robinson was not likely to engage in predatory acts of sexual violence. III RP 334. He testified that based on his risk assessments Mr. Robinson's mental abnormality or alleged personality disorder was not likely to cause him to engage in predatory acts of sexual violence if he were released into the community. *Id.* Dr. Manley rated Mr. Robinson "at moderate risk to reoffend." III RP 350. On the Static -99 R both experts ranked the respondent at moderate/high.[28] III RP 351.

M. The trial court erred when it entered finding of fact 40. CP 607.

Dr. Manley rejected the validity of the SRA:FV (Structured Risk Assessment forensic Version). III RP 335. The instrument has not been published, has not been critiqued by the forensic psychologist community and is still experimental. III RP 336. It is only used by state evaluators. *Id.* Over the past year, for instance, the scoring manual has changed twice. *Id.* The instrument was described as not as reliable. The population of the study group was "either court referred or were sent to the treatment facility [Bridgewater] based on sexual activity in prison." Consequently, they were still in the department of corrections system. III RP 337. That stale data collected between 1956 to

---

[28] The Static-99R was criticized by Dr. Manley because is included "...samples from Europe, samples from Canada, and a few samples from the United States." III RP 338.

1984 is attempted to be applied to people like Mr. Robinson who are "post-sentence people, which are different." III RP 337`. Also, there were only 300 people in the sample group.

According to Dr. Manley "It needs to be replicated, and it needs to be published, and it needs to be reviewed. Those things are kind of step-by-step what we do to check reliability and check the validity of these psychometric tests." III RP 338, See also, *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). *Frye* requires that the reliability of new scientific methods be tested on three factors: "1) the validity of the underlying principle, 2) the validity of the technique apply that principle; and 3) the validity of the application of the technique used on the particular occasion." *State v. Huynh*, 49 Wn. App. 192, 194-5, 742 P.2d 160 (1987), *review denied*, 109 Wn.2d 1024 (1988).

N. The trial court erred when it entered finding of fact 41. CP 607.

This finding relates to protective factors that might alleviate a concern for Mr. Robinson to re-offend. The trial court took one of Mr. Robinson's mitigating factors, his age then of 48, and instead declared: "The court finds, in this instance, that age is not a mitigating factor, in that the score on the Static-99R and the Static-2002R takes into account the current age of the offender." CP 607. Other than being inserted as a static factor the trial court did not consider the clinical significance of this factor.

O. The trial court repeated this conclusion in finding of fact 47 when

it stated in part:"However, the Court does not accept the view of Dr. Manley, as the age differential and the libidinal difference with age is accounted for in the Static-99R." CP 609. This factor is only considered in the Static-99 where the factor is merely listed as Item Name "Young" and a place for "Score". Mr. Robinson was ranked with a score of minus one or a deduction of one point. III RP 280. (See CP 1-61 from Jefferson County) (See appendix for copy of form).

P. The trial court erred when it entered finding of fact 42: CP 608.

In this finding the trial court decided that "...Mr. Robinson does not have the protective factor[29] of having realistic release plans." CP 608. It was stated in a Seattle University Law Review article on SVP's that trial judges will find almost any reason to not release an inmate of SCC for fear of disturbing the public's sensitivity to sexual offenders. See generally, "Predator's and Politics: A Symposium on Washington's Sexually Violent Predator's Statute." 15 UPS LR (1992).

Contrary, to the trial court's findings was the evidence that Mr.

---

[29] The trial court did not mention or list or refer to any potential mitigating factor that was in Mr. Robinson's favor. For instance, although Mr. Robinson developed romantic relationships with female partners and had been employed mostly through his work life, there was no mention of these positive factors.

Robinson had a total of four relationships. III RP 299. He was even employed in the kitchen at SCC. II RP 124, III RP 309.

Robinson's release plans were described as realistic: " But the fact that he has a plan to go back and do the same job is realistic...." III RP 348. For instance, he told Dr. Manley that he planned to return to California and work in the construction field. One job would be cleaning up the rubble around construction sites and working in the construction field. *Id.* The other job that he was capable of performing would be tearing off roofs prior to new roofs being installed. These were some of the same jobs he performed before moving to Washington. *Id.*

Q. The trial court erred when it entered finding of fact 43. CP 608.

Dr. Manley testified that Mr. Robinson did not fit the profile of a predator. Yet, the trial court found in part: "From Mr. Robinson's past history of sexual misconduct, it is clear that his activities were predatory."[30] CP 348.

Of the three definitions of a predator all three encompass most social relationships, i.e., 1) acts directed toward strangers. There was no testimony that Mr. Robinson's past sexual conduct involved random strangers, such as he would meet in his carnival work. 2) Individuals with whom a relationship has been established or promoted for the primary purpose of victimization.

---

[30] Predatory acts is not a scientific term. Rather it is a legislative term that is employed to infer some animalistic urge. See RCW 71.09.020(10) which defines "Predatory." See also, ff. 43, CP 608.

Robinson testified that he baby-sat when he was asked by the youngsters' parents.[31] CP 322. The third category, added by the legislature, is all encompassing and could apply to almost anybody: persons of casual acquaintance with whom no substantial personal relationship exists.

The court concluded that Mr. Robinson's behaviors were "grooming behaviors and were done for the purpose of furthering his sexual desires against children." No witness testified to the details of Mr. Robinson's alleged grooming behaviors. No parent testified. No victim testified.

There was testimony during the trial that the parent of the two female children in California that resulted in Mr. Robinson's parole revocation on two occasions (in the vehicle and walking along a road) did not believe the accusations against Mr. Robinson or felt that Robinson would molest his daughters. CP 235. Ms. Guss testified: "The father trusted him, and he didn't believe that he had molested anyone." CP 243.

R. The trial court erred when it entered findings of fact 48 and 49. CP 609.

Both of these findings have to do with Mr. Robinson's alleged lack of volitional control because he was in the presence of children when he was on

---

[31] Robinson testified that he babysat AAM when he was asked by his parents and expected to be paid. CP 322-23. WB's mother asked him to babysit. He volunteered to do so on one occasion that led to his arrest. CP 344. In an uncharged incident he had contact with P who was being babysat by Mr. Robinson's girlfriend. CP 348.

parole. Yet, the evidence in the case was that Mr. Robinson was nevertheless in the presence of some children and he did not molest them. Dr. Manley testified this was evidence that he did exercise volitional control. III RP 328-29.

In addition, Mr. Robinson lived with a woman (Heather Taylor) in a romantic relationship for over two years. She had two children. There were no allegations that he molested these children.

S. The trial court erred when it entered findings of fact 50 and 51 CP 610.

Both of these findings have to do with Mr. Robinson's behavior while an inmate in the SCC as it related to his ability to control himself. The trial court rejected the testimony that Mr. Robinson "...had not participated in cutting out pictures of children from magazines or the fact that he had not sexually offended against younger residents of the SCC shows that he is able to control himself. " ff 50, CP 610. And the court stated in another finding: "In particular, the fact that Mr. Robinson has been in the SCC and had not offended is of little value in the analysis." ff 51; CP 610.

Comparison should be made to the evidence in *In re Detention of Thorell, supra,* where the Supreme Court found sufficient evidence that a consolidated petitioner named Bishop was an SVP beyond a reasonable doubt because "the State also introduced evidence that during his confinement Bishop had continuously attempted to solicit sex from other inmates who fit his preferred molestation profile. One year before his scheduled release date,

Bishop was caught soliciting a young, slim, mentally retarded inmate with childlike features." 149 Wn.2d at 763.

In addition, there was evidence presented by the State to show that Thorell had difficulty controlling his behavior. Evidence was introduced to allow the jury to conclude beyond a reasonable doubt that Thorell was an SVP because he promoted his sexual fantasies of children by "...modifying children's pictures to make pornography, writing pornographic stories featuring children[32], and concealing store advertisements featuring children...." *id.* at 759.

T. The trial court erred when it entered finding of fact 52.

The trial court stated in part: "Also of great concern and which supports the Court's conclusions is the extreme denial presented by Mr. Robinson during his own testimony in this case...When describing the incident in California, he stated that the child wanted to be touched, as opposed to taking responsibility as the adult in the situation." CP 610.

Contrary to this finding were the following excerpts from Robinson's video deposition:

> "Q. Then why did you start touching him?
> A. I don't know. I just did it. It's something that happened." CP 326.
> "Q. Okay. Why did you start touching him?
> A. I don't know. I just did it. It's just something that just

---

[32] It is reputed that Mr. Robinson is at lower end of intellect and illiterate. III RP 318.

happened." CP 327.

"Q. Where did you start touching him at, what part of his body?
A. In the crotch.
Q. And why did you touch him in the crotch?
A. I don't know. It's just something that happened." CP 328.
"Q. Okay. How–did you touch him first over his clothing?
A. Yes." CP 328.
"Q. Okay. Did you unzip his pants at some point in time?
A. Yes.
Q. And what did you do after unzipping his pants?
A. Touched him some more." CP 330.
Q. Okay. So after unzipping his pants what did you do?
A. We–I touched him some more." CP 331.

This testimony shows, Mr. Robinson volunteered considerable information. According to Dr. Manley regarding denial: "Well, I was – given the setting, I could see why he wouldn't want to talk about it. However, what's also important is – and in one of – or two of Hanson's metanalyses, denial was not really a robust predictor of recidivism." III RP 293.

D. Conclusion

This court should reverse the trial court decision and order that the defendant should be released from secured confinement to community supervision.

Dated this 12th day of September, 2013.

Respectfully Submitted,

James L. Reese, III

James L. Reese, III
WSBA #7806
Court Appointed Attorney
For Appellant

STATE OF WASHINGTON
KITSAP COUNTY SUPERIOR COURT

In re the Detention of:	NO. 07-2-03026 -5
CHARLES ROBINSON, Respondent.	FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER OF COMMITMENT

This matter was tried to the Court on December 10-12, 2012, pursuant to RCW 71.09.090, to determine whether the Respondent, Charles Robinson, should be civilly committed as a sexually violent predator (SVP). The Court heard the testimony of the following witnesses: Sharon Guss (by videotaped deposition); Dr. Ronald Page; Dr. Harry Goldberg; the respondent, Charles Robinson (by videotaped deposition); Dr. James Manley; and the declaration of John Withrow. Having considered this testimony and the exhibits entered into evidence, as well as the written closing arguments of counsel, the Court now enters the following:

I. FINDINGS OF FACT

1. On December 18, 2007, the State filed a petition alleging that Charles Robinson is a sexually violent predator as defined under RCW 71.09.020(18). On December 21, 2007, the Court entered an order affirming the existence of probable cause to believe Mr. Robinson is an SVP, and directed that he be transported to the Special Commitment Center (SCC).

ATTORNEY GENERAL'S OFFICE
Criminal Justice Division
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-6430

2. In order to involuntarily civilly commit Mr. Robinson under RCW 71.09, the State must prove beyond a reasonable doubt that he is a sexually violent predator. The term "sexually violent predator" is defined in RCW 71.09.020(18) as a person who: 1) has been convicted of or charged with a crime of sexual violence; and 2) suffers from a mental abnormality or personality disorder; and 3) the mental abnormality or personality disorder makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility.

3. Mr. Robinson was born on January 9, 1964, and is now 49 years old. He has been convicted of one sexually violent offense as that term is defined under RCW 71.09.020(17). He was convicted for Child Molestation in the First Degree in Jefferson County Superior Court on March 9, 2001. Child molestation in the first degree is, by definition, a sexually violent offense. This offense occurred in 2000. Victim WB was four-years-old at the time of the offense. Mr. Robinson was initially charged with Rape of a Child in the First Degree and ultimately convicted by a jury for Child Molestation in the First Degree. He was sentenced to 89 month following appeal.

