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No. 63879-3-I

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

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IN RE DETENTION OF LIPTRAP,

STATE OF WASHINGTON,

Respondent,

v.

JEFFREY LIPTRAP,

Appellant.

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

The Honorable Ronald L. Castleberry

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APPELLANT'S OPENING BRIEF

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## **A. ASSIGNMENTS OF ERROR**

1. The trial court erred in denying petitioner Jeffrey Liptrap's Civil Rule 60 motion for relief from judgment, asking the court to vacate a 2007 judgment entered on a jury determination that he was a Sexually Violent Predator pursuant to RCW 71.09 et seq.

2. The trial court abused its discretion in denying Mr. Liptrap's CR 60(b)(3) motion for relief from judgment based on newly discovered evidence, where the proffered evidence, in the form of new actuarial instruments and new recidivism risk prediction protocols, was discovered since the time of trial, would likely change the outcome of trial, and in all other respects met the requirements of CR 60(b)(3).

## **B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR**

Mr. Liptrap moved for relief from judgment under authority of CR 60(b)(3), arguing that newly discovered evidence existed which would likely change the result of his Sexually Violent Predator ("SVP") commitment trial held in December, 2007. Mr. Liptrap's motion was predicated on the discovery of new scientific evidence that was not cumulative of evidence already raised by the defense in 2007, nor was the new evidence simply additional impeachment of the State's proof at that time. Rather, the evidence was comprised

of new actuarial instruments and new recidivism risk prediction protocols affirmatively demonstrating that Mr. Liptrap had a substantially lower risk of reoffense than that required for civil commitment. Although a defense expert at the prior trial offered criticism of the State's expert's methodology that bore some similarity to the later-proffered scientific evidence, the new evidence represents a wholesale change to that methodology, to the extent that he himself now deems his prior methodology to be "outdated," and the percentage recidivism risks that are calculated under that methodology to be "inflated." The new instruments and protocols proffered by Mr. Liptrap represent a dramatic invalidation of the prior methodology for predicting recidivism, and are now accepted by the scientific community; this new evidence would have changed the result of the 2007 commitment trial, and in all other respects met the requirements for relief from judgment under Civil Rule 60(b)(3).

Did the trial court abuse its discretion in denying Mr. Liptrap's motion for relief from judgment?

### **C. STATEMENT OF THE CASE**

Jeffrey Liptrap was determined by a jury in 2007 to be a Sexually Violent Predator under RCW 71.09 et seq., following civil proceedings commenced by the filing of an SVP petition two days

prior to Mr. Liptrap's release from the Washington Department of Corrections, and under the authority of which he was subjected to continued detention. CP 9, CP 309-10. The Attorney General's Office alleged that Mr. Liptrap met the SVP criteria because (1) he had been convicted in 1986 and 1993 of one or more sexually violent offenses; (2) he suffered from a mental abnormality of Pedophilia, and a personality disorder, not otherwise specified ("NOS"); and (3) he was more likely than not to sexually reoffend if not confined to a secure facility. CP 309-10.

A first trial on the State's petition ended with a "hung" jury that was unable to conclude that Mr. Liptrap was an SVP. CP 208. The second SVP trial resulted in the affirmative verdict in favor of the Attorney General. CP 9. On direct appeal, Mr. Liptrap asked this Court to reverse the judgment entered on the jury's SVP determination, arguing, inter alia, that the trial court prevented him from arguing his theory of the case when it denied his request for an instruction requiring the jury to find that there was a greater than 50 percent chance of him engaging in future acts of sexual violence. CP 3. The Court of Appeals ruled that the jury instruction's use of "more likely than not" language was adequate to express the statutory standard required for SVP commitment. In re Detention of

Liptrap, 2009 WL 667963 (Wash. App. Div. 1, March 16, 2009) (unpublished decision).<sup>1</sup> See 12/5/07RP at 102; 12/10/70RP at 591.<sup>2</sup>

The Civil Rule 60 motion that is the subject of the present appeal was filed by Mr. Liptrap's trial counsel on April 22, 2009. CP 69. By means of a summary of the evidence upon which the jury relied for its SVP determination in 2007, and a description of newly discovered evidence in the form of new actuarial instruments and new recidivism risk prediction protocols under which Mr. Liptrap would be assessed as not having a risk of reoffense adequate to warrant commitment under RCW 71.09.090, counsel contended that the requirements of CR 60(b)(3) were satisfied. CP 69-267.

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<sup>1</sup>The appellant cites this Court's unpublished decision in Liptrap merely to acquaint the Court with the pertinent procedural history preceding the present second appeal. See GR 14.1(a) (formerly RAP 10.4(h)) ("A party may not cite as an authority an unpublished opinion of the Court of Appeals"); State v. Golden, 112 Wn. App. 68, 47 P.3d 587, review denied, 148 Wn.2d 1005, 60 P.3d 1212 (2002) (RAP 12.4(h) not violated where counsel did not cite unpublished decision as precedential authority).

