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**DEC 27 2010**

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

NO. 28867-6-III

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**COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON**

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In re the Detention of:

RONALD R. TIMM,

Appellant,

v.

THE STATE OF WASHINGTON,

Respondent.

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**BRIEF OF RESPONDENT**

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## I. ISSUE PRESENTED

- A. **Whether there was sufficient evidence at trial that Mr. Timm is likely to commit future acts of predatory sexual violence if not confined in a secure facility when (1) the State's expert followed the generally accepted practice in his field while assessing Timm's risk; (2) the State expert's opinions were based on research from his field; and (3) sufficient evidence to prove Timm's high likelihood of reoffense was presented at trial.**

## II. STATEMENT OF THE CASE

### A. Procedural History

On May 1, 2006, the State filed a sexually violent predator (SVP) petition seeking the involuntary civil commitment Ronald Timm pursuant to RCW 71.09. CP at 1. When the petition was filed, Mr. Timm was serving a prison sentence for Rape of a Child in the First Degree and was scheduled to be released into the community on May 13, 2006. Ex. 13, CP at 8. On May 18, 2006, Mr. Timm stipulated that probable cause existed to believe he was an SVP, and he was transported to the Special Commitment Center (SCC) on McNeil Island. CP at 58.

His jury trial was held from February 22, 2010, through March 3, 2010. RP 604-1458. On March 3, 2010, the jury returned a verdict finding that Mr. Timm was an SVP. CP at 963, RP 1453. On the same day, the trial court entered an Order of Commitment. CP at 964. Also on March 3, 2010, Mr. Timm filed a Notice of Appeal. CP at 965.

## **B. Sexually Violent Predator Trial**

### **1. Sex Offense History**

Respondent, Ronald Timm, has a long and extensive history of molesting young girls. RP 780, Supp. CP at 1045, Ex. 30, Ex. 28. He was born on September 1, 1950. Supp. CP at 974. During his lifetime, he has sexually assaulted at least twenty-four children aged three to seven years old. Ex. 30, RP 782.

He has admitted to being obsessed with, and having primary sexual arousal to, girls aged four to twelve. RP 825, 972. Mr. Timm is attracted by the lack of hair and the softness of the vulva of the young girls. RP 825. He also has difficulty being aroused by adult females, and has had to fantasize about children when having sex with an adult. RP 825.

Mr. Timm's first victim was his daughter D.T.<sup>1</sup> Supp. CP at 990, 1046. He fondled her vaginal area while masturbating to ejaculation when she was six years old. Supp. CP at 990, Ex 30. His visitation with D.T. and her younger sister was suspended in 1984 upon suspicion of his molestation. Supp. CP at 989. Though no criminal charges were filed, Mr. Timm has not seen D.T. or her sister since. Supp CP at 985.

Mr. Timm acknowledges a pattern of befriending families, babysitting their children, and sometimes becoming a "special father" to

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<sup>1</sup> At trial, only the first names of many victims were used. See RP 1084. To protect the anonymity of these victims, the State will be referring to them by their initials.

the children. RP 972. In 1987, he agreed to babysit the five- and six-year-old daughters of his friend Karen J. RP 651, Supp. CP at 993-4. On more than one occasion, Mr. Timm placed one of the girls on his lap, lifted up their pajamas and touched them “between their legs.” RP 646, Ex 30. Mr. Timm was convicted of Attempted Statutory Rape in the First Degree. Supp. CP at 995, Ex. 3. He received a 36-month deferred sentence and a Special Sex Offender Sentencing Alternative (SSOSA). Supp. CP at 996, Ex. 3, Ex. 4, Ex. 5.

Timm’s SSOSA included several conditions he violated. Ex. 4, Ex. 5. He admitted he looked at these conditions with “complete disregard.” Supp. CP at 997. One condition he violated was to stay away from minors. RP 710. Nevertheless, he would remain in the presence of children, and report to his Community Corrections Officer (CCO) that he did so because he “was thinking of getting a thrill.” RP 724-725. Mr. Timm also admitted to living in an area “chock full of children” while on his SSOSA. RP 781.

In July 1990, just five months after his release from prison, Mr. Timm violated his parole. RP 721, Ex. 8. He told his CCO he had repeated contact with minors, including sexual contact. RP 726-727. This included putting a child in his lap and placing his hands on the child’s “crotch area” on top of the child’s clothing. RP 726. His participation in

required sex offender treatment was also described as being “all show and no go” and insincere. RP 721. Mr. Timm was sentenced to 90 days incarceration for his parole violations. RP 729, Ex. 8.

He was released from jail on August 5, 1991. RP 730. But his poor attitude towards his SSOSA continued. Supp. CP at 1003. In November 1991, the court revoked Mr. Timm’s SSOSA when he continued to have contact with children. Supp. CP at 1011, Ex. 10, RP 741. At this time, he reported that he didn’t want to sexually touch children, but was having a difficult time trying to control himself. RP 782. His violations included contact with four-year-old twins S.T. and K.T. Supp. CP at 1005, 1048, Ex. 10, Ex. 30, RP 71. He bought them gifts and spent some nights with them on the floor of their home. RP 665-668. Mr. Timm also admitted having sexual contact with them while on his SSOSA. Supp. CP at 1002, Ex. 30. For example, he fondled S.T.’s vagina while she was sleeping. Supp. CP at 1008, Ex. 30.