4. Mr. Robinson denied and continues to deny that he committed any inappropriate acts against WB. Mr. Robinson worked as a maintenance manager at an apartment complex in Port Hadlock. By his own admission, he befriended WB's mother, Christine. He clearly placed himself in a position of trust and was able to groom WB and build trust between himself and the child, as well as WB's mother. In 2000, Mr. Robinson molested WB by placing his penis in the child's mouth, and in the child's words, Mr. Robinson "peed" into the child's mouth.

5. Several years prior to his conviction for molesting WB, Mr. Robinson was charged in California with three counts of Lewd and Lascivious Conduct with a Child under the Age of Fourteen. This offense occurred in 1987. The victim was a six-year-old boy with

ATTORNEY GENERAL'S OFFICE
Criminal Justice Division
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-6430

the initials AMM. AMM was attending a pre-Halloween function at a church. AMM and his parents had been acquainted with Mr. Robinson for three years. Mr. Robinson inserted himself into a position of trust, involving himself with the church youth group, and the parents consequently trusted the child with him. During that pre-Halloween function, he was alone with the child in the church facilities where he unclothed and fondled the child, and touched him in his private area. It was reported that Mr. Robinson had oral sex with the child.

6. Although charged with three counts of Lewd and Lascivious Conduct, pursuant to a plea agreement, Robinson pleaded guilty to one count while the other two counts were dismissed. As a result of his conviction, Robinson was sentenced to six years in prison, and he was subject to parole after his incarceration.

7. Aside from Robinson's convictions, the Court considered his behavior while on parole. In California, while under parole in the 1990's, Robinson committed several parole violations, two of which earned him two separate terms of incarceration of twelve months each. In March of 1992, he was observed by his parole officer sitting outside of his back door watching children play. Robinson admitted that he had brought a young child into his home on at least two occasions and had accompanied a seven-year-old into the bathroom. Robinson admitted to wrestling with the children, although he denied molesting them. For this parole violation he received a one-year term in jail.

8. Mr. Robinson returned to the community in 1993. Within just a few months of release, he was again violated. During a search of his residence, a probation officer discovered child magazines and a toy car at his residence. More concerning was the contents of a locked trunk belonging to Robinson. The trunk contained boys underwear and badges associated with a children's youth group. On the same day as that search, Robinson arrived at his residence in a car accompanied by two young children, which was a violation of his parole. For these reasons, Robinson was sentenced to an additional year in jail.

ATTORNEY GENERAL'S OFFICE
Criminal Justice Division
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-6430

9. Mr. Robinson returned to the community on September 28, 1994. Within less than three months, he was observed walking along a road holding hands with two small children, ages six and nine. This was a violation of his probation and he was again incarcerated. His parole expired on January 16, 1995.

10. In addition to Mr. Robinson's parole violations in California, there were additional allegations that came to the attention of authorities, although no charges or convictions arose from these allegations. One allegation was from a child, PJH, who was three-years-old at the time. He reported to his mother that Robinson sucked on his "pee-pee," and that it occurred during a time when Robinson was baby-sitting. Additionally, a four-year-old girl with the initials COP, reported to her father that Robinson had pulled her pants down. Her five-year-old brother disclosed that Robinson made him suck on Robinson's penis and paid him to allow Robinson to suck on the child's penis. The same child reported that he observed Robinson suck on his sisters' privates. His sisters were COP and KGP.

11. As to Mr. Robinson's convictions, the Court does find, beyond a reasonable doubt, that he has been convicted as well as charged with a crime of sexual violence; and the predicate conviction requirement under the sexually violent predator statute has been satisfied.

12. The Court next considered whether Mr. Robinson suffers from a mental abnormality or a personality disorder. The term "mental abnormality" is defined as "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 as a menace to the health and safety of others." The term "personality disorder" is defined, in pertinent part, as an enduring pattern of inner experience and behavior that deviates markedly from the expectations of the individual's culture. It is pervasive and inflexible, has onset in adolescence or early adulthood, is stable over time and leads to distress or impairment. The Court finds, beyond a reasonable doubt, based on the expert psychological testimony

ATTORNEY GENERAL'S OFFICE
Criminal Justice Division
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-6430

presented at trial that Mr. Robinson does suffer from a mental abnormality and a personality disorder; and that his mental condition causes him serious difficulty in controlling his sexually violent behavior. For this determination, the court relied upon expert testimony from various psychologists.

13. The court first heard from Dr. Ronald Page, who is a Ph.D. clinical psychologist experienced in forensic and diagnostic work. Dr. Page performed a diagnostic consultation in 2006. He reviewed the central file and medical folder, which included Mr. Robinson's criminal background, prior evaluations, incident reports, infractions and correspondence. Dr. Page diagnosed Mr. Robinson with pedophilia, which is a chronic condition such as sexual identification tend to be. Despite an instance of heterosexual co-cohabitation, his conviction in 1987 of lewd and lascivious conduct with a child under the age of fourteen, and an accusation in 1997, followed by a conviction in 2001 demonstrate that Robinson has an ongoing and recurring interest in children that qualifies him as a pedophile.

14. Pedophilia is a mental disorder under the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV-TR). Moreover, according to Dr. Page, this is a chronic condition where Mr. Robinson has no insight and one for which he refuses to address. Importantly, Robinson has been in state custody since 2001 and has not availed himself of any treatment.

15. Dr. Page made two additional diagnoses of Robinson. One is substance abuse, where Robinson acknowledged a past problem with alcohol, crank and other amphetamines. A third diagnosis is borderline personality disorder. In reaching this diagnosis, Dr. Page noted that Robinson does not form long-term, interpersonal relationships or deep personal relationships. Robinson is ego based in his reference and is manipulative and pursued a lifestyle of a predatory pedophile. His choice of work was unstructured and placed him in a situation to permit a lot of contact with children. To accomplish this, Robinson pursued

ATTORNEY GENERAL'S OFFICE
Criminal Justice Division
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-6430

opportunistic relationships, whether in a church setting or in carnival work. His contacts with children and his opportunities to baby-sit were not accidental but predatory.

16. Dr. Page opined and felt strongly that Robinson posed a high risk to re-offend. In particular, Dr. Page noted that Robinson had never been treated as a sex offender, yet he was anticipating release at the end of his sentence, in 2007, and was hoping to go back to his lifestyle prior to his incarceration, which Dr. Page believed included a lifestyle suited to that of a pedophile. Dr. Page noted that Robinson's previous employment in unstructured carnival work and managing apartments allowed him to begin relationships with single mothers to gain access to their children, all being consistent with predatory practices of a pedophile.

17. Dr. Harry Goldberg is the State's retained expert. He is a clinical psychologist licensed since 1985, and he specifically diagnoses the mental condition of sex offenders. Since 1986, he has evaluated and treated thousands of sex offenders.

18. Dr. Goldberg was asked to evaluate Mr. Robinson to determine if he met the criteria of a sexually violent predator. Dr. Goldberg evaluated Robinson in July of 2007 and then again in October of 2012. He reviewed between three to four thousand pages of materials and interviewed Robinson while he was still at the Walla Walla state prison and then at the SCC. Dr. Goldberg considered Robinson's mental state, the crimes that had occurred and the crimes that he was responsible for, his general mental capacity and whether there existed a major mental disorder.

19. Dr. Goldberg indicated that, under the statute, it was necessary to determine if Mr. Robinson had a current mental disorder. The first time he met with Mr. Robinson he administered the Hare Psychopathy Checklist Revised (PCL-R), as well as four actuarial instruments. Dr. Goldberg also considered dynamic risk factors, as opposed to the actuarial instruments, which is a static evaluation. The second evaluation involved some of the same things, but a newer assessment: the SRA-FV, was performed.

ATTORNEY GENERAL'S OFFICE
Criminal Justice Division
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-6430

20. Mr. Robinson's criminal history was important in forming Dr. Goldberg's opinions, and he also relied upon offenses for which Robinson was not convicted. He stated that convictions hold the most weight, but allegations are also important in that it is unusual to be accused of a sex offense. There were allegations in the 1980s and in 2000, which were not subject of criminal prosecution.

21. Whether the Respondent suffers from a mental abnormality or personality disorder which causes him serious difficulty in controlling his sexually violent behavior and makes the person likely to engage in predatory acts of sexual violence, if not confined to a secure facility, requires the Court to determine if there is a diagnosis of a mental condition currently existing and whether this condition creates a serious risk of re-offense.

22. As to the diagnosis, Dr. Goldberg diagnosed Mr. Robinson with pedophilia, sexually attracted to males, nonexclusive type. He determined that, based upon the commonly used and accepted definitions used by experts in the field, and as defined in the DSM, the person who is diagnosed as such would, over a period of at least six months, have recurrent, intense sexually arousing fantasies, sexual urges or behaviors involving sexual activity with a prepubescent child or children generally 13 years of age or younger. Further, the person has acted on these sexual urges, or it had caused a marked distress or interpersonal difficulties. Moreover, the perpetrator would have to be at least 16 years old and at least five years older than the child with whom he had sexual activity.

23. Dr. Goldberg noted that Mr. Robinson's first conviction was in 1987 and the second in the year 2000. When interviewed in 2012, Mr. Robinson admitted to the 1987 offense as to taking the child's clothing and kissing the child. As to the 2000 offense, Mr. Robinson was in total denial and has remained in total denial about that offense. In addition, there were several allegations reported by children in Mr. Robinson's neighborhood, where a three-year-old girl said that he had performed oral sex on her, and a four-year-old girl said that

ATTORNEY GENERAL'S OFFICE
Criminal Justice Division
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-6430

Mr. Robinson had touched her and pulled her pants down. There also existed an allegation from a twelve-year-old boy arising from an incident in 1984. But the child reported to school officials, and it did not go beyond that report.

24. Dr. Goldberg opined to a reasonable degree of psychological certainty that he believed Mr. Robinson suffers from recurring, intense, sexually arousing fantasies with prepubescent children and that there has been a pattern of sex acts towards children, which has lasted for a period in excess of six months; and that these urges create dysfunction, in particular the criminal convictions; and that these fantasies cause marked distress and interpersonal difficulties. Overall, to a reasonable degree of psychological certainty, Dr. Goldberg opined that Mr. Robinson does suffer from pedophilia, which is consistent with Dr. Page's opinion.

25. In addition, Dr. Goldberg opined, to a reasonable degree of psychological certainty that Mr. Robinson suffers from another mental abnormality, in particular, psychotic disorder not otherwise specified.

26. Dr. Goldberg also opined that Mr. Robinson suffers from a personality disorder, as defined under RCW 71.09.020(9), specifically, personality disorder not otherwise specified with antisocial personality features.

27. Regarding pedophilia, the State must not only prove that Mr. Robinson suffers from a mental disorder but that the condition constitutes a mental abnormality as defined under RCW 71.09. Dr. Goldberg opined that Mr. Robinson does suffer from pedophilia, which is a mental disorder as defined by the DSM-IV-TR, and he is impaired by that disorder. Additionally, Dr. Goldberg testified that Robinson's pedophilia met the definition of mental abnormality, as defined under the statute, that being a congenital or acquired condition affecting the emotional or volitional capacity, which predisposes the person to the commission

ATTORNEY GENERAL'S OFFICE
Criminal Justice Division
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-6430

of criminal sexual acts in a degree constituting such person a menace to the health and safety of others.