<sup>2</sup>Mr. Liptrap's memorandum in support of his CR 60 motion included selected portions of the verbatim report of proceedings of the 2007 commitment trial. CP 69 (Appendices). In addition, the transcript of the 2007 trial, which was a part of the record for purposes of Mr. Liptrap's original appeal in COA No. 61034-1-I, has been made a part of the record for purposes of the present appeal of the denial of his CR 60 motion, pursuant to RAP 9.1. The multiple volumes of transcript from the original trial and the present motion are referred to by the date of the proceeding covered by each volume, followed by the appropriate page reference.

The court denied Mr. Liptrap's motion. CP 10; 6/22/09RP at 8-10; see CP 60-68 (State's Memorandum in Response to Respondent's Motion to Set Aside Judgment Pursuant to CR 60(b)). The court reasoned in its oral ruling that Mr. Liptrap's motion had not proffered matters that were "within the classic parameters of newly-discovered evidence" because, the court asserted, they were based upon the fact that the recidivism prediction methodology employed by the State's expert had "come under some degree of modification." 6/22/09RP at 7. The court also stated that the changes in the science raised by Mr. Liptrap's motion were "already in one form or another put to the jury" at the time of the 2007 trial. 6/22/09RP at 8.

Finally, the court stated that a person committed as a Sexually Violent Predator cannot obtain a new trial based simply on "a change in the data and . . . a change in the risk assignment." 6/22/09RP at 9-10. Instead, the court held, a new trial would be warranted only if "it could be shown that the test as it was administered back at that time was invalid." 6/22/09RP at 10.

Mr. Liptrap timely appealed. CP 4-6.

## D. ARGUMENT

### **MR. LIPTRAP WAS ENTITLED TO RELIEF UNDER CR 60(b)(3) BASED ON NEW ACTUARIAL INSTRUMENTS AND NEW RECIDIVISM RISK PREDICTION PROTOCOLS THAT ESTABLISH A RISK OF REOFFENSE INADEQUATE TO WARRANT COMMITMENT UNDER THE SEXUALLY VIOLENT PREDATOR STATUTE.**

(1). **Legal Standard.** Proceedings to vacate judgments, such as a motion brought pursuant to Civil Rule 60, are equitable in nature, and the trial court on such motion should exercise its authority liberally, in order to preserve the parties' substantial rights and do justice between them. Haller v. Wallis, 89 Wn.2d 539, 543, 573 P.2d 1302 (1978). CR 60(b) specifically addresses concerns for fairness at the trial level and authorizes the court to relieve a party from a final judgment "upon such terms as are just." Among the grounds that warrant relief in the form of vacation of judgment are specifically, according to CR 60(b)(3), "[n]ewly discovered evidence."

The relevant portion of the rule provides:

On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: . . . (3) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under rule 59(b).

CR 60(b)(3). The rule grants authority to the trial court to, inter alia, reverse an order of commitment entered pursuant to Washington's

Sexually Violent Predator law, RCW 71.09 et seq. See In re Detention of Elmore, 162 Wn.2d 27, 41, 168 P.3d 1285 (2007) (noting that "Civil Rule (CR) 60(b) allows for a detainee to seek relief from judgment based on newly discovered evidence or '[a]ny other reason justifying relief.' CR 60(b)(3), (11)") (Bridge, J. in dissenting opinion); In re Detention of Ward, 125 Wn. App. 374, 379, 104 P.3d 751 (2005). The rule's provisions are a proper vehicle for seeking vacation of a judgment entered on a fact-finder's determination of SVP status. Ward, 125 Wn. App. at 378-80.

A movant under CR 60(b)(3) must meet several requirements in order to gain vacation of a judgment based on "newly discovered evidence." He or she must show the following

- (1) the new evidence will probably change the result of trial;
- (2) the new evidence was discovered since the trial;
- (3) the new evidence could not have been discovered before trial by the exercise of due diligence;
- (4) the new evidence is material; and
- (5) the new evidence is not merely cumulative or impeaching.

See State v. D.T.M., 78 Wn. App. 216, 219, 896 P.2d 108 (1995). In addition, some decisions have stated that the evidence in question must have existed at the time of the prior trial. See, e.g., In re Marriage of Knutson, 114 Wn. App. 866, 872, 60 P.3d 681 (2003).

**(2). Background of 2007 SVP Trial, and Subsequent CrR**

**60(b)(3) motion.** In order to assist the trial court in its ability to assess whether the new recidivism methodology met the definition of newly discovered evidence under CR 60, and satisfied the requirement of materiality to the outcome of the 2007 SVP trial, Mr. Liptrap's motion summarized relevant portions of the State's proof the previous proceeding.