Mr. Timm was released from prison in November 1992. Supp. CP at 1016. He was determined to not return to prison and not be sexual with children anymore. Supp. CP at 1015-16. Within seven months, however, he moved in with Ronda T., the mother of the younger two of his four children and his step-daughter H.S. Supp. CP at 985-6, 1018.

In January of 1997, Mr. Timm was convicted of Rape of a Child in the First Degree for raping six-year-old H.S. Ex. 13, 30, Supp. CP at 1019, 1048. Mr. Timm made H.S. disrobe so he could fondle her and rub his penis on her vagina. Supp. CP at 1021, Ex. 30. He ejaculated on H.S.'s stomach at least once. CP 1022.

Police investigating this offense discovered Timm was not living at his registered address. RP 792. When he was discovered living at Ronda's home with children, Mr. Timm claimed that being around children was "a testimony that he wasn't going to reoffend again." RP 793. He was sentenced to 120 months in prison for this offense. Supp. CP at 1027, Ex. 13.

In March 2003, while incarcerated for his Rape of a Child conviction, Mr. Timm entered the Sex Offender Treatment Program (SOTP) in the Department of Corrections (DOC). RP 943, 951. Regarding his arousal to children, Timm told the program, "If I don't have this, I won't have anything." RP 981. He admitted having at least 24 child victims, and listed each one in homework assignments. RP 955, Ex. 28, Ex. 30. While in the SOTP, Mr. Timm sought to view television shows and other materials with children to help himself masturbate to ejaculation. RP 979-980.

In his treatment group, he was disruptive, late on homework assignments, and used inappropriate humor. RP 998, 1000. He received an infraction for strong-arming and threatening his treatment provider. RP 1000-1001, 1004. DOC also discovered that Mr. Timm had pictures of his children in his cell, despite his awareness that he was not supposed to have such contraband. RP 1002-1004, Supp. CP 1041.

Following his infraction, Mr. Timm was terminated from SOTP in February 2004. RP 951, 999-1000. He had made minimal progress in the program. RP 1007, 1044. This was because he remained defensive, was unwilling to make changes, and dismissed rules at the facility. RP 1018-1019.

Mr. Timm has resided at the Special Commitment Center (SCC) since 2006. Supp. CP at 974. At the time of his SVP trial, he reported relatively good health. Supp. CP at 975. He testified he was not participating in any sex offender treatment and would not do so until released. Supp. CP at 1048.

## **2. Dr. Goldberg**

At trial, the State presented expert testimony from licensed psychologist Dr. Harry Goldberg. RP 1054. Dr. Goldberg specializes in forensic psychology and has evaluated well over 1000 sex offenders in his

practice. RP 1054, 1057. He has conducted over 600 SVP evaluations since 1995. RP 1061-1062.

The DOC retained Dr. Goldberg to evaluate whether Mr. Timm met the statutory criteria for civil commitment as an SVP. RP 1065-1066. Dr. Goldberg reviewed extensive records related to Mr. Timm. RP 1066-1067. They included criminal history, institutional, and psychological records, all of which are of the type commonly relied upon by experts who evaluate SVPs. RP 1066-1068. Though Timm initially refused to be interviewed, Dr. Goldberg did interview him in 2009 as part of an updated evaluation. RP 1068.

Dr. Goldberg opined, to a reasonable degree of psychological certainty, that Mr. Timm suffers from pedophilia and that, in Timm's case, it qualifies as a mental abnormality under RCW 71.09. RP 1096. Pedophilia involves intense, sexually arousing urges or fantasies towards prepubescent children that a person has acted upon or that causes the person interpersonal difficulty. RP 1097. He also opined that Timm's mental abnormality causes him to have serious difficulty controlling his sexually violent behavior. RP 1111-1112. He held this opinion to a reasonable degree of psychological certainty as well. RP 1112.

Finally, Dr. Goldberg testified that Timm's mental abnormality makes him likely to commit sexually violent acts in the future. RP 1142.

This opinion was also held to a reasonable degree of psychological certainty. RP 1142. His opinion was based on a risk assessment utilizing a “multiple prong approach” that included consideration of, among other things, actuarial instruments, dynamic risk factors and protective factors. RP 1113-1118.

Actuarial instruments are tools that combine factors associated with sexual reoffense to provide a statistical risk level for the person being assessed. RP 1114. Dr. Goldberg employed four such instruments: the Static 99R, the Static 2002R, the Minnesota Sex Offender Screening Tool Revised (MnSOST-R), and the Sex Offender Risk Appraisal Guide (SORAG). RP 1115-1116.

These instruments provided varying risk estimates for Mr. Timm. RP 1128. Mr. Timm’s score on the Static 99R associated him with a group of offenders that were charged or convicted of a new sex offense at a rate of 15.8 percent in five years and 24.3 percent in ten years. RP 1118-1121, 1124-1125. His score on the Static 2002R placed Mr. Timm in a group that recidivated at a rate of 29.3 percent in five years and 39.7 percent in ten years. RP 1121-1122. Mr. Timm’s score on the MnSOST-R placed him in the “high risk” category and associated him with a group of offenders who were arrested for a new sex offense at a rate between 30 percent and 57 percent within six years. RP 1122-1123. The SORAG,

which measures sexually violent and nonsexually violent recidivism, placed Timm in a group that has a 39 percent to 59 percent chance of recidivism. RP 1123-24.