28. This Court is persuaded by the testimony and opinions of Dr. Goldberg and accepts that pedophilia is a congenital or acquired condition, which, in this case, affects Mr. Robinson's volitional capacity, which predisposes him to commit criminal sexual acts in a degree constituting Robinson a menace to the health and safety of children. It is, indeed, Mr. Robinson's pedophilia which causes him to have sexual urges to have contact with children and affects his decisions, which drive him to commit sexual crimes repeatedly, despite his experience and knowledge that these actions are criminal and that he would be subject to serious consequences. Dr. Goldberg testified that Robinson's pedophilia leads to intense and recurring sexual fantasies involving children, and this has led him to commit crimes against children. He is predisposed to commit sexual offenses and has been a menace to society. Hence, the diagnosis of pedophilia qualifies Mr. Robinson as having a mental abnormality, under the state statute.

29. If the evidence contained just the 1987 conviction alone, it is doubtful that this would be sufficient for Mr. Robinson to meet the criteria of a mental abnormality, based upon the testimony. However, when the Court looked at the three parole violations in the 1990s, where Mr. Robinson had unapproved contact with children, as well as the children's items stored in a locked trunk, it is important to remember that Mr. Robinson was sanctioned each time and that did not prevent his later behavior in the year 2000. Mr. Robinson's activities during his parole period are a strong indicator of his failure to control his volitional capacity.

30. In 2000, Mr. Robinson knew that he had a previous conviction and had been on parole previously. He knew the issues. However, when he arrived in Washington State, he placed himself in the vicinity of children, and he proceeded to babysit young children, and then he proceeded to molest children. He acknowledged his problem in that he told an officer, at

ATTORNEY GENERAL'S OFFICE
Criminal Justice Division
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-6430

the time of the investigation in the 2000 case, "I cannot do this." He then told the officer that he masturbates to the thoughts of children, albeit that he tried not to. This shows he lacks volitional control. And this led to his offense in 2000. It is this pedophilia that predisposes Mr. Robinson to the commission of criminal sexual acts.

31. Given the span of time, it is clear that Mr. Robinson has not resolved his sexual urges and his fantasies as it relates to young children, and, if free in the community, he would continue to engage in this behavior. He has not engaged in treatment to manage this behavior, and so his pedophilia will predispose him to continue to engage in this harmful behavior. Based upon these observations, Dr. Goldberg concluded, to a reasonable degree of psychological certainty, that Mr. Robinson's pedophilia constitutes a mental abnormality. And the Court accepts that conclusion.

32. The next question is whether the mental abnormalities and personality disorder causes Mr. Robinson serious difficulty in controlling dangerous behavior. For example, if he is a pedophile but he is able to exercise volitional control so that he does not offend against children, the fact of the mental disorder does not mean that he has serious difficulty controlling behavior. Therefore, this question must be answered by reviewing how the disorders lead Mr. Robinson to behave. Is it because of these disorders and the mental abnormalities that he is unable to control the dangerous behaviors?

33. After a review of Mr. Robinson's history of sexual violence and the offenses against children and given his failure to follow through with conditions on parole when he was under close scrutiny, it is clear that he has serous difficulty controlling his dangerous behaviors. Not only did he offend against children, but he repeatedly did so over a span of years. His failure to exercise self-control is demonstrated by repeated probation violations for contact with children, when he was clearly directed to not have contact unless otherwise approved by the probation officer. Moreover, after arrest and conviction against a child, a

ATTORNEY GENERAL'S OFFICE
Criminal Justice Division
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-6430

lengthy prison sentence, numerous probation violations and sanctions, he continued to allow himself to babysit and placed himself around children. He was able to groom children and to gain confidence from their parents, and he continued to engage in sexual acts with those children.

34. In order to qualify as a sexually violent predator, the Court must also determine whether the mental abnormality and personality disorder make the person more likely than not to commit predatory acts of sexual violence if not confined to a secure facility. To make that determination, the State's expert, Dr. Goldberg, relied on a risk assessment using actuarial and dynamic tools. The actuarial instruments examine static factors, and specifically look at the statistics related to recidivism. The most heavily relied upon tool was the Static-99R and is considered the most common actuarial instrument in the world for predicting sexually violent recidivism. Mr. Robinson scored five, which placed him in the moderate to high risk category. Translating this, Dr. Goldberg opined that Mr. Robinson would not be "a routine sex offender," but someone who is at higher risk to reoffend when compared with other sexual offenders. In statistical terms, people who scored similarly to Mr. Robinson reoffended at a rate 35.3 percent over a ten year period following release.

35. A second actuarial instrument was performed, the Static-2002R. This instrument placed Mr. Robinson with a group of offenders that reoffend at a rate of 39.7 percent over a ten year period following release.

36. The third instrument used was the Minnesota Sex Offender Screening Tool – Revised (MnSOST-R). This instrument placed Mr. Robinson with a group of offenders that reoffended at a rate of 20 to 25 percent over a period of six years.

37. The fourth instrument used was the Sex Offender Risk Appraisal Guide (SORAG), which placed Mr. Robinson with a group of offenders that committed a violent,

ATTORNEY GENERAL'S OFFICE
Criminal Justice Division
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-6430

including sexual offense at a rate of 45 percent over seven years, and 59 percent over ten years following release.

38. These instruments vary based upon the statistics discussed above, with the most consistent report being that of the Static-99R. It is the Static-99R is the most heavily relied upon instrument by those in the field.

39. In addition to the actuarial instruments, the PCL-R was used to evaluate personality disorders. Mr. Robinson's overall score on the PCL-R placed him in the low to moderate range for psychopathic antisocial traits.

40. Of particular interest to the Court was Dr. Goldberg's scoring on the Structured Risk Assessment – Forensic Version (SRA-FV). According to the data and the three categories regarding sexual interest, relational style and self-management, Mr. Robinson scored a 3.31, which placed him in the high risk/high need category. Dr. Goldberg testified how the Static-99R and the SRA-FV are combined as to static and dynamic factors, which show Mr. Robinson to be above the 50th percent threshold to reoffend and is thus considered more likely than not to sexually reoffend.

41. In considering whether Mr. Robinson is likely to reoffend, the Court also considered whether there are protective factors that might alleviate the concern for re-offense. First, because of his confined status since his last conviction, Mr. Robinson does not have a significant length of time in the community without committing a new offense. The Court does know that the last time Mr. Robinson was free in the community he proceeded to commit a sexual crime against a child and was convicted for that. Second, the Court considered whether age is a mitigating factor. The Court finds, in this instance, that age is not a mitigating factor, in that the score on the Static-99R and the Static-2002R takes into account the current age of the offender. Furthermore, the Court is highly concerned that Mr. Robinson has not

ATTORNEY GENERAL'S OFFICE
Criminal Justice Division
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-6430

entered into nor completed a sex offender treatment program; and therefore, his risk is not lowered as a result of such a program.

42. Finally, Mr. Robinson does not have the protective factor of having realistic release plans. He demonstrated that he believes he can simply find a job in the construction field, albeit he does not have contacts in the community. His risk is not lowered through the existence of a plan. Instead, the lack of a plan would aggravate the risk to re-offend. In particular, Mr. Robinson, in the past, has participated in transient type of jobs, such as carnival work, that would expose him again to the presence of children.

43. The Court also accepts the concern, as presented by Dr. Goldberg, that future acts of sexual violence would be predatory by Mr. Robinson. Predatory is defined as acts directed toward: A) Strangers; B) individuals with whom a relationship has been established or promoted for the primary purpose of victimization; or C) with persons of casual acquaintance with whom no substantial personal relationship exists. From Mr. Robinson's past history of sexual misconduct, it is clear that his activities were predatory. He volunteered to babysit casual acquaintances and with persons with whom the relationship had been established for the primary purposes of his victimization. His behaviors were grooming behaviors and were done for the purpose of furthering his sexual desires against children.

44. The Court accepts the evaluations and conclusions of the State's expert, Dr. Goldberg, and finds that Mr. Robinson is a sexually violent predator, as is defined under the statute.

45. The Court considered the testimony of Dr. James Manley. Dr. Manley is a clinical psychologist who testified on behalf of Mr. Robinson. The two experts, Dr. Manley and Dr. Goldberg, were very close in their analysis on various fronts but differed on some basis and also in their ultimate conclusions. The Court did not find the ultimate conclusion of Dr. Manley to be persuasive.

ATTORNEY GENERAL'S OFFICE
Criminal Justice Division
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-6430

46. As to the diagnosis, Dr. Manley, as did Dr. Goldberg, diagnosed Mr. Robinson with pedophilia. However, unlike Dr. Goldberg, Dr. Manley did not find that Mr. Robinson suffers from a mental abnormality. In other words, albeit he is diagnosed as a pedophile, Dr. Manley believes he does not fit the statutory requirement that there is a current mental abnormality.

47. Similar to Dr. Goldberg, Dr. Manley used the Static-99R. Dr. Manley testified that the Static-99R is the gold standard for sex offender risk assessment, and it now addresses the age factor, which the original tool did not. Although there were slight variations in the weights given to various factors, as with Dr. Goldberg, Dr. Manley scored Robinson in the moderate to high range to reoffend. Thus, both doctors came to the same conclusion that Mr. Robinson was a moderate to high range to reoffend. However, when considering the dynamic risk factors, Dr. Manley did not consider Mr. Robinson to have the current behaviors of a pedophile. He takes into account that libidinal urges tend to decrease with age. However, the Court does not accept the view of Dr. Manley, as the age differential and the libidinal difference with age is accounted for in the Static-99R.

48. Moreover, Dr. Manley stated that he could not find that there was a lack of volitional control. The Court, in considering all of the evidence and all of the circumstances, disagrees with the analysis and conclusions of Dr. Manley and finds the fact that Mr. Robinson could not resist being with children, especially those three incidences during the time he was on parole, indicates and demonstrates a lack of volitional control.

49. Dr. Manley attempted to persuade the Court that had Mr. Robinson really lacked volitional control, he would not simply have been in the presence of those children, but he would have actually abused those children. The Court is not persuaded by that argument. The fact that he allowed himself to be amongst children, when that was a strict prohibition under his parole, demonstrates to the Court that there was a lack of volitional control.

ATTORNEY GENERAL'S OFFICE
Criminal Justice Division
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-6430

50. Furthermore, Dr. Manley opined that the fact Mr. Robinson had been a quiet resident at the SCC and had not participated in cutting out pictures of children from magazines or the fact that he had not sexually offended against younger residents of the SCC shows that he is able to control himself. Additionally, Dr. Manley posits that the fact that Mr. Robinson did not have an offense from 1987 to 2000 shows that he did not have an uncontrolled volitional reaction or knee-jerk reaction in the community. The Court disagrees with the interpretation of those analysis and events as put forward by Dr. Manley, and finds that Mr. Robinson, indeed, does lack and has demonstrated a lack of volitional control.

51. Dr. Manley also posits that because Mr. Robinson had not acted out at the SCC and because he did not cut out pictures and so forth, that this demonstrated a lack of evidence of a mental abnormality as it exists now. Again, the Court does not accept and rejects the arguments of Dr. Manley and accepts the position put forward by Dr. Goldberg. In particular, the fact that Mr. Robinson has been in the SCC and had not offended is of little value in the analysis. He has not been around four-year-old or six-year-old children whilst at the SCC, which is the general age group that Mr. Robinson has offended against in the past. And the fact that he has not cut out pictures of children from magazines is of very limited value as to whether someone is still acting out on urges. More persuasive is the fact that Mr. Robinson has reoffended when in the community and, moreover, the fact that he has not received any treatment for his condition in order to manage those urges.