In the SVP context, an actuarial instrument is a predictive test that is based on past studies of a population of sexual offenders, relating their behavioral patterns and their psychological characteristics to their actual known record of subsequent re-offending. The aspiration of the "actuarial approach" to predicting recidivism is to accurately predict a particular individual's future likelihood of re-offending by comparing the person's patterns and characteristics to those of a studied offender population. See In re Detention of Robinson, 135 Wn. App. 772, 785-87, 146 P.3d 451 (2006).

At the December 2007 commitment trial, the State offered the testimony of its expert witness, Dr. Christopher North. Dr. North is a member of the Association for the Treatment of Sexual Abusers ("ATSA"), which is considered to be the "pre-eminent organization

pertaining to research on sex offenders and treatment of sex offenders." 12/5/07RP at 145. Dr. North stated in 2007 that the detainee, Mr. Liptrap, met the criteria of having "a mental abnormality [paraphilia], pedophilia, that causes him serious difficulty in controlling his behavior," and testified to his expert opinion that Mr. Liptrap was "more likely than not to re-offend" if not confined to a secure facility. 12/5/07RP at 230.

On the critical question of future risk assessment, meaning the detainee's likelihood of engaging in acts of sexual violence in the future if not confined in a secure facility, Dr. North utilized actuarial instruments in making his assessment. 12/5/07RP at 176-77. In addition, Dr. North relied on a protocol by which "research-derived risk factors" are employed to further clarify and assess the detainee's recidivism risk as calculated using actuarial instruments. 12/5/07RP at 222-23.

Dr. North employed the following actuarial instruments: the Static-99; the Sex Offender Risk Appraisal Guide ("SORAG"); and the Minnesota Sex Offenders Screening Tool - Revised ("MnSOST-R"). 12/5/07RP at 176-77. Dr. North explained that he did not use a fourth actuarial instrument in assessing Mr. Liptrap -- the "Static-2002" -- because he believed it had not received

adequate cross-validation in the scientific community at the time.

12/5/07RP at 178, 192.

When evaluated in 2007 according to the actuarial tool known as the SORAG, which predicts the likelihood that an offender will be convicted of a new violent offense (not limited to sexual crimes), Mr. Liptrap scored a 15, which corresponded to a recidivism rate of 58% within 7 years, and 76% within 10 years. 12/5/07RP at 201-21.

When Mr. Liptrap was evaluated under the MnSOST-R, the doctor indicated that the respondent's raw score fell within a range of "7" to "10." The lower score was associated with a 25% probability for sexual recidivism within 6 years of release, while the higher score predicted a 57% likelihood of recidivism within that period. Dr. North noted that the MnSOST-R defines recidivism as the occurrence of an arrest for a new sexual offense. 12/5/07RP at 216-20.

On the Static-99 actuarial test, Mr. Liptrap scored a "5." After reviewing the factors that this particular test uses to predict re-offense and applying them to the detainee, the doctor testified that under the Static-99, Mr. Liptrap had a recidivism risk of 33% within 5 years, 38% within 10 years, and 40% within 15 years of release. 12/5/07RP at 180-86.

On the bases of these actuarial tools, along with adjustments made to the detainee's scores pursuant to protocols under which Dr. North used his clinical judgment to modify the actuarial results, the State's expert issued his opinion that Mr. Liptrap was "more likely than not to re-offend" within the meaning of the Sexually Violent Predator statute, meaning that Mr. Liptrap was "likely" to commit predatory acts of sexual violence unless confined to a secure facility. 12/5/07RP at 230.

Importantly, in 2007, Dr. North testified that his overall prediction of Mr. Liptrap's risk of sexual re-offense was based on consideration of certain "dynamic factors" which he termed "intimacy deficits," "[s]exual self-regulation," "attitudes about sex with children," and "general self-control." 12/5/07RP at 222-23.

**(3). New actuarial instruments and recidivism risk prediction protocols are "newly discovered evidence" that would have changed the result of Mr. Liptrap's 2007 SVP commitment hearing.** Mr. Liptrap's newly discovered evidence took the form of new actuarial instruments that are now used to predict the risk of sexual reoffense. Although these new instruments carry the same or similar titles as prior instruments, they represent an evolution in the methodology of calculating the recidivism rates of

sexual offenders. In addition, new protocols, based on agreement in the scientific community, have been established which affirm the accuracy of the actuarial approach to predicting reoffense, and announce the inaccuracy of protocols which used a “clinical approach” to adjust an offender’s scores on actuarial instruments.

In contrast to using actuarial predictions, forecasting a particular individual’s future recidivism by means of the “clinical approach” involves evaluation of the alleged SVP by employing a more diffuse set of criteria based on the individual’s prior acts, his “observed” characteristics, and the evaluator’s subjective impressions. In re Robinson, 135 Wn. App. at 786. The actuarial approach and the clinical approach can be understood as two different methodologies for predicting recidivism.