Undetected offenses are not included in actuarial data. RP 1118, 1233, 1239. Accordingly, Dr. Goldberg testified, actuarials like the Static 99R underestimate risk because they only track new charges or convictions. RP 1118-1119. Therefore, because many of Timm's victims are unadjudicated, he received divergent scores. RP 1128-1129, 1233.

Dr. Goldberg also used the Stable 2007 instrument to assess Timm's dynamic risk factors – those that change over time. RP 1129-30. He opined that several factors aggravated Mr. Timm's risk. RP 1130-1135. They included dysfunctional relationships with women, emotional identification with children, lack of concern for others, using sex as a coping device, deviant sexual interest, poor problem solving skills and negative emotionality. RP 1130-35. Dr. Goldberg relied on research indicating that the presence of multiple dynamic risk factors increase a person's actuarial risk level. RP 1135-36, 1146, 1217. He opined that the dynamic factors he found present indicate that Mr. Timm is a high risk to reoffend. RP 1145-46.

Dr. Goldberg considered other factors, as well. RP 1136-42. For example, Mr. Timm's persistent sexually deviant behavior with very

young victims is moderately correlated with recidivism. RP 1136-37. Also, Mr. Timm's sex offender treatment failures in the community and prison aggravate his recidivism risk. RP 1137-1138. Additionally, Dr. Goldberg found Timm's release plans concerning. RP 1141. For example, he noted that Mr. Timm did not seem committed to sex offender treatment in the community. RP 1141.

The protective or mitigating factors Dr. Goldberg took into account can reduce a person's risk. RP 1139. Of the three protective factors he considered, only one mitigated Mr. Timm's risk. RP 1139-41. Mr. Timm's inability to complete sex offender treatment or remain offense free in the community for a long period of time did not lower his risk. RP 1139-41. Dr. Goldberg did conclude that Mr. Timm's advancing age had a mitigating effect. RP 1140. It was not as strongly mitigating for Timm as it could be for others; however, because Timm offended in his 40s and was continuing to talk about his desires for children in his 50s. RP 1140, 1184. In short, Mr. Timm is not a typical 59 year old. RP 1184.

### **3. Dr. Donaldson**

Timm presented testimony from his expert, Dr. Theodore Donaldson. RP 1249. Dr. Donaldson disagreed with Dr. Goldberg's pedophilia diagnosis for Mr. Timm. RP 1260-65. His conclusion was not "firm," but Dr. Donaldson did not believe there was

sufficient evidence of the disorder. RP 1264. He acknowledged that it was a “close call.” RP 1264. Dr. Donaldson did not believe that Mr. Timm suffered from a mental abnormality that caused him serious difficulty controlling his behavior. RP 1291. He also did not believe that Mr. Timm was likely to engage in predatory acts of sexual violence. RP 1291.

On cross examination, Dr. Donaldson acknowledged that the Static 99R does not measure unreported offenses. RP 1332. Dr. Donaldson testified that he saw no evidence of criminal charges brought against Mr. Timm for offending against D.T., S.T., or K.T. Supp. CP at 1046; RP 1332-1335. Earlier, Mr. Timm had testified that these three girls were victims of his. Supp. CP at 1046. Dr. Donaldson also testified that he was aware that the developer of the Static 99R instrument had published an article warning that actuarial rates should be considered underestimates. RP 1338.

Dr. Donaldson does not advocate a strict actuarial approach in SVP cases. RP 1340. He believes that if a person is a pedophile and he has difficulty controlling his pedophilia, he is likely to reoffend. RP 1345.

### **III. ARGUMENT**

Appellant argues that the trial court erred when it committed Timm as an SVP because the State failed to prove beyond a reasonable doubt

that he is likely to engage in predatory acts of sexual violence if unconditionally released. His argument is without merit. There was substantial evidence below that he is likely to engage in predatory acts of sexual violence if not confined in a secure facility. Because of the overwhelming evidence at trial regarding Timm's likelihood to reoffend, this Court should affirm Timm's commitment as an SVP.

**A. Standard of Review**

The criminal standard of review applies to sufficiency of the evidence challenges under the SVP statute. *In re the Detention of Thorell*, 149 Wn.2d 724, 744, 72 P.3d 708 (2003). "Under this approach, the evidence is sufficient if, when viewed in the light most favorable to the State, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.*

In reviewing the sufficiency of the evidence, the reviewing court does not determine whether *it* believes the evidence at trial was proven beyond a reasonable doubt. *State v. Hughes*, 154 Wn.2d 118, 152, 110 P.3d 192 (2005), *overruled on other grounds by Washington v. Recuenco*, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006). This Court must look at the evidence in the light most favorable to the State and the commitment must be upheld if any rational trier of fact could have

found the essential elements beyond a reasonable doubt. *In re the Detention of Audett*, 158 Wn.2d 712, 727-28, 147 P.3d 982 (2006).

In this sufficiency challenge, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against Appellant. *See Id.* at 727. An appellate court should not second guess the credibility determinations of the fact-finder. *In re the Detention of Halgren*, 156 Wn.2d 795, 811, 132 P.3d 714 (2006); *see also In re the Detention of Davis*, 152 Wn.2d 647, 680, 101 P.3d 1 (2004) ("A trial court's credibility determinations cannot be reviewed on appeal, even to the extent there may be other reasonable interpretations of the evidence.") Appellate courts defer to the trier of fact regarding a witness's credibility, conflicting testimony, and the persuasiveness of the evidence. *In re the Detention of Broten*, 130 Wn. App. 326, 335, 122 P.3d 942 (2005). "Determinations of credibility are for the fact finder and are not reviewable on appeal." *Hughes*, 154 Wn.2d at 152.