52. Also of great concern and which supports the Court's conclusions is the extreme denial presented by Mr. Robinson during his own testimony in this case. He has demonstrated that he lacks a complete understanding of his actions or the fact that he has harmed anybody. In considering his testimony, he tended to blame the children. When describing the incident in California, he stated that the child wanted to be touched, as opposed to taking responsibility as the adult in the situation.

ATTORNEY GENERAL'S OFFICE
Criminal Justice Division
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-6430

53. In conclusion, the Court finds that the State has proven beyond a reasonable doubt that all elements of the sexually violent predator statute have been met as to Mr. Robinson. He does qualify as a sexually violent predator under the law of our state.

II. CONCLUSIONS OF LAW

1. The Court has subject matter and personal jurisdiction in this matter.

2. Each of the findings of fact enumerated herein have been proven beyond a reasonable doubt.

3. The Respondent's conviction for child molestation in the first degree constitutes a sexually violent offense, as that term is defined in RCW 71.09.020(17).

4. The Respondent suffers from a mental abnormality as that term is defined in RCW 71.09.020(8), namely Pedophilia and Psychotic Disorder NOS.

5. The Respondent suffers from a personality disorder as that term is defined in RCW 71.09.020(9), namely Personality Disorder NOS with Antisocial Features.

6. The Respondent's Pedophilia, Psychotic Disorder NOS and Personality Disorder NOS cause him serious difficulty controlling his sexually violent behavior.

7. Further, Respondent's prior sexual offenses, parole violations, and the testimony of Dr. Goldberg provided a sufficient link of the Respondent's mental disorders to a serious difficulty controlling his behavior.

8. The Respondent's mental abnormalities and personality disorder make him likely to engage in predatory acts of sexual violence if he is not confined in a secure facility.

9. The evidence presented at the Respondent's trial proves beyond a reasonable doubt that the Respondent is a sexually violent predator, as that term is defined by RCW 71.09.020(18).

10. The Court's oral ruling from January 18, 2013, is incorporated herein by reference and is attached as Exhibit A

ATTORNEY GENERAL'S OFFICE
Criminal Justice Division
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-6430

ORDER

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Respondent, Charles Robinson, is a sexually violent predator as defined in RCW 71.09.020(18). Having so found, the Court therefore ORDERS that the Respondent be committed to the custody of the Department of Social & Health Services for continued placement in a secure facility for control, care, and treatment until further order of this Court.

DATED this 14 day of February, 2013.

THE HONORABLE LEILA MILLS
Judge of the Superior Court

Presented by:
ROBERT FERGUSON
Attorney General

KENT LIU, WSBA #21599
JEREMY BARTELS, WSBA #36824
Assistant Attorneys General
Attorneys for Petitioner

Approved as to Form ONLY and Notice of Presentation Waived:

F. JARDINE MCNAMARA, WSBA #21677
Attorney for Respondent

ATTORNEY GENERAL'S OFFICE
Criminal Justice Division
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-6430

Actuarial Risk Assessment:

In order to establish a baseline level of risk that Mr. Robinson will commit another sexually violent offense, he was scored on the Static-99 (Hanson and Thornton 2000), the MnSOST-R (Epperson, 1999), and SORAG (Quinsey, Harris, Rice, Cormier, 1998), which are actuarial measures of risk for sexual offense recidivism. These instruments have shown to be a moderate predictor of sexual reoffense, which is defined as being arrested or convicted of a new sexual crime.

The table below represents Mr. Robinson's scores on the Static-99:

Item	Item Name	Score
1.	Young	0
2.	Ever lived with	1
3.	Index nonsexual violence	0
4.	Prior nonsexual violence	1
5.	Prior sexual offenses	2
6.	Prior sentencing dates	0
7.	Convictions for non-contact sexual offenses	0
8.	Unrelated victims	1
9.	Stranger victims	0
10.	Male victims	1

The total score is 6. This places Mr. Robinson within the high range for sexual reoffense. What this means is that he has a 39% chance for reoffense over a period of 5 years, a 45% chance for sexual reoffense over a period of 10 years, and after 15 years, his sexual reoffense rate reaches a level of 52%.

The MnSOST-R was also scored. This scale includes both static (non-changeable) and dynamic (changeable) measures of sexual recidivism including response to treatment.

Mr. Robinson obtained the following scores on the MnSOST-R as represented by the table below:

Item	Item Name	Score
1.	Number of sexual convictions	2
2.	Length of sexual offending	0
3.	Supervision failure	0
4.	Public place	2
5.	Force	0
6.	Multiple acts	1
7.	Different age groups	0
8.	Adolescent victims	0

establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorized the recording of documents of that kind in that office.

(15) *Statements in Documents Affecting an Interest in Property.* A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

(16) *Statements in Ancient Documents.* Statements in a document in existence 20 years or more whose authenticity is established.

(17) *Market Reports, Commercial Publications.* Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.

(18) *Learned Treatises.* To the extent called to the attention of an expert witness upon cross examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

(19) *Reputation Concerning Personal or Family History.* Reputation among members of a person's family by blood, adoption, or marriage, or among a person's associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of a person's personal or family history.

(20) *Reputation Concerning Boundaries or General History.* Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or state or nation in which located.

(21) *Reputation as to Character.* Reputation of a person's character among his associates or in the community.

(22) *Judgment of Previous Conviction.* Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a crime punishable by death or imprisonment in excess of 1 year, to prove any fact essential to sustain the judgment, but not including, when offered by the prosecution in a criminal case for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

(23) *Judgment as to Personal, Family, or General History, or Boundaries.* Judgments as proof of matters of personal, family, or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation.

(b) Other Exceptions. [Reserved.]

[Amended effective September 1, 1992.]

RULE 804. HEARSAY EXCEPTIONS: DECLARANT UNAVAILABLE

(a) Definition of Unavailability. "Unavailability as a witness" includes situations in which the declarant:

(1) Is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or

(2) Persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or

(3) Testifies to a lack of memory of the subject matter of the declarant's statement; or

(4) Is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) Is absent from the hearing and the proponent of the statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subsection (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means.

(6) A declarant is not unavailable as a witness if the exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.

(b) Hearsay Exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) *Former Testimony.* Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

(2) *Statement Under Belief of Impending Death.* In a trial for homicide or in a civil action or proceeding, a statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be the declarant's impending death.

(3) *Statement Against Interest.* A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declar-

ant's position would not have made the statement unless the person believed it to be true. In a criminal case, a statement tending to expose the declarant to criminal liability is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

(4) *Statement of Personal or Family History.* (i) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or (ii) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

(5) *Other Exceptions.* [Reserved.]

[Amended effective September 1, 1992.]

RULE 805. HEARSAY WITHIN HEARSAY

Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules.

RULE 806. ATTACKING AND SUPPORTING CREDIBILITY OF DECLARANT

When a hearsay statement, or a statement defined in rule 801(d)(2)(iii), (iv), or (v), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross examination.

[Amended effective September 1, 1992.]

RULE 807. CHILD VICTIMS OR WITNESSES [RESERVED]

[Reserved. See RCW 9A.44.120.]

[Adopted effective September 1, 1988.]

TITLE IX. AUTHENTICATION, IDENTIFICATION AND ADMISSION OF EXHIBITS

RULE 901. REQUIREMENT OF AUTHENTICATION OR IDENTIFICATION

(a) **General Provision.** The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

(b) **Illustrations.** By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

(1) *Testimony of Witness With Knowledge.* Testimony that a matter is what it is claimed to be.

(2) *Nonexpert Opinion on Handwriting.* Nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.

(3) *Comparison by Court or Expert Witness.* Comparison by the court or by expert witnesses with specimens which have been authenticated.

(4) *Distinctive Characteristics and the Like.* Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.

(5) *Voice Identification.* Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.

(6) *Telephone Conversations.* Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if (i) in the case of a person, circumstances, including self-identification, show the person answering to be the one called, or (ii) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.

(7) *Public Records or Reports.* [Reserved. See RCW 5.44 and CR 44.]

(8) *Ancient Documents or Data Compilation.* Evidence that a document or data compilation, in any form, (i) is in such condition as to create no suspicion concerning its authenticity, (ii) was in a place where it, if authentic, would likely be, and (iii) has been in existence 20 years or more at the time it is offered.

(9) *Process or System.* Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.

(10) *Methods Provided by Statute or Rule.* Any method of authentication or identification provided by statute or court rule.

(f), to take the testimony of the witness in response to the questions and to prepare, certify, and serve the deposition transcript, attaching thereto the copy of the notice and the questions received by the officer, on the party taking the deposition, unless the court orders otherwise.

(c) **Notice of Service.** When the deposition has been served, the officer shall promptly give notice of its service to all other parties and file such notice with the clerk of the court.

[Amended effective July 1, 1972; September 1, 1988.]

RULE 32. USE OF DEPOSITIONS IN COURT PROCEEDINGS

(a) Use of Depositions. At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the Rules of Evidence applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any of the following provisions:

(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness or for any purpose permitted by the Rules of Evidence.

(2) The deposition of a party or of anyone who at the time of taking the deposition was an officer, director, or managing agent, or a person designated under rule 30(b)(6) or 31(a) to testify on behalf of a public or private corporation, partnership or association or governmental agency which is a party may be used by an adverse party for any purpose.

(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: (A) that the witness is dead; or (B) that the witness resides out of the county and more than 20 miles from the place of trial, unless it appears that the absence of the witness was procured by the party offering the deposition or unless the witness is an out-of-state expert subject to subsection (a)(5)(A) of this rule; or (C) that the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment; or (D) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or (E) upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

(4) If only part of a deposition is offered in evidence by a party, an adverse party may require him to introduce any other part which ought in fairness to be considered with the part introduced, and any party may introduce any other parts.

(5) The deposition of an expert witness may be used as follows:

(A) The discovery deposition of an opposing party's rule 26(b)(5) expert witness, who resides outside the state of Washington, may be used if reasonable notice before the trial date is provided to all parties and any party against whom the deposition is intended to be used is given a reasonable opportunity to depose the expert again.

(B) The deposition of a health care professional, even though available to testify at trial, taken with the expressly stated purpose of preserving the deponent's testimony for trial, may be used if, before the taking of the deposition, there has been compliance with discovery requests made pursuant to rules 26(b)(5)(A)(i), 33, 34, and 35 (as applicable) and if the opposing party is afforded an adequate opportunity to prepare, by discovery deposition of the deponent or other means, for cross examination of the deponent.

Substitution of parties pursuant to rule 25 does not affect the right to use depositions previously taken; and, when an action has been brought in any court of the United States or of any state and another action involving the same issues and subject matter is afterward brought between the same parties or their representatives or successors in interest, all depositions lawfully taken and duly filed in the former action may be used in the latter as if originally taken therefor. A deposition previously taken may also be used as permitted by the Rules of Evidence.

(b) Objections to Admissibility. Subject to the provisions of rule 28(b) and subsection (d)(3) of this rule, objection may be made at the trial or hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying.

(c) Effect of Taking or Using Depositions. A party does not make a person his own witness for any purpose by taking his deposition. The introduction in evidence of the deposition or any part thereof for any purpose other than that of contradicting or impeaching the deponent makes the deponent the witness of the party introducing the deposition, but this shall not apply to the use by an adverse party of a deposition under subsection (a)(2) of this rule. At the trial or hearing any party may rebut any relevant evidence contained in a deposition whether introduced by him or by any other party.

(d) Effect of Errors and Irregularities in Depositions.