At least until the emergence of the new methodologies at issue in the present appeal, a scientifically-accepted step in the application of actuarial studies to a particular sexual offender had been the making of an adjustment to the actuarial study's initial scoring of the individual based on additional factors not considered by the instrument. In re Robinson, 135 Wn. App. at 786. This was effectively a procedure for predicting reoffense by using clinical

techniques to “adjust” the results of actuarial tests. In re Robinson, at 786.

Dr. North’s employment in 2007 of what he termed “dynamic factors,” used to adjust a detainee’s actuarial scores, represented an overlay of a clinical approach to recidivism prediction. See 12/5/07RP at 222-23. Dr. North literally changed Mr. Liptrap’s scores on the accepted actuarial tests based on his personal clinical judgment. See In re Robinson, at 786 (noting that this melded approach to predicting recidivism “evaluates a limited set of predictors and then combines these variables using a predetermined, numerical weighting system to determine future risk of reoffense which may be adjusted (or not) by expert evaluators considering potentially important factors not included in the actuarial measure”) (citing In re Detention of Thorell, 149 Wn.2d 724, 754, 72 P.3d 708 (2003)); see generally Dennis M. Doren, Using Risk Assessment Instrumentation, in Evaluating Sex Offenders: A Manual for Civil Commitments and Beyond ch. 5, at 103 (2002).

With regard to the new actuarial tables that Mr. Liptrap proffered in his CR 60(b) motion for relief from judgment, since Mr. Liptrap’s commitment, the developers of the Static-99 actuarial test had recommended replacing the base-line percentage risk estimates

that are calculated from the raw score results of the actuarial instruments reported by Dr. North with newer risk estimates. In 2007, Dr. North specifically testified that the risk estimates he reported to the jury were the risk estimates endorsed by Dr. Karl Hanson, the developer of the Static-99. 12/5/07RP at 208. Dr. North argued at that time that these risk estimates, as compared to risk estimates used by Mr. Liptrap's experts, were more accurate and reliable because these estimates were based upon a larger sample size of actual sex offenders. 12/5/07RP at 207.

However, the risk estimates resulting from application of the new Static-99 test were calculated based upon a much larger sample of sexual offenders, and the chance of re-offense under the new test is considerably lower than that reported as the result of the old, now outmoded, Static-99 that Dr. North described and employed during Mr. Liptrap's 2007 trial. Mr. Liptrap noted, though it needed no attention directed to it, that Dr. North – the State's expert – was now in agreement that use of these newer risk estimate percentages is appropriate. CP 72.

Additionally, since the 2007 trial, the developers of the MnSOST-R actuarial test have reported newer probability estimates

for that predictive instrument. These estimates are also substantially lower than those reported during Mr. Liptrap's trial. CP 72.

Finally, Mr. Liptrap also noted in his motion that leaders in the field of scientific prediction of sexual recidivism have adopted two substantial changes to the overall manner – or “protocol” – in which experts in this area conduct final risk assessments of sexual offenders. These experts have changed the accepted standard by which a recidivism evaluator should consider “dynamic risk factors” as reliable adjustments to a particular individual’s initial score on actuarial tests. CP 72.

**(i). *New actuarial instruments.***

The actuarial instruments employed by the State’s expert in the 2007 SVP trial, Dr. North, are no longer accepted in the scientific community. New evidence exists in the form of new actuarial instruments that would change the result of Mr. Liptrap’s SVP trial.

First, the new Static-99 actuarial test employed by Dr. Hanson is accepted by the scientific community as the only acceptable standard for formulating percentage scores into understandable varying risks of reoffense. CP 176-77. In its newsletter of winter 2009, the ATSA published a paper written by Dr. Karl Hanson, Dr. David Thornton, and Leslie Helmus. The paper is entitled

"Reporting Static-99 in Light of New Research on Recidivism Norms." CP 174 (Attachment B to Jeffrey Liptrap's CR 60 motion for relief from judgment).

In this paper, these recognized experts first observe that the vast majority of the base population of sexual offenders used to formulate the risk estimates stated in the prior Static-99 test were offenders who had been released in the 1960's, 1970's, and 1980's. CP 72, CP 175. Dr. Hanson and his co-authors have determined that the actual sexual recidivism rates of offenders released during the 1990's and post-2000 are actually significantly lower than the recidivism rates of offenders released during the much earlier time frame that formed the basis of the Static-99 test used to evaluate Mr. Liptrap. CP 175 (describing the reduction in recidivism rates as a "dramatic decline"). Because Mr. Liptrap's release date from criminal incarceration was December 2007, actuarially derived recidivism estimates from sexual offender populations from 1997 and upwards are applicable -- not the older estimates which were based on populations from the 1960s, 70s, and 80s. See CP 175. The new Static-99 test uses these base populations.