**B. The State Presented Substantial Evidence That Timm Meets the Definition of a Sexually Violent Pedator**

In this case, a review of the record indicates that there was sufficient evidence for the trial court to find, beyond a reasonable doubt, that Timm meets criteria as an SVP. Taken in the light most favorable to the State, the evidence overwhelmingly supported a finding that Timm's

mental abnormality causes him serious difficulty controlling his behavior and makes him likely to engage in predatory acts of sexual violence if not confined in a secure facility.

An SVP is an individual “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.”<sup>2</sup> RCW 71.09.020(18). Additionally, the “mental abnormality” or “personality disorder” coupled with the person’s history of sexually predatory acts, must support the conclusion that the person has serious difficulty controlling their behavior. *In re the Detention of Thorell*, 149 Wn.2d 724, 742, 72 P.3d 708 (2003).

The definition of mental abnormality is tied directly to present dangerousness. *In re the Detention of Henrickson*, 140 Wn.2d 686, 692, 2 P.3d 473 (2000). Due process requires that an individual be both mentally ill and presently dangerous before he may be civilly committed. *See In re the Detention of Young*, 122 Wn.2d 1, 27, 857 P.2d 989 (1993).<sup>3</sup>

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<sup>2</sup> “Likely to engage in predatory acts of sexual violence if not confined in a secure facility” means that “the person more probably than not will engage in such acts” if unconditionally released. RCW 71.09.020(7). A mental abnormality is “a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to the commission of criminal sexual acts in a degree constituting such person a menace to the health and safety of others.” RCW 71.09.020(8).

<sup>3</sup> In the conclusion section of his brief, Mr. Timm alludes to due process guarantees. Appellant’s Brief at 14. He specifies no reasons, authority, or argument for a

When a person is incarcerated prior to the civil commitment trial, the State may rely on the offender's offense history, mental condition, expert testimony, and other relevant, probative evidence to establish the offender's current dangerousness. See *Froats v. State*, 134 Wn. App. 420, 438-39, 140 P.3d 622 (2006). "The point of *Young* is that an individual's conduct during incarceration is not necessarily probative of current dangerousness given the relative difficulty, if not impossibility, of committing an offense during incarceration." *Id.* at 439. The Washington Supreme Court has held that by properly finding all the statutory elements are satisfied to commit someone as an SVP, the fact-finder impliedly finds that the person is currently dangerous. *In re the Detention of Moore*, 167 Wn.2d 113, 124-25, 216 P.3d 1015 (2009). Unchallenged findings are verities on appeal. *In re Estate of Jones*, 152 Wn.2d 1, 8, 93 P.3d 147 (2004); *In re Detention of Anderson*, 166 Wn.2d 543, 549, 211 P.3d 994 (2009).

A claim of insufficiency admits the truth of the State's evidence and all reasonable inferences must be drawn in favor of the State. *Audett*, 158 Wn.2d at 727. Dr. Goldberg testified in detail about how he assessed Mr. Timm's risk. See RP 1113-1147. Dr. Goldberg testified that

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constitutional claim on appeal. Any constitutional claims made by Mr. Timm must be rejected, because "naked castings into the constitutional sea are insufficient to command judicial consideration and discussion." *State v. Johnson*, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992).

in his expert opinion, to a reasonable degree of psychological certainty, Timm is likely to commit predatory acts of sexual violence if not confined in a secure facility. RP 1142, 1144. Viewing the evidence in the light most favorable to the State, with all reasonable inferences drawn in favor of the State, a rational trier of fact would have found that Timm is likely to reoffend.

**1. Dr. Goldberg's Risk Assessment of Timm was Based on an Empirically Guided Approach That is Generally Accepted by Mental Health Evaluators Conducting Sex Offender Risk Assessments**

Timm argues that Dr. Goldberg's opinion regarding Timm's risk amounts to "a hodgepodge of psychobabble." Appellant's Brief at 13. He fails to support his argument. Dr. Goldberg's opinions relied upon methods generally accepted in his field and the State established a proper foundation under ER 702 and ER 703 for their admission.

The records Dr. Goldberg relied on in assessing Mr. Timm are the type of records commonly relied upon by other mental health providers evaluating SVP candidates. RP 1067-1068. Dr. Goldberg's interview with Mr. Timm was also among the type of information commonly relied upon by SVP evaluators. RP 1067-1068. This was not contested at trial. In fact, Mr. Timm's expert, Dr. Donaldson, relied on many of the same records Dr. Goldberg reviewed and read Dr. Goldberg's report. RP 1258.