(1) *As to Notice.* All errors and irregularities in the notice for taking a deposition are waived unless written objection is promptly served upon the party giving the notice.

(2) *As to Disqualification of Officer.* Objection to taking a deposition because of disqualification of the officer before whom it is to be taken is waived unless made before the taking of the deposition begins or as soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence.

(3) *As to Taking of Deposition.*

(A) Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time.

(B) Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties, and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition.

(C) Objections to the form of written questions submitted under rule 31 are waived unless served in writing upon the party propounding them within the time allowed for serving the succeeding cross or other questions and within 5 days after service of the last questions authorized.

(4) *As to Completion and Return of Deposition.* Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, endorsed, transmitted, filed, or otherwise dealt with by the officer under rules 30 and 31 are waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is, or with due diligence might have been, ascertained.

[Amended effective July 1, 1972; September 1, 1983; September 1, 1993.]

RULE 33. INTERROGATORIES TO PARTIES

(a) **Availability; Procedures for Use.** Any party may serve upon any other party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or a partnership or association or governmental agency, by any officer or agent, who shall furnish such information as is available to the party. Interrogatories may, without leave of court, be served upon the plaintiff after the summons and a copy of the complaint are served upon the defendant, or the complaint is filed, whichever shall first occur, and upon any other party with or after service of the summons and complaint upon that party.

Interrogatories shall be so arranged that after each separate question there shall appear a blank space reasonably calculated to enable the answering party to place the written response. In the event the responding party either chooses to place the response on a separate page or pages or must do so in order to complete the response, the responding party shall clearly denote the number of the question to which the response relates, including the subpart thereof if applicable. Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer. The answers are to be signed by the person making them, and the objections signed by the attorney making them. The party upon whom the interrogatories have been served shall serve a copy of the answers, and objections if any, within 30 days after the service of the interrogatories, except that a defendant may serve answers or objections within 40 days after service of the summons and complaint upon that defendant. The parties may stipulate or any party may move for an order under rule 37(a) with respect to any objection to or other failure to answer an interrogatory.

(b) **Scope; Use at Trial.** Interrogatories may relate to any matters which can be inquired into under rule 26(b), and the answers may be used to the extent permitted by the Rules of Evidence.

An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact, but the court may order that such an interrogatory need not be answered until after designated discovery has been completed or until a pretrial conference or other later time.

An interrogatory otherwise proper is not objectionable merely because the propounding party may have other access to the requested information or has the burden of proof on the subject matter of the interrogatory at trial.

(c) **Option to Produce Business Records.** Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, or from a compilation, abstract or summary based thereon, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries. A specification shall be in sufficient detail to permit the interrogating party to locate and to identify, as readily as can the party served, the records from which the answer may be ascertained.

[Amended effective July 1, 1972; September 1, 1985; September 1, 1989; October 29, 1993.]

RULE 34. PRODUCTION OF DOCUMENTS AND THINGS AND ENTRY UPON LAND FOR INSPECTION AND OTHER PURPOSES

(a) **Scope.** Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on his behalf, to inspect and copy, any designated documents (including writings, drawings, graphs, charts, photographs, phonorecords, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable

the parties shall constitute action of record for purposes of this rule.

(D) Other Grounds for Dismissal and Reinstatement. This rule is not a limitation upon any other power that the court may have to dismiss or reinstate any action upon motion or otherwise.

(3) *Defendant's Motion After Plaintiff Rests.* After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subsection and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under rule 19, operates as an adjudication upon the merits.

(c) Dismissal of Counterclaim, Cross Claim, or Third Party Claim. The provisions of this rule apply to the dismissal of any counterclaim, cross claim, or third party claim. A voluntary dismissal by the claimant alone pursuant to subsection (a)(1) of this rule shall be made before a responsive pleading is served or, if there is none, before the introduction of evidence at the trial or hearing.

(d) Costs of Previously Dismissed Action. If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of taxable costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.

(e) Notice of Settlements. If a case is settled after it has been assigned for trial, it shall be the duty of the attorneys or of any party appearing pro se to notify the court *promptly* of the settlement. If the settlement is made within 5 days before the trial date, the notice shall be made by telephone or in person. All notices of settlement shall be confirmed in writing to the clerk. [Amended effective September 1, 1997.]

RULE 42. CONSOLIDATION; SEPARATE TRIALS

(a) Consolidation. When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

(b) Separate Trials. The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross claim, counterclaim, or third party claim, or of any separate issue or of any number of claims, cross claims, counterclaims, third party claims, or issues, always preserving inviolate the right of trial by jury.

RULE 43. TAKING OF TESTIMONY

(a) Testimony.

(1) *Generally.* In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise directed by the court or provided by rule or statute. For good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location.

(2) *Multiple Examinations.* When two or more attorneys are upon the same side trying a case, the attorney conducting the examination of a witness shall continue until the witness is excused from the stand; and all objections and offers of proof made during the examination of such witness shall be made or announced by the attorney who is conducting the examination or cross examination.

(b) and (c) [Reserved. See ER 103 and 611.]

(d) Oaths of Witnesses.

(1) *Administration.* The oaths of all witnesses in the superior court

(A) shall be administered by the judge;

(B) shall be administered to each witness individually; and

(C) the witness shall stand while the oath is administered.

(2) *Applicability.* This rule shall not apply to civil ex parte proceedings or default divorce cases and in such cases the manner of swearing witnesses shall be as each superior court may prescribe.

(3) *Affirmation in Lieu of Oath.* Whenever under these rules an oath is required to be taken, a solemn affirmation may be accepted in lieu thereof.

(e) Evidence on Motions.

(1) *Generally.* When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or depositions.

(2) *For Injunctions, etc.* On application for injunction or motion to dissolve an injunction or discharge an attachment, or to appoint or discharge a receiver, the notice thereof shall designate the kind of evidence to be introduced on the hearing. If the application is to be heard on affidavits, copies thereof must be served by the moving party upon the adverse party at least 3 days before the hearing. Oral testimony shall not be taken on such hearing unless permission of the court is first

Prosecuting Attorney

It is so ordered this ___ day of _____, 19___.

Judge

[Amended effective September 1, 1995.]

Comment

Supersedes RCW 10.46.030 in part.

RULE 4.6 DEPOSITIONS

(a) When Taken. Upon a showing that a prospective witness may be unable to attend or prevented from attending a trial or hearing or if a witness refuses to discuss the case with either counsel and that his testimony is material and that it is necessary to take his deposition in order to prevent a failure of justice, the court at any time after the filing of an indictment or information may upon motion of a party and notice to the parties order that his testimony be taken by deposition and that any designated books, papers, documents or tangible objects, not privileged, be produced at the same time and place.

(b) Notice of Taking. The party at whose instance a deposition is to be taken shall give to every other party reasonable written notice of the time and place for taking the deposition. The notice shall state the name and address of each person to be examined. On motion of a party upon whom the notice is served, the court for cause shown may extend or shorten the time and may change the place of taking.

(c) How Taken. A deposition shall be taken in the manner provided in civil actions. No deposition shall be used in evidence against any defendant who has not had notice of and an opportunity to participate in or be present at the taking thereof.

(d) Use. Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as witness, or as substantive evidence under circumstances permitted by the Rules of Evidence.

(e) Objections to Admissibility. Objections to receiving in evidence a deposition or part thereof may be made as provided in civil actions.

[Amended effective September 1, 1983.]

RULE 4.7 DISCOVERY

(a) Prosecutor's Obligations.

(1) Except as otherwise provided by protective orders or as to matters not subject to disclosure, the prosecuting attorney shall disclose to the defendant the following material and information within the prosecuting attorney's possession or control no later than the omnibus hearing:

(i) the names and addresses of persons whom the prosecuting attorney intends to call as witnesses at the hearing or trial, together with any written or recorded statements and the substance of any oral staten of such witnesses;

(ii) any written or recorded statements and substance of any oral statements made by the d dant, or made by a codefendant if the trial is to joint one;

(iii) when authorized by the court, those por of grand jury minutes containing testimony o defendant, relevant testimony of persons whom prosecuting attorney intends to call as witnesses a hearing or trial, and any relevant testimony tha not been transcribed;

(iv) any reports or statements of experts mac connection with the particular case, including re of physical or mental examinations and scie tests, experiments, or comparisons;

(v) any books, papers, documents, photograph tangible objects, which the prosecuting attorne tends to use in the hearing or trial or which obtained from or belonged to the defendant;

(vi) any record of prior criminal convictions kn to the prosecuting attorney of the defendant an persons whom the prosecuting attorney intends tc as witnesses at the hearing or trial.

(2) The prosecuting attorney shall disclose to defendant:

(i) any electronic surveillance, including wire ping, of the defendant's premises or conversatior which the defendant was a party and any re thereof;

(ii) any expert witnesses whom the prosecu attorney will call at the hearing or trial, the subje their testimony, and any reports they have submi to the prosecuting attorney;

(iii) any information which the prosecuting a ney has indicating entrapment of the defend

(3) Except as is otherwise provided as to protec orders, the prosecuting attorney shall disclose to de dant's counsel any material or information within prosecuting attorney's knowledge which tends to ne defendant's guilt as to the offense charged.

(4) The prosecuting attorney's obligation under section is limited to material and information within knowledge, possession or control of members of prosecuting attorney's staff.

(b) Defendant's Obligations.

(1) Except as is otherwise provided as to matters subject to disclosure and protective orders, the de dant shall disclose to the prosecuting attorney following material and information within the de dant's control no later than the omnibus hearing: names and addresses of persons whom the defenc intends to call as witnesses at the hearing or t together with any written or recorded statements the substance of any oral statements of such witn

(2) Notwithstanding the initiation of judicial ceedings, and subject to constitutional limitations,

(1) ***Completion.*** The party who noticed the deposition must notify all other parties when it is completed.

(2) ***Filing.*** A party who files the deposition must promptly notify all other parties of the filing.

(Amended March 30, 1970, effective July 1, 1970; March 2, 1987, effective August 1, 1987; April 22, 1993, effective December 1, 1993; April 30, 2007, effective December 1, 2007.)

ADVISORY COMMITTEE NOTES

1937 Adoption

This rule is in accordance with common practice. In most of the states listed in the Note to Rule 26(a), provisions similar to this rule will be found in the statutes which in their respective statutory compilations follow those cited in the Note to Rule 26(a).

1970 Amendment

Confusion is created by the use of the same terminology to describe both the taking of a deposition upon "written interrogatories" pursuant to this rule and the serving of "written interrogatories" upon parties pursuant to Rule 33. The distinction between these two modes of discovery will be more readily and clearly grasped through substitution of the word "questions" for "interrogatories" throughout this rule.

Subdivision (a). A new paragraph is inserted at the beginning of this subdivision to conform to the rearrangement of provisions in Rules 26(a), 30(a), and 30(b).

The revised subdivision permits designation of the deponent by general description or by class or group. This conforms to the practice for depositions on oral examination.

The new procedure provided in Rule 30(b)(6) for taking the deposition of a corporation or other organization through persons designated by the organization is incorporated by reference.

The service of all questions, including cross, redirect, and recross, is to be made on all parties. This will inform the parties and enable them to participate fully in the procedure.

The time allowed for service of cross, redirect, and recross questions has been extended. Experience with the existing time limits shows them to be unrealistically short. No special restriction is placed on the time for serving the notice of taking the deposition and the first set of questions. Since no party is required to serve cross questions less than 30 days after the notice and questions are served, the defendant has sufficient time to obtain counsel. The court may for cause shown enlarge or shorten the time.