The scientific community now uses revised and modernized data on released sexual offenders from these later decades to

calculate a particular alleged sexual predator's recidivism risk. In contrast to the trial court's reasoning that Mr. Liptrap's motion merely proffered modifications to still-valid actuarial tests, Dr. North's current expert opinion is that the recidivism risk percentages churned out by the older version of the Static-99 test are "outdated," and more importantly, are "inflated." (Emphasis added.) CP 184, 207 (Deposition of Dr. Christopher North, in In re the Detention of William Gaston, Snohomish County Superior Court No. 08-2-01878-2, January 29, 2009, page 91, line 12) (Attachment C to Liptrap motion). The old Static-99 test – used in Mr. Liptrap's 2007 commitment trial – does not represent accurate science for purposes of the 2007 proceeding.

These authors (all of whom developed the original Static-99 test) explained that the new risk estimates are more accurate for the additional reason that, compared to the old risk estimates that Dr. North reported at Mr. Liptrap's original trial, they are derived from studies on a larger base population of offenders. CP 73 (noting Dr. Hanson's evaluation of the actuarial data in the new Static-99 as being "based on more offenders, more complete data, and more recent, representative samples"). By these new norms, Mr. Liptrap's raw score of "5" no longer corresponds with a 10-year recidivism rate

of 38% as testified by Dr. North; instead it corresponds with a recidivism rate that ranges between 11.8% and 32.1%. If this new evidence - a different Static-99 test – had been presented at the 2007 commitment trial, it would have calculated a lower recidivism risk for Mr. Liptrap, and thus weighed strongly against the critical SVP finding of likelihood of sexual reoffense. The question of the criteria of “materiality to the outcome,” with regard to this one actuarial test, alone satisfies the materiality requirement of both rule and case law.

Additionally, the new, far more accurate MnSOST-R instrument also predicts recidivism based on a later population of sexual offenders released from prison in 1997. CP 74. The former estimates obtained under the MnSOST-R, those reported as evidence by Dr. North during Mr. Liptrap's 2007 SVP trial, were based upon studies of sexual offenders who had been released from confinement upwards of a decade previously, in 1988 and 1990. Id. Based on the new MnSOST-R , Mr. Liptrap's raw score of between 7 and 10 now corresponds with a sexual recidivism rate of between 20% and 30% over 6 years. CP 74-75.

The developers of the 2009 iteration of the MnSOST-R instrument have hypothesized on the causes of marked decreases in

percentage likelihood of sexual recidivism over the years. Id. But the significant data is the percentage numbers themselves, and the new evidence proffered by Mr. Liptrap in his CR 60 motion comprises these risk estimates, and the methodologies used to arrive at them, which are undisputed within the community of recidivism experts as dramatically more accurate, according to the best methodologies this field of experts – including Dr. North – has ever developed.

***(ii). New predictive protocols.***

Mr. Liptrap, in his motion, also proffered new evidence in the form of Dr. North's new conclusion, as now dictated by the developer of the MnSOST-R actuarial instrument, that recidivism risk estimates derived from this test are not to be modified by clinical adjustments as was done under the MnSOST-R in 2007. Once again, as he stated in explaining the scientific community's rejection of the methodologies he used in 2007, where risk assessments at that time were heavily influenced by adjustment of actual test scores under the rubric of the "clinical approach," Dr. North has now testified that the estimates from the old MnSOST-R are inaccurate. CP 204 (Deposition of Dr. Christopher North, in In re Detention of William Gaston, pp. 80-81) (Attachment C to Liptrap motion).

Mr. Liptrap argued below that Dr. Hanson, as a leader in his field, has established new protocols with regard to the so-called "dynamic" risk factors. As discussed supra, the use of such factors in prior recidivism prediction methodology involved the adjustment of an alleged SVP's recidivism risk (as determined by actuarial instruments) based on subjective clinical impressions. See In re Robinson, 135 Wn. App. at 786. In the past, consideration of dynamic risk factors could be used to "adjust" the risk estimates produced by actuarial instruments. See 12/5/07RP at 222-23 (testimony of Dr. North at 2007 trial). This is no longer a credited or credible aspect of recidivism prediction methodology.

Because new research demonstrates that clinical adjustment of sexual recidivism risk assessments actually decreases predictive accuracy of actuarial tests, dynamic factors are no longer employed to adjust actuarial assessments (i.e., to suggest that an individual's recidivism risk is higher than what a given actuarial instrument suggests). See CP 184, 206 (Deposition of Dr. Christopher North, in In re Detention of William Gaston, at p. 89, line 24, and p. 90, line 11) (Attachment C to Liptrap motion). Other experts in the field beyond just Dr. Hanson and Dr. North have not failed to bluntly repudiate this prior practice, with several commentators stating that

clinically adjusted risk assessments decrease predictive accuracy over that observed for the pure actuarial measures. Overrides simply added “noise.”