Dr. Goldberg's risk assessment methods were also properly admitted at trial. Washington courts have routinely admitted testimony about predictions of future dangerousness, despite the inherent uncertainties of such psychiatric predictions.<sup>4</sup> *Young*, 122 Wn.2d at 55-57. An expert's testimony about risk assessment using clinical judgment is admissible. *See id.* at 15-18, 55-57; *see also In re the Detention of Campbell*, 139 Wn.2d 341, 356-58, 986 P.2d 771 (1999). Such testimony is relevant and the accuracy of the assessment is properly a matter of weight to be determined by the fact-finder. *See Id.*

Dr. Goldberg testified that it was not common in his profession to rely strictly on actuarial information. RP 1234. He explained that he would have made some "pretty strange decisions" if he based his opinion on actuarials alone. RP 1234. As an example, Dr. Goldberg testified that in 1990, Mr. Timm would have had low actuarial scores, and would have been in the "low risk" category. RP 1234. However, during this period, Mr. Timm was in "the midst of offending." RP 1234. In 1990, Mr. Timm was on his SSOSA and sexually assaulting children. RP 726-727.

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<sup>4</sup> Mr. Timm cites the *Thorell* case as authority for his argument that actuarial models are more reliable than clinical judgment. Appellant's Brief at 13. He misconstrues the Supreme Court's holding in that case. The *Thorell* court was persuaded by the State's arguments that testimony regarding actuarial data was admissible, not that actuarial data was more reliable than clinical judgment. *See In re Thorell*, 149 Wn.2d 724, 757, 72 P.3d 708 (2003). Further, Dr. Goldberg testified that he did not use clinical judgment in his risk assessment of Timm. RP 1218.

Clearly, actuarial information would not have been a reliable indication of Mr. Timm's actual risk of reoffense. RP 1234-1235. Dr. Goldberg testified that considering other factors, outside of actuarial information, was a "very common practice" in his field.<sup>5</sup> RP 1235.

**2. Sufficient Evidence was Presented at Trial to Find Timm Meets Civil Commitment Criteria as an SVP**

Mr. Timm argues that Dr. Goldberg's opinion "is so flawed that no rational jury could have determined, beyond a reasonable doubt, that he qualifies as [an] SVP" Appellant's Brief at 9. The trial record belies his argument. Viewing the evidence in the light most favorable to the State, with all reasonable inferences drawn in favor of the State, a rational trier of fact could have found that Timm was likely to reoffend. *See Audett*, 158 Wn.2d at 727-28. There was substantial evidence at trial that Timm met civil commitment criteria and was more likely than not to commit predatory acts of sexual violence unless he was confined in a secure facility.

**a. Crime of Sexual Violence**

Evidence at trial proved that Mr. Timm has been convicted of two crimes of sexual violence. He was convicted of Attempted Statutory Rape in the First Degree on August 25, 1989. Ex 3, Supp. CP 995. Mr. Timm

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<sup>5</sup> Even Dr. Donaldson would not advocate a strict actuarial approach to risk assessment. In fact, he testified that he "wouldn't recommend an actuarial approach at all." RP 1340.

was also convicted of Rape of a Child in the First Degree on January 6, 1997. Ex. 13, Supp. CP at 1019. Both of these crimes constitute sexually violent offenses. *See* RCW 71.09.020(17).

**b. Mental Abnormality**

The jury was presented with an abundance of evidence indicating Mr. Timm suffers from a mental abnormality. Dr. Goldberg testified that Mr. Timm's pedophilia constituted a mental abnormality. RP 1096. His testimony about the bases of his opinion, as well as other evidence, supported his diagnostic opinion.

**(1) Pedophilia**

Pedophilia involves intense, sexually arousing urges or fantasies towards prepubescent children that a person has acted upon or that have caused the person interpersonal difficulty.<sup>6</sup> RP 1097, 1101-1102. The criteria to make this diagnosis are found in the Diagnostic and Statistical Manual of Mental Disorders IV-TR, the standardized diagnostic manual used by psychologists in the United States. RP 1097-1098. Dr. Goldberg

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<sup>6</sup> Mr. Timm argues that there is no evidence of current distress from Mr. Timm's pedophilia. Appellant's Brief at 10. The record contradicts this assertion. First, how Mr. Timm's multiple incarcerations and now civil commitment as a result of his pedophilic behavior could be viewed as anything but distress or impairment is inconceivable. Second, the criteria for pedophilia do not require distress. RP 1101-1102. A diagnosis is proper if a person's urges or fantasies regarding children cause distress or impairment, *or are acted upon*. RP 1102. Clearly, Mr. Timm has acted upon his sexual attraction to children. Ex. 3, Ex. 13, Ex. 30.

used these criteria when diagnosing Mr. Timm with pedophilia. RP 1101-1102.

Dr. Goldberg testified that Mr. Timm had an interest in young girls' vaginas from a very young age. RP 1103. This continued into adulthood, demonstrated by his molestation of his daughter and convictions for sexually assaulting children. RP 1103. Mr. Timm has admitted having fantasies about children aged four to twelve and a preference for the physical characteristics of young girls, such as the characteristics of their vaginas. RP 1103. In fact, Mr. Timm has acknowledged that, when with adults, he can only achieve arousal by thinking about young children. RP 1103. The number of victims disclosed by Mr. Timm reveals the pervasive nature of his disorder. RP 1105. Dr. Goldberg found such evidence supported his pedophilia diagnosis. RP 1103-1105.

Pedophilia is a chronic condition. RP 1109. The fact that Mr. Timm has not reoffended since 1997 is because he has been incarcerated since that time, and the objects of his affections are not available in prison. RP 1110. Dr. Goldberg noted, offenders like Mr. Timm are usually compliant in prison and have few infractions because there are no children present. RP 1110.