Subdivision (d). Since new Rule 26(c) provides for protective orders with respect to all discovery, and expressly provides that the court may order that one discovery device be used in place of another, subdivision (d) is eliminated as unnecessary.

1987 Amendment

The amendments are technical. No substantive change is intended.

1993 Amendments

Subdivision (a). The first paragraph of subdivision (a) is divided into two subparagraphs, with provisions comparable to those made in the revision of Rule 30. Changes are made in the former third paragraph, numbered in the revision as paragraph (4), to reduce the total time for developing cross-examination, redirect, and recross questions from 50 days to 28 days.

2007 Amendment

The language of Rule 31 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

The party who noticed a deposition on written questions must notify all other parties when the deposition is completed, so that they may make use of the deposition. A deposition is completed when it is recorded and the deponent has either waived or exercised the right of review under Rule 30(e)(1).

Rule 32. Using Depositions in Court Proceedings

(a) Using Depositions.

(1) ***In General.*** At a hearing or trial, all or part of a deposition may be used against a party on these conditions:

(A) the party was present or represented at the taking of the deposition or had reasonable notice of it;

(B) it is used to the extent it would be admissible under the Federal Rules of Evidence if the deponent were present and testifying; and

(C) the use is allowed by Rule 32(a)(2) through (8).

(2) ***Impeachment and Other Uses.*** Any party may use a deposition to contradict or impeach the testimony given by the deponent as a witness, or for any other purpose allowed by the Federal Rules of Evidence.

(3) ***Deposition of Party, Agent, or Designee.*** An adverse party may use for any purpose the deposition of a party or anyone who, when deposed, was the party's officer, director, managing agent, or designee under Rule 30(b)(6) or 31(a)(4).

(4) ***Unavailable Witness.*** A party may use for any purpose the deposition of a witness, whether or not a party, if the court finds:

(A) that the witness is dead;

(B) that the witness is more than 100 miles from the place of hearing or trial or is outside the United States, unless it appears that the witness's absence was procured by the party offering the deposition;

(C) that the witness cannot attend or testify because of age, illness, infirmity, or imprisonment;

(D) that the party offering the deposition could not procure the witness's attendance by subpoena; or

(E) on motion and notice, that exceptional circumstances make it desirable—in the interest of justice and with due regard to the importance of live testimony in open court—to permit the deposition to be used.

(5) ***Limitations on Use.***

(A) *Deposition Taken on Short Notice.* A deposition must not be used against a party who, having received less than 14 days' notice of the deposition, promptly moved for a protective order under Rule 26(c)(1)(B) requesting that it not be taken or be taken at a different time or place—and this motion was still pending when the deposition was taken.

(B) *Unavailable Deponent; Party Could Not Obtain an Attorney.* A deposition taken without leave of court under the unavailability provision of Rule 30(a)(2)(A)(iii) must not be used against a party who shows that, when served with the notice, it could not, despite diligent efforts, obtain an attorney to represent it at the deposition.

(6) ***Using Part of a Deposition.*** If a party offers in evidence only part of a deposition, an adverse party may require the offeror to introduce other parts that in fairness should be considered with the part introduced, and any party may itself introduce any other parts.

(7) ***Substituting a Party.*** Substituting a party under Rule 25 does not affect the right to use a deposition previously taken.

(8) ***Deposition Taken in an Earlier Action.*** A deposition lawfully taken and, if required, filed in any federal- or state-court action may be used in a later action involving the same subject matter between the same parties, or their representatives or successors in interest, to the same extent as if taken in the later action. A deposition previously taken may also be used as allowed by the Federal Rules of Evidence.

(b) **Objections to Admissibility.** Subject to Rules 28(b) and 32(d)(3), an objection may be made at a hearing or trial to the admission of any deposition testimony that would be inadmissible if the witness were present and testifying.

(c) **Form of Presentation.** Unless the court orders otherwise, a party must provide a transcript of any deposition testimony the party offers, but may provide the court with the testimony in nontranscript form as well. On any party's request, deposition testimony offered in a jury trial for any purpose other than impeachment must be presented in nontranscript form, if available, unless the court for good cause orders otherwise.

(d) **Waiver of Objections.**

(1) ***To the Notice.*** An objection to an error or irregularity in a deposition notice is waived unless promptly served in writing on the party giving the notice.

(2) ***To the Officer's Qualification.*** An objection based on disqualification of the officer before whom a deposition is to be taken is waived if not made:

(A) before the deposition begins; or

(B) promptly after the basis for disqualification becomes known or, with reasonable diligence, could have been known.

(3) ***To the Taking of the Deposition.***

(A) *Objection to Competence, Relevance, or Materiality.* An objection to a deponent's competence—or to the competence, relevance, or materiality of testimony—is not waived by a failure to make the objection before or during the deposition, unless the ground for it might have been corrected at that time.

(B) *Objection to an Error or Irregularity.* An objection to an error or irregularity at an oral examination is waived if:

(i) it relates to the manner of taking the deposition, the form of a question or answer, the oath or affirmation, a party's conduct, or other matters that might have been corrected at that time; and

(ii) it is not timely made during the deposition.

(C) *Objection to a Written Question.* An objection to the form of a written question under Rule 31 is waived if not served in writing on the party submitting the question within the time for serving responsive questions or, if the question is a recross-question, within 7 days after being served with it.

(4) ***To Completing and Returning the Deposition.*** An objection to how the officer transcribed the testimony—or prepared, signed, certified, sealed, endorsed, sent, or otherwise dealt with the deposition—is waived unless a motion to suppress is made promptly after the error or irregularity becomes known or, with reasonable diligence, could have been known.

(Amended March 30, 1970, effective July 1, 1970; November 20, 1972, effective July 1, 1975; April 29, 1980, effective August 1, 1980; March 2, 1987, effective August 1, 1987; April 22, 1993, effective December 1, 1993; April 30, 2007,

(f) Decisions on Certain Motions Not Designated in Notice. An appeal from a final judgment brings up for review the ruling of the trial court on an order deciding a timely motion based on (1) CR 50(b) (judgment as a matter of law), (2) CR 52(b) (amendment of findings), (3) CR 59 (reconsideration, new trial, and amendment of judgments), (4) CrR 7.4 (arrest of judgment), or (5) CrR 7.5 (new trial).

(g) Award of Attorney Fees. An appeal from a decision on the merits of a case brings up for review an award of attorney fees entered after the appellate court accepts review of the decision on the merits.

[Amended effective September 1, 1994; September 1, 1998; December 24, 2002; September 1, 2010.]

References

Rule 5.2, Time Allowed To File Notice, (f) Subsequent notice by other parties.

RULE 2.5 CIRCUMSTANCES WHICH MAY AFFECT SCOPE OF REVIEW

(a) Errors Raised for First Time on Review. The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right. A party or the court may raise at any time the question of appellate court jurisdiction. A party may present a ground for affirming a trial court decision which was not presented to the trial court if the record has been sufficiently developed to fairly consider the ground. A party may raise a claim of error which was not raised by the party in the trial court if another party on the same side of the case has raised the claim of error in the trial court.

(b) Acceptance of Benefits.

(1) *Generally.* A party may accept the benefits of a trial court decision without losing the right to obtain review of that decision only (i) if the decision is one which is subject to modification by the court making the decision or (ii) if the party gives security as provided in subsection (b)(2) or (iii) if, regardless of the result of the review based solely on the issues raised by the party accepting benefits, the party will be entitled to at least the benefits of the trial court decision or (iv) if the decision is one which divides property in connection with a dissolution of marriage, a legal separation, a declaration of invalidity of marriage, or the dissolution of a meretricious relationship.

(2) *Security.* If a party gives adequate security to make restitution if the decision is reversed or modified, a party may accept the benefits of the decision without losing the right to obtain review of that decision. A party that would otherwise lose the right to obtain review because of the acceptance of benefits shall be given a reasonable period of time to post security to prevent loss of review. The trial court making the decision shall fix the amount and type of security to be given by the party accepting the benefits.

(3) *Conflict With Statutes.* In the event of any conflict between this section and a statute, the statute governs.

(c) Law of the Case Doctrine Restricted. The following provisions apply if the same case is again before the appellate court following a remand:

(1) *Prior Trial Court Action.* If a trial court decision is otherwise properly before the appellate court, the appellate court may at the instance of a party review and determine the propriety of a decision of the trial court even though a similar decision was not disputed in an earlier review of the same case.

(2) *Prior Appellate Court Decision.* The appellate court may at the instance of a party review the propriety of an earlier decision of the appellate court in the same case and, where justice would best be served, decide the case on the basis of the appellate court's opinion of the law at the time of the later review.

[Amended effective September 1, 1985; September 1, 1994.]

TITLE 3. PARTIES

RULE 3.1 WHO MAY SEEK REVIEW

Only an aggrieved party may seek review by the appellate court.

RULE 3.2 SUBSTITUTION OF PARTIES

(a) Substitution Generally. The appellate court will substitute parties to a review when it appears that a party is deceased or legally incompetent or that the interest of a party in the subject matter of the review has been transferred.

(b) Duty to Move for Substitution. A party with knowledge of the death or declared legal disability of a party to review, or knowledge of the transfer of a party's interest in the subject matter of the review, shall promptly move for substitution of parties. The motion and all other documents must be served on all parties and on the personal representative or successor in interest of a party, within the time and in the manner provided for service on a party. If a party fails to promptly move for substitution, the personal representative of a deceased or legally disabled party, or the successor in interest of a party, should promptly move for substitution of parties.

(c) Where to Make Motion. The motion to substitute parties must be made in the appellate court if the motion is made after the notice of appeal was filed or discretionary review was granted. In other cases, the motion should be made in the trial court.

appellate court objections to the cost bill within 10 days after service of the cost bill upon the party.

References

Form 11, Objections to Cost Bill.

RULE 14.6 AWARD OF COSTS

(a) Commissioner or Clerk Awards Costs. A commissioner or the clerk will determine costs within 10 days after the time has expired for filing objections to the cost bill. The commissioner or clerk will notify the parties of the ruling on costs.

(b) Objection to Ruling. A party may only object to the ruling on costs by motion to the appellate court in the same manner and within the same time as provided for objections to any other rulings of a commissioner or clerk as provided in rule 17.7.

(c) Transmitting Costs. The commissioner or clerk will award costs in the mandate or the certificate of finality or in a post-mandate ruling or order. An award of costs may be enforced as part of the judgment in the trial court.

[Amended effective September 1, 1998; December 24, 2002.]

References

Rule 12.7, Finality of Decision, (c) Special rule for costs.

TITLE 15. SPECIAL PROVISIONS RELATING TO RIGHTS OF INDIGENT PARTY

RULE 15.1. PROCEDURES TO WHICH TITLE APPLIES

The rules in this title define the procedure to be used (1) to determine indigency and to determine the expenses of an indigent party to review which will be paid from public funds as provided in rule 15.2, (2) to obtain a waiver of charges imposed by the court as provided in rule 15.3, (3) to claim payment from public funds for services rendered to an indigent party to review as provided in rule 15.4, (4) to allow claims for expense as provided in rule 15.5, and (5) to recover public funds expended on behalf of an indigent as provided in rule 15.6. The rules in this title apply to all proceedings in the appellate court, except the rules apply to personal restraint petitions only to the extent defined in rule 16.15 (g) and (h).

[Amended effective September 1, 2010.]

RULE 15.2 DETERMINATION OF INDIGENCY AND RIGHTS OF INDIGENT PARTY

(a) Motion for Order of Indigency. A party seeking review in the Court of Appeals or the Supreme Court partially or wholly at public expense must move in the trial court for an order of indigency. The party shall submit a Motion for Order of Indigency, in the form prescribed by the Office of Public Defense.