CP 215 (Dr. Amy Phoenix and Dr. Dale Arnold, Proposed Considerations for Conducting Sex Offender Risk Assessment, ¶ 7 (2008)). The “noise” referred to by these commentators is, specifically, the prior practice of actually overriding the numeric value of the actuarial results associated with an offender. CP 212, 215.

The new recidivism protocols rejecting the application of “dynamic factors” that Dr. North used in 2007 were developed based upon the results of recently completed meta-analyses<sup>3</sup> of multiple risk-prediction studies. The results of this new research established that when experts in the field of sexual recidivism attempt to adjust actuarial results with their professional clinical judgment, the accuracy of recidivism risk prediction actually decreased. See Hanson, Karl, and Morton-Bourgon, Kelly, The Accuracy of Recidivism Risk Assessments for Sexual Offenders: A Meta-Analysis of 118 Prediction Studies, in 1 Psychological Assessment, at pp. 1-

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<sup>3</sup>The American Heritage Dictionary defines “meta-analysis” as follows:

The process or technique of synthesizing research results by using various statistical methods to retrieve, select, and combine results from previous separate but related studies.

American Heritage Dictionary of the English Language, 4th Ed. 2000, 2009 (Houghton Mifflin).

21 (2009). In this published study, Dr. Hanson and his colleague resoundingly concluded that the adjustment of actuarial data by application of clinical judgment does nothing but "add noise" to predictions of recidivism. *Id.* Like the new actuarial instruments discussed supra, these new protocols also constituted newly discovered evidence within the meaning of CR 60(b)(3).

**(iii). *The Static-2002.***

Mr. Liptrap also proffered additional new evidence in the form of specific results obtained by application of the new "Static-2002" actuarial test. This test effectively melds new scientific data of the sort represented by the revised actuarial tests discussed above, together with the new predictive methodologies' emphasis on objective criteria for risk assessment, as opposed to the loose-handed "clinical approach" Dr. North relied on in the 2007 trial.

Dr. Karl Hanson now recommends using the Static-2002, an actuarial instrument also not offered or admitted into evidence in the 2007 SVP trial. State's expert Dr. North, per his training and his academic alignment with the methodologies and strictures promulgated by Dr. Hanson, thus now employs the Static-2002 test. See CP 184 (Deposition of Dr. Christopher North, in *In re Detention of William Gaston*, pp. 80-91).

A thorough review of the elements of the Static-2002 indicates that Mr. Liptrap scores a "7" on the Static-2002. CP 74. This raw score, when correlated to recidivism risk pursuant to the "Static-99 and Static-2002 Workbook for SVP Evaluators," states that the associated risk percentage for that score on this instrument is 13.3% to 32.1% over 10 years. CP 74. This risk percentage – substantially lower than the “more likely than not” standard of RCW 71.09 et seq., is tremendously significant as “material” new evidence that the trial court should have determined to be dispositive of Mr. Liptrap’s CR 60 motion for relief from judgment. These numbers are “newly discovered evidence” coming in the form of new, scientifically-accepted recidivism prediction data, calculated absent any percentage ‘adjustment up’ based on the now disfavored subjective clinical considerations of “dynamic factors.”

**(iv). Summary: Materiality to the Outcome.**

A motion for relief from judgment brought under CR 60(b)(3) requires, in its most basic sense, that the moving party show that “newly discovered evidence” exists that would likely change the result of the prior proceeding. 4 Washington Practice, Rules Practice, CR 60. Relief From Judgment or Order, (Tegland, K.) (5th ed. 2009)

(referencing “newly discovered evidence” standard of CR 59(a)(4)<sup>4</sup>); see, e.g., In re the Personal Restraint of Brown, 143 Wn.2d 431, 453, 21 P.3d 687 (2001). In summary, these new instruments and protocols described herein dramatically changed the terrain in which recidivism experts predict reoffense. Mr. Liptrap’s motion for relief is premised on the fact that substantive due process permits civil incarceration only upon proof that the respondent is currently mentally disordered and currently dangerous. Particularly pertinent here, due process requires a showing of current dangerousness. Detention of Paschke, 121 Wn. App. 614, 622, 90 P.3d 74 (2004). “Current dangerousness is a bedrock principle underlying the [sexually violent predator] commitment statute.” In re Detention of Ward, 125 Wn. App. at 386. In an SVP trial the State must prove that the chance of the respondent re-offending is, beyond a reasonable doubt, greater than “50 percent.” This is the language of In re Detention of Brooks, 145 Wn.2d 275, 280, 36 P.3d 1034 (2001), and the percentage risk of reoffense is that which must be found for a person to be deemed likely to engage in predatory acts of sexual violence. RCW 71.09.020(1).

