

No. 83023-I
(Ct. App. No. 55572-3-I)

WASHINGTON SUPREME COURT

In re the Detention of
CHARLES W. POST

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SUPREME COURT
STATE OF WASHINGTON
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STATE'S SUPPLEMENTAL BRIEF

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ORIGINAL

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I. INTRODUCTION

The civil commitment of sexually violent predators serves the "irrefutable" compelling state interests of sex offender treatment and incapacitation. *In re Detention of Thorell*, 149 Wn.2d 724, 750, 72 P.3d 708 (2003). Consistent with these interests, there is an inherent and close link between successful sex offender treatment, a sex predator's current mental condition, and his or her resulting dangerousness. *See* Laws of 2005, c. 344, sec. 1 (legislative finding). The 2-1 majority below erred by failing to recognize the broad relevance of treatment evidence to the SVP civil commitment inquiry. *In re Post*, 145 Wn.App. 728, 187 P.3d 803 (2008). The *Post* majority limited its focus to obvious relevance issues associated with informing the jury of the "consequences of commitment," *Id.* At 743, while overlooking how evidence of lackluster treatment efforts directly informs the mental condition and danger elements. In short, the *Post* majority merits reversal because its myopic focus on one potential misuse of treatment evidence caused it to miss the overwhelming statutory and practical importance of treatment evidence to RCW 71.09 civil commitment elements.

II. ISSUES PRESENTED FOR REVIEW

A. Did the trial court abuse its discretion when it admitted relevant testimony outlining Post's participation in the SCC treatment program pending the commitment trial? No.

B. Did the trial court abuse its discretion when it refused to admit speculative testimony regarding the possibility of a recent overt act filing should Post escape his current civil commitment? No.

III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY ADMITTING EVIDENCE REGARDING POST'S PARTICIPATION IN THE SCC TREATMENT PROGRAM PENDING TRIAL

Post participated in the SCC treatment program pending his civil commitment trial, but stalled in the lower treatment phases and failed to make progress. VRP 12/7/04 at 41-51. The State elicited brief testimony described the phases of the program utilized by Post and the sex offender subjects that he had yet to address. *Id.* It also noted the existence of a "transition phase," involving release with conditions. *Id.* Testimony revealed that Post was "not fully engaged in treatment, not by any stretch of the imagination," and he was "attempting to manipulate his way through the treatment program." *Id.* at 57. Although initially objecting to "relevance," the defense explored the treatment program further in cross-examination, including the conditional release of SCC residents who had completed the program. *Id.* at 85-88.

A. EVIDENCE REGARDING POST'S TREATMENT EFFORTS PENDING HIS CIVIL COMMITMENT TRIAL WERE RELEVANT TO DETERMINING HIS MENTAL CONDITION AND DANGEROUSNESS

Post claims that the phases of the SCC treatment program are not relevant or admissible under the statute. Opening Br. at 60-61. Rather

than reviewing the trial court's decision for abuse of discretion and examining factors supporting the relevance of treatment evidence, the 2-1 *Post* majority opinion beelined its analysis to possible improper uses for treatment evidence, including a focus on the "consequences of commitment." 145 Wn.App. at 740-749. The majority erred because evidence regarding *Post*'s participation in sex offender treatment and the limits of his participation in sex offender treatment are highly probative to determining his current mental condition and dangerousness.¹

The Legislature has specifically recognized the close relationship between sex offender treatment progress, a sex predator's current mental condition, and a sex predator's danger to reoffend. In adopting the sex predator law, the Legislature found that the "treatment needs of this population are very long term, and the treatment modalities for this population are very different than the traditional treatment modalities" RCW 71.09.010 (Legislative Finding). In 2005 amendments to the SVP law, the Legislature further found that "that the mental abnormalities and personality disorders that make a person subject to civil commitment under chapter 71.09 RCW" are chronic and require treatment intervention.