(b) Action by the Trial Court. The trial court shall determine the indigency, if any, of the party seeking review at public expense . The determination shall be made in written findings after a hearing, if circumstances warrant, or by reevaluating any order of indigency previously entered by the trial court. The court:

(1) shall grant the motion for an order of indigency if the party seeking public funds is unable by reason of poverty to pay for all or some of the expenses for appellate review of:

(a) criminal prosecutions or juvenile offense proceedings meeting the requirements of RCW 10.73.150,

(b) dependency and termination cases under RCW 13.34,

(c) commitment proceedings under RCW 71.05 and 71.09,

(d) civil contempt cases directing incarceration of the contemner,

(e) orders denying petitions for writ of habeas corpus under RCW 7.36, including attorneys' fees upon a showing of extraordinary circumstances, and

(f) any other case in which the party has a constitutional or statutory right to counsel at all stages of the proceeding; or

(2) shall deny the motion for an order of indigency if a party has adequate means to pay all of the expenses of review. The order denying the motion for an order of indigency shall contain findings designating the funds or source of funds available to the party to pay all of the expenses of review.

(c) Other Cases. In cases not governed by subsection (b) of this rule, the trial court shall determine in written findings the indigency, if any, of the party seeking review. The party must demonstrate in the motion or the supporting affidavit that the issues the party wants reviewed have probable merit and that the party has a constitutional or statutory right to review partially or wholly at public expense.

(1) *Party Not Indigent.* The trial court shall deny the motion if a party has adequate means to pay all of the expenses of review. The order denying the motion for an order of indigency shall contain findings designating the funds or sources of funds available to the party to pay all of the expenses of review.

(2) *Party Indigent.* If the trial court finds the party seeking review is unable by reason of poverty to pay for all or some of the expenses of appellate review, the trial court shall enter such findings, which shall be forwarded to the Supreme Court for consideration, pursuant to section (d) of this rule. The trial court shall determine in those findings the portion of the record necessary for review and the amount, if any, the party is able to

contribute toward the expense of review. The findings shall conclude with an order to the clerk of the trial court to promptly transmit to the Supreme Court, without charge to the moving party, the findings of indigency, the affidavit in support of the motion, and all other papers submitted in support of or in opposition to the motion. The trial court clerk shall promptly transmit to the Supreme Court the papers designated in the findings of indigency.

(d) Action by Supreme Court. If findings of indigency and other papers relating to the motion for an order of indigency are transmitted to the Supreme Court, the Supreme Court will determine whether an order of indigency in that case should be entered by the superior court. The determination will be made by a department of the Supreme Court on a regular motion day without oral argument and based only on the papers transmitted to the Supreme Court by the trial court clerk, unless the Supreme Court directs otherwise. If the Supreme Court determines that the party is seeking review in good faith, that an issue of probable merit is presented, and that the party is entitled to review partially or wholly at public expense, the Supreme Court will enter an order directing the trial court to enter an order of indigency. In all other cases, the Supreme Court will enter an order denying the party's motion for an order of indigency. The clerk of the appellate court will transmit a copy of the order to the clerk of the trial court and notify all parties of the decision of the Supreme Court.

(e) Order of Indigency. An order of indigency shall designate the items of expense which are to be paid with public funds and, where appropriate, the items of expense to be paid by a party or the amount which the party must contribute toward the expense of review. The order shall designate the extent to which public funds are to be used for payment of the expense of the record on review, limited to those parts of the record reasonably necessary to review issues argued in good faith. The order of indigency must be transmitted to the appellate court as a part of the record on review.

(f) Continued Indigency Presumed. A party and counsel for the party who has been granted an order of indigency must bring to the attention of the trial court any significant improvement during review in the financial condition of the party. The appellate court will give a party the benefits of an order of indigency throughout the review unless the trial court finds the party's financial condition has improved to the extent that the party is no longer indigent.

(g) Appointment and Withdrawal of Counsel in Appellate Court. The appellate court shall determine questions relating to the appointment and withdrawal of counsel for an indigent party on review. The Office of Public Defense shall, in accordance with its indigent appellate representation policies, provide the names of indigent appellate counsel to the appellate courts on a case-by-case basis. If trial counsel is not appointed, trial counsel must assist counsel appointed for review in preparing the record.

(h) Review of Order or Finding of Indigency. A party in a case of a type listed in section (b)(1) of this rule may seek review of an order denying an order of indigency entered by a trial court. A party may also seek review of written findings under section (c)(1) of this rule that the party is not indigent. Review must be sought by a motion for discretionary review.

(i) Withdrawal of Counsel in Appellate Court. If counsel can find no basis for a good faith argument on review, counsel should file a motion in the appellate court to withdraw as counsel for the indigent as provided in rule 18.3(a).

[Amended effective July 2, 1976; July 1, 1978; January 1, 1980; September 1, 1994; June 1, 1999; December 28, 1999; December 24, 2002; amended September 9, 2004, effective July 1, 2005; amended effective January 3, 2006; September 1, 2010.

References

Form 12, Order of Indigency; Rule 2.3, Decisions of the Trial Court Which May Be Reviewed by Discretionary Review.

RULE 15.3 PAYMENT OF CHARGES FOR REPRODUCING BRIEFS

The appellate court will submit charges for reproducing briefs and other papers to the Office of Public Defense to the extent authorized by the order of indigency.

[Amended effective May 29, 2001.]

RULE 15.4 CLAIM FOR PAYMENT OF EXPENSE FOR INDIGENT PARTY

(a) Conditions for Payment. The expenses for an indigent party which are necessarily incident to review by an appellate court will be paid from public funds only if:

(1) An order of indigency is included in the record on review; and

(2) An order properly authorizes the expense claimed; and

(3) The claim is made by filing an invoice in the form and manner provided by this rule and procedures established by the Office of Public Defense.

The invoice of a court reporter may be submitted as soon as the report of proceedings has been filed by the court reporter. The invoice of a superior court clerk may be submitted as soon as the expense has been incurred. Invoices of counsel, court reporters, and superior court clerks must be filed within 20 days after the filing of the decision terminating review or 30 days after the denial of reconsideration, whichever is later.

(b) [Reserved.]

(c) Invoice of Counsel. An invoice submitted by counsel representing an indigent party should be titled

(13) "Risk potential activity" or "risk potential facility" means an activity or facility that provides a higher incidence of risk to the public from persons conditionally released from the special commitment center. Risk potential activities and facilities include: Public and private schools, school bus stops, licensed day care and licensed preschool facilities, public parks, publicly dedicated trails, sports fields, playgrounds, recreational and community centers, churches, synagogues, temples, mosques, public libraries, public and private youth camps, and others identified by the department following the hearings on a potential site required in RCW 71.09.315. For purposes of this chapter, "school bus stops" does not include bus stops established primarily for public transit.

(14) "Secretary" means the secretary of social and health services or the secretary's designee.

(15) "Secure facility" means a residential facility for persons civilly confined under the provisions of this chapter that includes security measures sufficient to protect the community. Such facilities include total confinement facilities, secure community transition facilities, and any residence used as a court-ordered placement under RCW 71.09.090.

(16) "Secure community transition facility" means a residential facility for persons civilly committed and conditionally released to a less restrictive alternative under this chapter. A secure community transition facility has supervision and security, and either provides or ensures the provision of sex offender treatment services. Secure community transition facilities include but are not limited to the facility established pursuant to RCW 71.09.250(1)(a)(i) and any community-based facilities established under this chapter and operated by the secretary or under contract with the secretary.

(17) "Sexually violent offense" means an act committed on, before, or after July 1, 1990, that is: (a) An act defined in Title 9A RCW as rape in the first degree, rape in the second degree by forcible compulsion, rape of a child in the first or second degree, statutory rape in the first or second degree, indecent liberties by forcible compulsion, indecent liberties against a child under age fourteen, incest against a child under age fourteen, or child molestation in the first or second degree; (b) a felony offense in effect at any time prior to July 1, 1990, that is comparable to a sexually violent offense as defined in (a) of this subsection, or any federal or out-of-state conviction for a felony offense that under the laws of this state would be a sexually violent offense as defined in this subsection; (c) an act of murder in the first or second degree, assault in the first or second degree, assault of a child in the first or second degree, kidnapping in the first or second degree, burglary in the first degree, residential burglary, or unlawful imprisonment, which act, either at the time of sentencing for the offense or subsequently during civil commitment proceedings pursuant to this chapter, has been determined beyond a reasonable doubt to have been sexually motivated, as that term is defined in RCW 9.94A.030; or (d) an act as described in chapter 9A.28 RCW, that is an attempt, criminal solicitation, or criminal conspiracy to commit one of the felonies designated in (a), (b), or (c) of this subsection.

(18) "Sexually violent predator" means 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.

(19) "Total confinement facility" means a secure facility that provides supervision and sex offender treatment services in a total confinement setting. Total confinement facilities include the special commitment center and any similar facility designated as a total confinement facility by the secretary.

[2009 c 409 § 1; 2006 c 303 § 10. Prior: 2003 c 216 § 2; 2003 c 50 § 1; 2002 c 68 § 4; 2002 c 58 § 2; 2001 2nd sp.s. c 12 § 102; 2001 c 286 § 4; 1995 c 216 § 1; 1992 c 145 § 17; 1990 1st ex.s. c 12 § 2; 1990 c 3 § 1002.]

RCW 71.09.025
Notice to prosecuting attorney prior to release.

(1)(a) When it appears that a person may meet the criteria of a sexually violent predator as defined in *RCW 71.09.020(16), the agency with jurisdiction shall refer the person in writing to the prosecuting attorney of the county in which an action under this chapter may be filed pursuant to RCW 71.09.030 and the attorney general, three months prior to:

(i) The anticipated release from total confinement of a person who has been convicted of a sexually violent offense;

(ii) The anticipated release from total confinement of a person found to have committed a sexually violent offense as a juvenile;

(iii) Release of a person who has been charged with a sexually violent offense and who has been determined to be incompetent to stand trial pursuant to RCW 10.77.086(4); or

(iv) Release of a person who has been found not guilty by reason of insanity of a sexually violent offense pursuant to **RCW 10.77.020(3).

(b) The agency shall provide the prosecuting agency with all relevant information including but not limited to the following information:

(i) A complete copy of the institutional records compiled by the department of corrections relating to the person, and any such out-of-state department of corrections' records, if available;

(ii) A complete copy, if applicable, of any file compiled by the indeterminate sentence review board relating to the person;

(iii) All records relating to the psychological or psychiatric evaluation and/or treatment of the person;

(iv) A current record of all prior arrests and convictions, and full police case reports relating to those arrests and convictions; and

(v) A current mental health evaluation or mental health records review.

(c) The prosecuting agency has the authority, consistent with ***RCW 42.56.540(3), to obtain all records relating to the person if the prosecuting agency deems such records are necessary to fulfill its duties under this chapter. The prosecuting agency may only disclose such records in the course of performing its duties pursuant to this chapter, unless otherwise authorized by law.

(d) The prosecuting agency has the authority to utilize the inquiry judge procedures of chapter 10.27 RCW prior to the filing of any action under this chapter to seek the issuance of compulsory process for the production of any records necessary for a determination of whether to seek the civil commitment of a person under this chapter. Any records obtained pursuant to this process may only be disclosed by the prosecuting agency in the course of performing its duties pursuant to this chapter, or unless otherwise authorized by law.

(2) The agency, its employees, and officials shall be immune from liability for any good-faith conduct under this section.