Other evidence supported Dr. Goldberg's opinions. For example, Mr. Timm's SOTP provider testified that Mr. Timm admitted to 24 child victims, sought television programs with children to masturbate to while in the SOTP program, and indicated that if he didn't have his arousal to children "I won't have anything." RP 955, 979-981, Ex 30, Ex 28.

The jury also heard evidence from a penile plethysmograph (PPG) operator at trial. RP 839-866. A PPG test measures sexual arousal to various stimuli, such as age, gender, and use of force. RP 846. Mr. Timm's PPG indicated that he had an arousal pattern toward young girls. RP 855, 926. During the July 2003 test, Timm admitted that 80 percent of his fantasies involved prepubescent girls, and that this percentage of deviant fantasies had increased since 1997. RP 849, 855, 858-859.

Based on this evidence, a rational jury could easily have found that Timm suffers from pedophilia.

## **(2) Serious Difficulty Controlling Behavior**

The State also proved that Mr. Timm's pedophilia causes him serious difficulty controlling his behavior. Again, both Dr. Goldberg's testimony and other substantive evidence presented to the jury support this finding.

Dr. Goldberg testified that Mr. Timm's mental abnormality causes him to have serious difficulty controlling his sexually violent behavior. RP 1111-1112, 1230. This sets him apart from sex offenders who have control and choice over their behaviors. RP 1230. Dr. Goldberg based his opinion in part on Mr. Timm's own reports of volitional impairment and his infraction for knowingly possessing pictures of children while he was at SOTP. RP 1112.

Additionally, Timm told an interviewer in 1990 that he didn't want to sexually touch children but was having a difficult time trying to control himself. RP 782. He has a pattern of offending, being incarcerated, and then being determined to not offend again. For example, Mr. Timm's SSOSA was revoked in 1991 for having contact with minors. RP 731-741. He was sent to prison. RP 741. When he left prison about a year later, Mr. Timm was determined to avoid future sexual activity with children and prison. Supp. CP at 1015-16. Yet, he moved in with H.S.'s mother within seven months of being released. Supp. CP at 1018. And he was convicted for raping H.S. a few years later. Ex. 13, Supp. CP at 1019. This is substantial evidence of volitional impairment and serious difficulty controlling behavior. Based on this evidence, a rational jury could have found that Timm suffers from a mental abnormality that causes him serious difficulty controlling his sexually violent behavior.

**c. Risk Assessment**

Substantial evidence was presented at trial to prove that Mr. Timm is more likely than not to commit predatory acts of sexual violence unless confined in a secure facility. To assess Mr. Timm's risk, Dr. Goldberg used a "multiple-prong approach" where he considered actuarial data, dynamic risk factor information, and factors that mitigate risk. RP 1113-1140. Dr. Goldberg described this method as "a standardized way to go about looking at likelihood for reoffense in cases such as this." RP 1114.

Dr. Goldberg opined that Mr. Timm is not an "ordinary" sex offender. RP 1202-1203. He elaborated that he has often evaluated more routine sex offenders, and Mr. Timm's case was different from those cases. RP 1203. For example, he exhibited unusual sexual behavior with young girls, has convictions and probation violations for sex offenses, has admitted his obsession with his deviant desires, and has a high number of sexual offenses. RP 1203.

**(1) Actuarial Instruments**

Dr. Goldberg obtained preliminary data about Mr. Timm's risk through actuarial assessment. RP 1113. Mr. Timm argues that Dr. Goldberg's ultimate opinion "runs counter to the actuarial test results." Appellant's Brief at 8. His argument mischaracterizes the nature and use of actuarial data in SVP cases. Instead, actuarial instruments are "tools"

used as one component of a comprehensive risk assessment. RP 1114, 1200-1201, 1208.

The four actuarials Dr. Goldberg used provided him varying estimates of Mr. Timm's risk. RP 1128. The Static 99R and Static 2002R instruments associated Mr. Timm with offenders who recidivated at rates of 24.3 percent and 39.7 percent within ten years, respectively. RP 1118-22. The MnSOST and SORAG instruments placed Mr. Timm in a subset of offenders who recidivated at a rate of 30-57 percent and 39-59 percent, respectively. RP 1122-1124. His MnSOST-R score placed him in the high risk category, while his SORAG score placed him in the moderate risk bin. RP 1123-24. Mr. Timm's scores on the Static 99R and Static 2002R placed him in the low-moderate and moderate-high risk categories, respectively. RP 1120, 1122.

When actuarial scores diverge, an evaluator must look for the cause. RP 1128. Dr. Goldberg concluded that instruments which focused on detected recidivism, such as the Static 99R and the Static 2002R, failed to account for Timm's large number of unadjudicated victims. RP 1128-1129.

This actuarial shortcoming is evident when considering Timm's offending history. In 1990, Mr. Timm would have had an even lower score on the Static 99R than he had at trial. RP 1208. Notwithstanding

his apparently low risk, Timm thereafter repeatedly offended, such as when he sexually assaulted H.S. in 1996. RP 1208, 1234-35.

Actuarial data is but a “piece of the puzzle” in a comprehensive risk assessment. RP 1200, 1208. It does not represent the entire picture because it only accounts for detected offenses that resulted in arrests, charges, or criminal convictions. RP 1118. The standard for civil commitment is whether a person is “likely to engage in predatory acts of sexual violence.” RP 1122, RCW 71.09.020(18). For this reason, actuarial data is to be considered an underestimate of the person’s risk. RP 1118-1119. Even the developer of the Static 99R instrument has warned that the rates in actuarials should be considered underestimates. RP 1338.