Laws of 2005, ch. 344, sec. 1. Indeed, "the risk posed by persons

¹ Without citation to the record, *Post* claims that a "person cannot complete the SCC program before the commitment trial." Answer to Petition at 1. *Post* is incorrect in this representation. Although transition to the LRA phase is not possible until a year of observation following commitment, there is no institutional barrier to completing treatment pending trial.

committed under chapter 71.09 RCW will generally require *prolonged treatment* in a secure facility followed by intensive community supervision in the cases where positive treatment gains are sufficient for community safety." *Id.* Such legislative findings establishing the relevance of treatment evidence to the SVP inquiry are entitled to substantial deference. *See Washington State Legislature v. Lowry*, 131 Wn.2d 309, 320, 931 P.2d 885 (1997) (noting need to defer to legislative findings of fact).

In accord with these legislative findings, RCW 71.09 explicitly recognizes the relevance of sex offender treatment efforts in determining whether a person meets criteria for civil commitment. Under RCW 71.09.025, a referring agency is required to "provide the prosecutor *with all relevant evidence* including but not limited to . . . All records relating to the psychological or psychiatric evaluation and/or treatment of the person." (Emphasis added). Under administrative rules authorized by RCW 71.09.040, the Department of Social and Health Services likewise mandates that forensic evaluations of sex predators consider any "sex offender treatment records" and all "treatment plans . . . made for or prepared by the SCC which relate to the resident's care, control, observation, and treatment." WAC 388-880-034(2)(c) and (j).

The actions of the Legislature and DSHS in mandating consideration of treatment records when evaluating whether a person

meets criteria for civil commitment strongly supports the relevance of this evidence. The case law, apart from the 2-1 *Post* majority, also recognizes the central role that treatment successes and failures often play in determining whether a person is a sexually violent predator.

The extent to which an sexually violent predator participates in treatment is directly relevant to questions of diagnosis. For example, an individual who completes a treatment program would have some argument to remove a DSM-IV diagnosis, or at least decrease the severity of the diagnosis. Concomitantly, a person who fails to complete treatment provides evidence that he or she continues to suffer from the diagnosed mental abnormality due to a lack of treatment intervention. The continuing existence of the diagnosis and the impact of treatment on that diagnosis goes directly to the questions of whether the person has a mental abnormality or personality disorder, as required for civil commitment.

A person's progress or lack of progress is also relevant to determining danger to reoffend. A primary purpose of sex offender treatment is "relapse prevention," i.e. learning the tools to prevent a sexually violent reoffense. The challenged testimony below put into context how far Post had proceeded down the road of treatment and where he had ended his efforts. He had passed the beginning phases of treatment -- one and two, but had not made it through the intermediate phases. Importantly, Post had not done the work necessary to advance him to

higher phases of treatment. Rather than confront the difficult sex offender issues presented in the advanced treatment phases, Post determined to quit the program.

An issue identical to the current case was addressed by the California appellate court in *People v. Castillo*, 170 Cal. App.4th 1156, 89 Cal.Rptr.3d 71 (2009).² During the SVP commitment trial in *Castillo*, the trial court "admitted prosecution evidence concerning the nature of the treatment programs offered to SVPs," including some details of the programs' five phases and the availability of a conditional release phase. 89 Cal.Rptr. 3d at 75, 82-84. The SVP respondent has "admitted that by choice he had never participated in any phase other than the first of the five treatment phases at the state hospitals." *Id.* at 83. In admitting the testimony, the trial court ruled that "Castillo's failure to complete aspects of the treatment program was relevant showing potential future dangerousness." *Id.* at 82. A jury "could reasonably infer that Castillo chose not to go forward with treatment because he did not want to make the effort -- which, in turn, would show he did not appreciate the seriousness of his mental condition and that he could not be expected to take the steps required to control his deviant behavior if released." *Id.*

The appellate court affirmed admission of the challenged treatment

² The California Supreme Court has granted review from the *Castillo* decision, but limited its review to an issue involving the length of the commitment term. *People v. Castillo*, 94 Cal.Rptr.3d 321, 208 P.3d 77 (2009). As such, the un-reviewed portions of the *Castillo*

evidence, finding "no abuse of discretion here." *Id.* at 83. The court further noted the importance of an overview of the treatment program to establish context for Castillo's actions:

Castillo's reasons for not proceeding with treatment were highly probative as to his amenability to voluntary treatment, since he refused to participate once he was informed what he would be expected to do in that program. As the trial court recognized, *the jury could not properly assess those reasons absent some knowledge of what the treatment plan entailed.*

Id. at 83 (emphasis added). In addition, the court held that there "was nothing prejudicial in the legal sense in informing the jury that Castillo opted out of the program when informed that he would be expected to honestly assess and acknowledge the wrongfulness of his past misconduct and to develop and apply strategies for correcting his improper sexual impulses." *Id.* at 84.

The Massachusetts Supreme Court has similarly recognized the relevance of evidence regarding treatment efforts in an SVP civil commitment case. In *Commonwealth v. Chapman*, 444 Mass. 15, 825 N.E.2d 508 (2005), the court noted that:

Most importantly, Chapman, although an admitted pedophile, chose not to participate in sex offender treatment programs appropriate to his condition during the thirteen years subsequent to his release from the treatment center. . . . The issue is not whether Chapman was "obligated" to participate in sex offender treatment programs, but rather the effect of his failure to participate in such programs on the current state of his mental abnormality and therefore his sexual dangerousness. This failure is particularly

opinion, including those discussed above, will be unaffected by any subsequent review.

relevant to Chapman's present ability to control a mental abnormality (pedophilia) that otherwise creates a substantial risk of additional sexual offenses . . .

Chapman, 444 Mass. at 23-24 (footnotes omitted).

Other states have recognized that testimony regarding treatment efforts is directly relevant to the SVP commitment elements. *See In re Commitment of Wolfe*, 246 Wis.2d 233, 256-257, 631 N.W.2d 240, 251 - 252 (Wis.App. 2001) (State properly presented evidence of the SVP's "inability to participate" in a sex offender treatment program offered at a state facility because such evidence "had the tendency to make the statutory elements of a [Wisconsin SVP] commitment more probable than not . . . and was thus relevant" and "the probative value of this evidence was not substantially outweighed by the risk of unfair prejudice."); *People v. Dinwiddie*, 306 Ill.App.3d 294, 300-301, 715 N.E.2d 647, 65, 239 Ill.Dec. 893, 899 (Ill.App. 1999) (Evidence that respondent "has failed to seek treatment . . . is directly relevant to an ultimate issue in the [SVP] commitment proceeding."); *In re Detention of Lieberman*, 379 Ill.App.3d 585, 599, 884 N.E.2d 160, 174-175, 318 Ill.Dec. 605, 619 - 620 (Ill.App. 2007)(sufficient evidence to support SVP's lack of volitional control over dangerousness where psychologist testified that SVP respondent "refused to undergo treatment for his paraphilia, which is the only way to control that disorder and shows a lack of empathy for his victims and a lack of remorse for his actions."); *See also People v. Roberge*, 29 Cal.4th 979,

988, 62 P.3d 97, 102, 129 Cal.Rptr.2d 861, 867 (2003) ("Evidence of the person's amenability to voluntary treatment, if any is presented, is relevant to the ultimate determination whether the person is likely to engage in sexually violent predatory crimes if released from custody.").

Overall, the testimony demonstrated that Post met civil commitment criteria because he had not yet obtained the tools through treatment to allow him to live in the community without a significant risk of relapse. One reason that Post was "likely to engage in predatory acts of sexual violence if not confined in a secure facility" was due to his failure to complete SCC treatment that was available to him pending his commitment trial.

B. EVIDENCE OF POST'S TREATMENT EFFORTS PENDING TRIAL WERE RELEVANT TO EVALUATING HIS PROPOSED VOLUNTARY TREATMENT PLAN

At trial, Post claimed that civil commitment was unnecessary because he would engage in voluntary treatment in the community sufficient to manage his risk of reoffending. 145 Wn.App. at 745. Under RCW 71.09.060(1), a jury is to consider the effects of Post's voluntary treatment intentions and his pre-existing release conditions on his existing risk to re-offend. The fact that Post's treatment effort at the SCC were lackluster is entirely relevant to the likelihood that he would *voluntarily* pursue such treatment out-of-custody, or that he would follow the

strictures of any treatment program.