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<sup>4</sup>CR 59(a)(4) provides that a court may grant a new trial on the basis of “[n]ewly discovered evidence, material for the party making the application, which he could not with reasonable diligence have discovered and produced at the trial[.]”

Of course, Mr. Liptrap need not establish that the newly discovered evidence would positively prove he is not a Sexually Violent Predator. He need only show that the new evidence, if considered by the trier of fact, would probably change the result at trial. See In Re Bradford, 140 Wn. App. 124, 165 P.3d 131 (2007). The new evidence he proffered below manifestly meets that standard.

The new protocols show that Mr. Liptrap's actuarial risk on the Static-99 is much lower than what was reported to the jury in 2007. His risk is 11.3% to 32.1% according to the Static-99 as currently formulated. Mr. Liptrap's risk on the Static-2002 is between 13.3% to 32.1%. Thus, instead of hearing evidence that actuarial data estimate a 6 year risk between 25% and 57%, the jury would hear two actuarial instruments converging on a 10 year risk that could be as low as 11%, and would not exceed 32.1%. Additionally, the newer data also indicate that Mr. Liptrap's recidivism rate on the MnSOST-R (which predicts solely violent recidivism) is only 20% to 30%.

Furthermore, Dr. North reported to the jury in 2007 that the existence of dynamic risk factors actually exacerbated Mr. Liptrap's dangerousness above that shown by the actuarial studies the doctor

employed. But recent research – as to which there is no dispute in the scientific community – along with Dr. North's own endorsement of these new methodologies, all indicate that the “dynamic factors” he used in 2007 should not be employed to “adjust” upward the risks reported by actuarial assessment. As a result, the jury would have learned that the presence of these dynamic factors does not increase Mr. Liptrap's risk above what the Static-99 and Static-2002 actuarial instruments report.

In total, the new protocols and actuarial instruments would manifestly change the result of the 2007 proceeding because they predict a risk of recidivism that is incompatible with the “likelihood” or more than 50% standard required for civil commitment under RCW 71.09. See In re Detention of Brooks, 145 Wn.2d at 280.

**(v). *Due Diligence.***

The new recidivism instruments and protocols constitute “newly discovered evidence” within the meaning of CR 60(b)(3), which includes a requirement that the evidence may not be matters that were available, but simply not presented, at trial. See Vance v. Offices of Thurston County Commissioners, 117 Wn. App. 660, 662, 71 P.3d 680 (2003) (matters that were available from then existing records will not be considered newly discovered). This requirement

includes a component of "due diligence." State v. Macon, 128 Wn.2d 784, 800, 911 P.2d 1004 (1996). Mr. Liptrap's SVP trial concluded in December, 2007. The new evidence regarding the Static-99, the Static-2002, and the newer protocols for risk assessment were not discovered until January, 2009. The risk estimates on the MnSOST-R were not discovered until April 19, 2009. CP 77. Given this chronology, no greater due diligence could have been exerted by Mr. Liptrap's defense team to discover and present at the commitment trial all the evidence that was of value in establishing his defense, but notwithstanding such diligence, this evidence was not discovered until it was too late to use it at the trial. State v. Macon, 128 Wn.2d at 800. In particular, the new actuarial risk percentages and the Static-2002 test as a whole were disclosed to Dr. North in December of 2008. Counsel below learned of the existence of these updates in late December, 2008 and was able to learn about them, read the literature about them, and understand them by January 2009. CP 77.

Due diligence could not have caused an earlier discovery of this new evidence. In fact, Mr. Liptrap's counsel's diligence resulted in his learning about the new evidence almost immediately after it became available. CP 77. Finally, counsel learned at this same

time that new risk predictions for the MnSOST-R would be forthcoming. However, those estimates were not revealed until March, 2009 and counsel did receive the information until April 19, 2009. CP 77.

**(vi). *The new evidence is not “Merely Cumulative or Impeaching” and Existed at the Time of Trial.***

During the 2007 trial, the jury would have, and necessarily must have, completely discounted the defense critiques of the State's expert's scientific testimony as mere attempts at impeachment of the official instruments and protocols employed by the State. The new evidence, however, is not merely “cumulative or impeaching.” See State v. D.T.M., 78 Wn. App. 219. It is neither – a fact shown by the chronology of the evolution of the new methodologies described herein as it became scientifically accepted. While the State will likely argue that the new methodologies its own expert witness now endorses were foreshadowed by the defense expert, Dr. Wollert, the wide acceptance of these new methodologies by the scientific community categorically precludes what is now the ‘accepted standard’ from being dismissed as mere impeachment evidence. In 2007, to the extent Dr. Wollert foreshadowed some of the new science now accepted by recidivism

risk prediction experts, his testimony was indeed mere impeachment.