Because of their objective nature, actuarials are a helpful risk assessment tool. RP 1208. But Dr. Goldberg warned that these instruments cannot be relied upon “like they’re some type of DNA test.” RP 1208. For that reason, Dr. Goldberg has found some people to meet civil commitment criteria despite low actuarial scores, and found that some people with very high scores did not meet criteria. RP 1208. Mr. Timm’s expert, Dr. Donaldson, also disapproves of a strict actuarial approach to risk assessment. RP 1340.

## (2) Dynamic Risk Factors

Actuarial instruments largely rely on static, non-changing factors. RP 1116. Research-derived dynamic factors change over time and have been found to lower the risk an offender poses. RP 1117, 1129-30, 1146, 1216-17. Because consideration of dynamic factors can increase the predictive accuracy of a risk assessment, the standard procedure in Dr. Goldberg's field is to use them to supplement actuarial assessment. RP 1218. Therefore, Dr. Goldberg used the Stable 2007 to assess Mr. Timm's dynamic risk factors. RP 1130.

While Dr. Goldberg found that some dynamic factors were either not present or mixed, most of those present aggravated Mr. Timm's risk. RP 1130-1135. For example, Dr. Goldberg examined Mr. Timm's relationship stability, i.e., his ability to form positive intimate relationships with women. RP 1131. In Dr. Goldberg's opinion, this factor aggravated Mr. Timm's risk because almost all of Mr. Timm's relationships with women were dysfunctional. RP 1131. The women often were mothers of young children. RP 1105, 1131. Mr. Timm also testified that he had struck H.S.'s mother with his hand. Supp. CP at 1023.

Another dynamic factor considers whether a person overly identifies with children or has many child-like interests. RP 1131. Dr. Goldberg found this to be "one of the more stronger factors for

Mr. Timm.” RP 1131. Timm has a talent for knowing what children like and was often surrounded by children in the community. RP 1131. Witnesses at trial also testified that Mr. Timm was constantly around children. RP 665, 680. This factor aggravated Mr. Timm’s risk. RP 1132.

Lack of concern for others is a dynamic risk factor. RP 1133. It is present where there is evidence a person is indifferent to and callous with other people. RP 1133. This factor aggravates Mr. Timm’s risk because of the many times Timm had difficulty showing remorse for his victims. RP 1133. He also noted that Mr. Timm was indifferent in the sexual relationships he had with children, and had indicated that had suffered more than his child victims. RP 1133.

Using sex as a coping device is another dynamic factor that aggravates Timm’s risk. RP at 1134. It is present if a person uses sex as a means to cope with his negative emotions and problems. RP 1133-34. Dr. Goldberg testified that Mr. Timm offended against children when he felt low self-esteem or rejected. RP. 1134. Mr. Timm acknowledged this in his testimony. Supp. CP at 1021. This tendency aggravates Mr. Timm’s risk. RP 1134.

Deviant sexual interests are moderately correlated with recidivism. RP 1136-37. Because Mr. Timm is sexually aroused to prepubescent girls,

his risk is aggravated. RP 1134. This factor and others are not captured by actuarial instruments.<sup>7</sup> RP 1137.

Mr. Timm's poor decision making elevates his risk. RP 1135. Despite past convictions, he continued to contact people who have children, place himself in situations where there are children, and even correspond with children from prison. RP 1135. For example, before he was arrested for raping H.S., Mr. Timm was found by police to be living at Ronda T.'s home with children. RP 793. Mr. Timm told police that being around children was "a testimony that he wasn't going to reoffend again." RP 793.

Negative emotionality, or hostility, is a dynamic risk factor that is present where an individual is hostile and often takes a victim stance. RP 1135. Dr. Goldberg testified that Mr. Timm has these qualities. RP 1135. For example, Timm blamed his treatment provider for his failure at SOTP. RP 1135. He has also been characterized at times as defensive and hostile. RP 1135.

Mr. Timm argues that dynamic factors are "subjective in nature" and claims that many of the factors Dr. Goldberg considered are generally

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<sup>7</sup> Mr. Timm argues that dynamic risk factors are already included in the actuarial tests used by Dr. Goldberg. Appellant's Brief at 12. Mr. Timm fails to cite any examples or authority for this argument. Not only is it standard practice to use dynamic risk factors in assessing SVP risk, but Dr. Goldberg testified that dynamic factors are used because they are different from actuarial instruments. RP 1116-17, 1218.

applicable to the population at large. Appellant's Brief at 12-13. He does not support his argument with citations to the record or to authority. Nor does he acknowledge the evidence contradicting his claims. First, as described above, each of these factors are research-derived and are not Dr. Goldberg's creation. RP 1130, 1216-17. Furthermore, Dr. Goldberg followed standard risk assessment procedures by considering them. RP 1218. Finally, Dr. Goldberg used the Stable 2007 manual as guidance when scoring the dynamic risk factors. RP 1219-1220, 1226. The manual has specific outlines for each factor, providing structure to the assessment. RP 1226.

Research, including that which has been conducted by the developer of the Static actuarial instruments, indicates that the presence of dynamic risk factors increases the risk level derived from actuarial assessment. RP 1136, 1145-46. Dr. Goldberg concluded Mr. Timm's dynamic factors did so in this case, and that they "support the notion that he is a high risk to engage in acts of sexual violence, predatory acts." RP 1145-46.