(3) As used in this section, "agency with jurisdiction" means that agency with the authority to direct

the release of a person serving a sentence or term of confinement and includes the department of corrections, the indeterminate sentence review board, and the department of social and health services.

[2009 c 409 § 2; 2008 c 213 § 11; 2001 c 286 § 5; 1995 c 216 § 2; 1992 c 45 § 3.]

Notes:

Reviser's note: *(1) RCW 71.09.020 was amended by 2009 c 409 § 1, changing subsection (16) to subsection (18).

**(2) RCW 10.77.020 was amended by 1998 c 297 § 30, deleting subsection (3).

***(3) RCW 72.09.345 was amended by 2011 c 338 § 5, changing subsection (3) to subsection (4).

Application -- Effective date -- 2009 c 409: See notes following RCW 71.09.020.

Recommendations -- Application -- Effective date -- 2001 c 286: See notes following RCW 71.09.090.

Severability -- Application -- 1992 c 45: See notes following RCW 9.94A.540.

RCW 71.09.040

Sexually violent predator petition — Probable cause hearing — Judicial determination — Transfer to total confinement facility upon probable cause determination.

(1) Upon the filing of a petition under RCW 71.09.030, the judge shall determine whether probable cause exists to believe that the person named in the petition is a sexually violent predator. If such determination is made the judge shall direct that the person be taken into custody and notify the office of public defense of the potential need for representation.

(2) Within seventy-two hours after a person is taken into custody pursuant to subsection (1) of this section, the court shall provide the person with notice of, and an opportunity to appear in person at, a hearing to contest probable cause as to whether the person is a sexually violent predator. In order to assist the person at the hearing, within twenty-four hours of service of the petition, the prosecuting agency shall provide to the person or his or her counsel a copy of all materials provided to the prosecuting agency by the referring agency pursuant to RCW 71.09.025, or obtained by the prosecuting agency pursuant to RCW 71.09.025(1) (c) and (d). At this hearing, the court shall (a) verify the person's identity, and (b) determine whether probable cause exists to believe that the person is a sexually violent predator. At the probable cause hearing, the state may rely upon the petition and certification for determination of probable cause filed pursuant to RCW 71.09.030. The state may supplement this with additional documentary evidence or live testimony. The person may be held in total confinement at the county jail until the trial court renders a decision after the conclusion of the seventy-two hour probable cause hearing. The county shall be entitled to reimbursement for the cost of housing and transporting the person pursuant to rules adopted by the secretary.

(3) At the probable cause hearing, the person shall have the following rights in addition to the rights previously specified: (a) To be represented by counsel, and if the person is indigent as defined in RCW 10.101.010, to have office of public defense contracted counsel appointed as provided in RCW 10.101.020; (b) to present evidence on his or her behalf; (c) to cross-examine witnesses who testify against him or her; (d) to view and copy all petitions and reports in the court file. The court must permit a witness called by either party to testify by telephone. Because this is a special proceeding, discovery pursuant to the civil rules shall not occur until after the hearing has been held and the court has issued its decision.

(4) If the probable cause determination is made, the judge shall direct that the person be transferred to the custody of the department of social and health services for placement in a total confinement facility operated by the department. In no event shall the person be released from confinement prior to trial.

[2012 c 257 § 4; 2009 c 409 § 4; 2001 c 286 § 6; 1995 c 216 § 4; 1990 c 3 § 1004.]

Notes:

Effective date -- 2012 c 257: See note following RCW 2.70.020.

Application -- Effective date -- 2009 c 409: See notes following RCW 71.09.020.

Recommendations -- Application -- Effective date -- 2001 c 286: See notes following RCW 71.09.015.

RCW 71.09.050
Trial — Rights of parties.

(1) Within forty-five days after the completion of any hearing held pursuant to RCW 71.09.040, the court shall conduct a trial to determine whether the person is a sexually violent predator. 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. The prosecuting agency shall have a right to a current evaluation of the person by experts chosen by the state. The judge may require the person to complete any or all of the following procedures or tests if requested by the evaluator: (a) A clinical interview; (b) psychological testing; (c) plethysmograph testing; and (d) polygraph testing. The judge may order the person to complete any other procedures and tests relevant to the evaluation. The state is responsible for the costs of the evaluation. At all stages of the proceedings under this chapter, any person subject to this chapter shall be entitled to the assistance of counsel, and if the person is indigent as defined in RCW 10.101.010, the court, as provided in RCW 10.101.020, shall appoint office of public defense contracted counsel to assist him or her. The person shall be confined in a secure facility for the duration of the trial.

(2) Whenever any indigent person is subjected to an evaluation under this chapter, the office of public defense is responsible for the cost of one expert or professional person to conduct an evaluation on the person's behalf. When the person wishes to be evaluated by a qualified expert or professional person of his or her own choice, the expert or professional person must be permitted to have reasonable access to the person for the purpose of such evaluation, as well as to all relevant medical and psychological records and reports. In the case of a person who is indigent, the court shall, upon the person's request, assist the person in obtaining an expert or professional person to perform an evaluation or participate in the trial on the person's behalf. Nothing in this chapter precludes the person from paying for additional expert services at his or her own expense.

(3) The person, the prosecuting agency, or the judge shall have the right to demand that the trial be before a twelve-person jury. If no demand is made, the trial shall be before the court.

[2012 c 257 § 5; 2010 1st sp.s. c 28 § 1; 2009 c 409 § 5; 1995 c 216 § 5; 1990 c 3 § 1005.]

Notes:

Effective date -- 2012 c 257: See note following RCW 3.70.020.

Application -- Effective date -- 2009 c 409: See notes following RCW 71.09.020.

RCW 71.09.060
Trial — Determination — Commitment procedures.

(1) The court or jury shall determine whether, beyond a reasonable doubt, the person is a sexually violent predator. In determining whether or not the person would be likely to engage in predatory acts of sexual violence if not confined in a secure facility, the fact finder may consider only placement conditions and voluntary treatment options that would exist for the person if unconditionally released from detention on the sexually violent predator petition. The community protection program under RCW [illegible] may not be considered as a placement condition or treatment option available to the person if unconditionally released from detention on a sexually violent predator petition. When the determination is made by a jury, the verdict must be unanimous.

If, on the date that the petition is filed, the person was living in the community after release from custody, the state must also prove beyond a reasonable doubt that the person had committed a recent overt act. If the state alleges that the prior sexually violent offense that forms the basis for the petition for commitment was an act that was sexually motivated as provided in *RCW [illegible](15)(c), the state must prove beyond a reasonable doubt that the alleged sexually violent act was sexually motivated as defined in RCW [illegible].

If the court or jury determines that the person is a sexually violent predator, the person shall be committed to the custody of the department of social and health services for placement in a secure facility operated by the department of social and health services for control, care, and treatment until such time as: (a) The person's condition has so changed that the person no longer meets the definition of a sexually violent predator; or (b) conditional release to a less restrictive alternative as set forth in RCW [illegible] is in the best interest of the person and conditions can be imposed that would adequately protect the community.

If the court or unanimous jury decides that the state has not met its burden of proving that the person is a sexually violent predator, the court shall direct the person's release.

If the jury is unable to reach a unanimous verdict, the court shall declare a mistrial and set a retrial within forty-five days of the date of the mistrial unless the prosecuting agency earlier moves to dismiss the petition. The retrial may be continued upon the request of either party accompanied by a showing of good cause, or by the court on its own motion in the due administration of justice provided that the respondent will not be substantially prejudiced. In no event may the person be released from confinement prior to retrial or dismissal of the case.

(2) If the person charged with a sexually violent offense has been found incompetent to stand trial, and is about to be or has been released pursuant to RCW [illegible](4), and his or her commitment is sought pursuant to subsection (1) of this section, the court shall first hear evidence and determine whether the person did commit the act or acts charged if the court did not enter a finding prior to dismissal under RCW [illegible](4) that the person committed the act or acts charged. The hearing on this issue must comply with all the procedures specified in this section. In addition, the rules of evidence applicable in criminal cases shall apply, and all constitutional rights available to defendants at criminal trials, other than the right not to be tried while incompetent, shall apply. After hearing evidence on this issue, the court shall make specific findings on whether the person did commit the act or acts charged, the extent to which the person's incompetence or developmental disability affected the outcome of the hearing, including its effect on the person's ability to consult with and assist counsel and to testify on his or her own behalf, the extent to which the evidence could be reconstructed without the assistance of the person, and the strength of the prosecution's case. If, after the conclusion of the hearing on this issue, the court finds, beyond a reasonable doubt, that the person did commit the act or acts charged, it shall enter a final order, appealable by the person, on that issue, and may proceed to

consider whether the person should be committed pursuant to this section.

(3) Except as otherwise provided in this chapter, the state shall comply with RCW [illegible] while confining the person. During all court proceedings where the person is present, the person shall be detained in a secure facility. If the proceedings last more than one day, the person may be held in the county jail for the duration of the proceedings, except the person may be returned to the department's custody on weekends and court holidays if the court deems such a transfer feasible. The county shall be entitled to reimbursement for the cost of housing and transporting the person pursuant to rules adopted by the secretary. The department shall not place the person, even temporarily, in a facility on the grounds of any state mental facility or regional habilitation center because these institutions are insufficiently secure for this population.

(4) A court has jurisdiction to order a less restrictive alternative placement only after a hearing ordered pursuant to RCW [illegible] following initial commitment under this section and in accord with the provisions of this chapter.

[2009 c 409 § 6; 2008 c 213 § 13; 2006 c 303 § 11; 2001 c 286 § 7; 1998 c 146 § 1; 1995 c 216 § 6; 1990 1st ex.s. c 12 § 4; 1990 c 3 § 1006.]

Notes:

***Reviser's note:** RCW [illegible] was amended by 2009 c 409 § 1, changing subsection (15) to subsection (17).

Application -- Effective date -- 2009 c 409: See notes following RCW [illegible].

Recommendations -- Application -- Effective date -- 2001 c 286: See notes following RCW [illegible].

Effective date -- 1998 c 146: "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect immediately [March 25, 1998]." [1998 c 146 § 2.]

Effective date -- 1990 1st ex.s. c 12: See note following RCW [illegible].

AMENDMENT (V)

No person shall be held to held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT (XIV)

Ss. 1. Citizenship rights not be abridged by states

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

PROOF OF SERVICE

STATE OF WASHINGTON)
COUNTY OF KITSAP)

James L. Reese, III, being first duly sworn on oath, deposes and says:

That he is a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to the above-entitled action, and competent to be a witness herein.

That on the 12th day of September, 2013, I hand delivered for filing the original and one (1) copy of Appellant's Brief in In re the Detention of Charles H. Robinson, Court of Appeals Cause No. 44575-1-II, to the Court of Appeals at 950 Broadway, Ste. 300, Tacoma, WA 98402; deposited in the mails of the United States of America, postage prepaid, one (1) copy of the same to Counsel for Respondent Kent Liu, Attorney General's Office, Criminal Division, 800 Fifth Avenue, Suite 2000, Seattle, WA 98104/ Jeremy S. Bartels, Attorney General's Office, Criminal Division, 800 Fifth Avenue, Suite 2000, Seattle, WA 98104; and mailed one (1) copy of the same to Appellant at his last known address: Charles Robinson, P.O. Box 88600, Steilacoom, WA 98388.

James L. Reese, III

Signed and Attested to before me this 12th day of September, 2013 by James L. Reese, III.

Julia L. Reese

Notary Public in and for the State of Washington residing at Port Orchard.
My Appointment Expires: 04/04/17