The new actuarial instruments and recidivism risk prediction protocols are now the official science in this field. These methodologies do not impeach Dr. North's expert presentation at the 2007 trial; rather, they replace his prior testimony, by his open admission.

Relatedly, however, Dr. Wollert's defense testimony, to the extent it mirrored later scientific advances in the area of sexual recidivism, demonstrates that the evidence proffered in support of Mr. Liptrap's CR 60(b)(3) motion existed at the time of trial. The State argued below that the evidence in question must have "existed" at the time of the prior proceeding. 6/22/09RP at 4-5 (citing In re Marriage of Knutson, 114 Wn. App. 866, 872, 60 P.3d 681 (2003) (holding that award of retirement fund to wife in dissolution proceeding could not be vacated under CR 60(b)(3) on ground that market value of fund changed subsequent to trial, because newly discovered evidence rule "applies to evidence existing at the time the decree was entered, not later")). Of course, the trial court actually ruled that this was the case, because of Dr. Wollert's testimony that critiqued the State's proof in ways that are similar to the later-

adopted actuarial instruments and new protocols abandoning clinical approaches to predicting sexual reoffense. 6/22/09RP at 9.

In any event, however, it is not at all uncommon for new scientific evidence to pass muster in a CR 60(b)(3) motion or other motion under the civil and criminal rules based on newly discovered evidence. For example, in the context of DNA evidence, which involves subsequent testing of physical evidence plainly present at the time of trial, DNA "results" will often warrant a new trial. State v. Riofta, No. 79407-3, 2009 WL 1623427 (Slip Op., at 2) (Wash. June 11, 2009); In re Bradford, 140 Wn. App. 124, 126, 165 P.3d 31 (2007). Mr. Liptrap's newly discovered evidence meets any requirement that the evidence in question existed at the time of the prior proceeding.

**(4). Mr. Liptrap's motion for relief from judgment should have been granted.** Civil Rule 60 recognizes that in appropriate cases, "circumstances arise where finality must give way to the even more important value that justice be done." Suburban Janitorial Servs. v. Clarke American, 72 Wn. App. 302, 313, 863 P.2d 1377 (1993). In the civil context within which SVP commitment proceedings are held, the provisions of CR 60 provide a post-trial "mechanism to guide the balancing between finality and fairness."

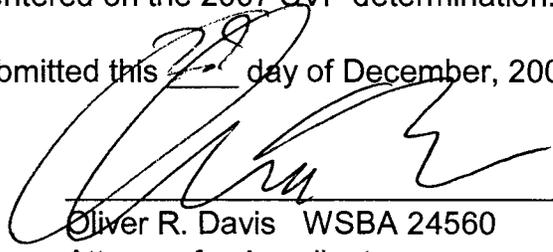
Suburban Janitorial Servs., 72 Wn. App. at 313. These principles apply aptly to post-judgment motions in a Sexually Violent Predator cases. Mr. Liptrap faces extreme deprivation of liberty as a result of his SVP determination. The trial court below believed that CR 60(b)(3) should guide reversal of a final judgment under a theory of newly discovered evidence only where the science used to commit the detainee had been deemed invalid." 6/22/09RP at 10.

Yet that is precisely what Mr. Liptrap's motion and argument showed. This Court, in recognition that "[t]he interest in finality of judgments is easily outweighed by the interest in ensuring that an individual is not arbitrarily deprived of his liberty," Ward, 125 Wn. App. at 380, should reverse Mr. Liptrap's order of commitment considering that the science used to justify an indefinite order of deprivation of his liberty was based on methodology that is no longer accepted in the scientific community.

**E. CONCLUSION**

Based on the foregoing, Mr. Liptrap requests that this Court reverse the trial court's denial of his CR 60 motion, and reverse the order of commitment entered on the 2007 SVP determination.

Respectfully submitted this 29 day of December, 2009.



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Washington Appellate Project - 91052

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

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IN RE THE DETENTION OF	)	
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	)	
JEFFREY LIPTRAP,	)	NO. 63879-3-I
	)	
	)	
APPELLANT.	)	

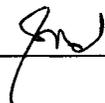
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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, DECLARE THAT ON THE 29<sup>TH</sup> DAY OF DECEMBER, 2009, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] JANA HARTMAN ATTORNEY AT LAW OFFICE OF THE ATTORNEY GENERAL 800 FIFTH AVENUE, SUITE 2000 SEATTLE, WA 98104-3188	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
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**SIGNED** IN SEATTLE, WASHINGTON THIS 29<sup>TH</sup> DAY OF DECEMBER, 2009.

X \_\_\_\_\_ 

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