### **(3) Protective Factors**

Protective factors are those that have been shown to reduce a person's risk. RP 1139. Dr. Goldberg considered several to determine whether Mr. Timm's actuarial-derived risk level should be lowered. RP

1139. He first considered whether Mr. Timm had been in the community for long periods of time without offending. RP 1139. That factor did not apply because Timm reoffended the last time he was in the community. RP 1140. In fact, since the late 1980s, there was no evidence that Mr. Timm spent any significant period of time in the community without offending against a child.

The second protective factor Dr. Goldberg considered was whether Mr. Timm had completed sex offender treatment. RP 1140. Completion of treatment lowers an individual's risk for reoffense. RP 1140. Mr. Timm was not successful in his sex offender treatment while on a SSOSA. RP 721. He was also terminated from SOTP. RP 951. Because Mr. Timm failed sex offender treatment in both the community and in prison, his risk is not mitigated. RP 1140. In fact, his treatment failures increase his risk. RP 1137-38.

Finally, Dr. Goldberg considered Mr. Timm's advancing age. RP 1140. Generally, the older an offender is, the less likely he is to reoffend.<sup>8</sup> RP 1140. While this factor mitigates his risk, its effect is reduced in Timm's case. RP 1140. This is because Timm offended when he was in his 40s and was continuing to talk about his desires for children

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<sup>8</sup> This is generally true. Dr. Goldberg testified that while advancing age has sufficiently mitigated the risk of individuals he has evaluated in the past, some child molesters continue their offending into their 80s. RP 1200, 1230.

in his 50s. RP 1140, 1184. Most research indicates that sexual recidivism begins to decline when a person turns forty years old. RP 1184. Also, while advancing age is a mitigating factor, it doesn't outweigh all of the other factors considered in a risk assessment. RP 1236.

#### **(4) Recidivism Rates**

Mr. Timm argues that Dr. Goldberg's "subjective factors run contrary to established recidivism rates." Appellant's Brief at 13. Mr. Timm is likely referring to a report indicating a 2.7 percent recidivism rate for sex offenders in Washington State. RP 1177. Another report states that under 5 percent of sex offenders in the United States recidivated. RP 1180. This argument lacks merit because Mr. Timm is not a typical sex offender.

Sex offenders are a very heterogeneous group. RP 1183. Some sex offenders are very low risk and certain sex offenders are very high risk. RP 1184. The vast majority commit one sexual crime and never reoffend. RP 1184. Mr. Timm is not like those other offenders. RP 1184. For example, in the study on sex offender recidivism in the United States, many of the offenders tracked were on a SSOSA and considered to be low risk for reoffense. RP 1232. Also, less than 25 percent of the offenders tracked in that study had prior arrests for sexual offenses, so Mr. Timm

was dissimilar from three-quarters of the sample of offenders in the study.  
RP 1232.

General recidivism rates lump every sex offender into one sample. Those rates rise when offenders are assessed against known risk factors and placed into groups according to the number of risk factors they share, such as with actuarial instruments. *See* RP 1124-1125. It tells us nothing to compare Mr. Timm to every sex offender in the state or country.

Even if the recidivism rate for sex offenders like Mr. Timm was that low, the evidence at trial indicated that Mr. Timm would be a member of the smaller group of recidivists. Mr. Timm's expert, Dr. Donaldson, testified that in 1989, the general recidivism rate for sex offenders was around 13-15 percent. RP 1343. He conceded that in 1989, when Mr. Timm was first convicted, that he was in the smaller group of offenders who reoffended. RP 1344. In 1997, Mr. Timm was convicted for raping H.S. Ex. 13. A reasonable jury could see through this meritless argument.

After cross examination by Mr. Timm's counsel, Dr. Goldberg's opinions were unaltered. RP 1230. The jury heard Dr. Goldberg's testimony and cross-examination. Dr. Goldberg's testimony and the other evidence presented by the state at trial constitute substantial evidence that

Mr. Timm is likely to engage in predatory acts of sexual violence if not confined in a secure facility.

**C. Mr. Timm's Expert's Testimony Also Provided Evidence That Timm is Likely to Reoffend**

At trial, Mr. Timm's expert, Dr. Donaldson, provided evidence that Mr. Timm is likely to reoffend if released into the community. During cross-examination, Dr. Donaldson advocated for a risk assessment approach that did not involve actuarial data. RP 1340. He testified that a person with pedophilia that has difficulty controlling his disorder is likely to reoffend. RP 1345. He testified it would be "illogical" to claim such a person would not reoffend. RP 1345.

As shown *supra*, the State presented substantial evidence supporting Timm's pedophilia diagnosis. RT 724-724, 780, 825, 858-859, 955, 972, 1077-1110. The State also presented significant evidence of Mr. Timm's serious difficulty controlling his behavior. RP 731-741, 782, 1111-1112, 1230, Supp. CP at 1015-19. A reasonable jury could find that Mr. Timm suffers from pedophilia and has difficulty controlling it. By finding Dr. Donaldson's approach credible, the jury could then find that these two factors make Mr. Timm likely to reoffend.

**IV. CONCLUSION**

For the foregoing reasons, the State requests that this Court affirm

Timm's civil commitment as a sexually violent predator.

RESPECTFULLY SUBMITTED this 22<sup>nd</sup> day of December, 2010.



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