In *People v. Superior Court (Ghilotti)*, 27 Cal. 4th 888, 927, 44 P.3d 949 (Cal. 2002), the California Supreme Court determined that an SVP respondent's refusal to do treatment at California's SVP facility was relevant evidence on the question of whether voluntary community treatment measures would reduce risk below the civil commitment "likely" standard. 27 Cal. 4th at 929. In interpreting the Washington SVP law, our appellate courts have previously relied on opinions of the California Supreme Court to interpret similar provisions of RCW 71.09. *E.g. In re Henrickson*, 140 Wn.2d 686, 692, 2 P.3d 473 (2000); *In re Detention of Keeney*, 141 Wn.App. 318, 325, 169 P.3d 852, 855 (2007).

Similar to RCW 71.09.060, the California SVP statute requires that a respondent's risk to re-offend be evaluated against "the person's amenability to voluntary treatment." *Ghilotti*, 27 Cal.4th at 928. In considering the effect of voluntary treatment intentions on risk, it is entirely relevant to consider respondent's actions in refusing available in-custody treatment at a commitment center for sexually violent predators: "*it would be reasonable to consider the person's refusal to cooperate in any phase of treatment provided by the Department . . . as a sign that the person is not prepared to control his untreated dangerousness by voluntary means if released unconditionally to the community.*" *Id.* at 929 (2002).

The relevance of such testimony to the statutory consideration of risk in light of voluntary treatment was further explained *People v. Sumahit*, 128 Cal.App.4th 347, 354, 27 Cal.Rptr.3d 233, 238 (2005). There, the California Court of Appeals determined that refusal "to undergo treatment constitutes *potent evidence* that he is not prepared to control his untreated dangerousness by voluntary means." *Id.* (Emphasis added). The court concluded that the "defendant's refusal to accept treatment, coupled with a valid diagnosis that he suffers from a sexual disorder affecting his volitional capacity, are sufficient to sustain the court's finding that defendant will, if released to the community, "represent a *substantial danger* of committing similar new crimes...." (*Ghilotti, supra*, 27 Cal.4th at p. 924, 119 Cal.Rptr.2d 1, 44 P.3d 949, original italics.) No further proof of current dangerousness is required." *Id.* at 354-55.

Once Post made voluntary treatment an issue, the State appropriately countered with evidence of incomplete efforts in the SCC program. The trial court should be affirmed.³

³ In the 2-1 *Post* opinion, the majority relies heavily on a 1999 California Court of Appeals decision for the proposition "that *the consequence of a finding* that someone is an SVP has *no relevance* to the question of whether the person has a diagnosed mental disorder or whether such a disorder makes the person a danger . . ." *Post*, 145 Wn.App. at 743 (emphasis added). The *Post* majority misses the point. The evidence of institutional treatment is not relevant because he will receive it if committed, but because he *refused it* while detained *pending* civil commitment. The above cases, which analyze the later, more cogent point, easily find that treatment evidence is relevant to both mental condition and danger. Moreover, the California Supreme Court decision in *Ghilotti* post-dates *Rains* by three years and holds that evidence regarding institutional treatment is relevant to the SVP inquiry, particularly with regard to claimed voluntary treatment. 27 Cal. 4th at 927. Because *Rains* is not particularly good authority in California, it is difficult to

C. EVIDENCE OF POST'S TREATMENT EFFORTS PENDING TRIAL WERE RELEVANT TO THE STATUTORY "SECURE FACILITY" INQUIRY

Apart from the independent relevance of the challenged treatment evidence to Post's SVP status and his voluntary treatment plans, such evidence is also properly admitted under the "secure facility" language of the SVP definition. It is clearly the State's burden to prove beyond a reasonable doubt that Post is a "sexually violent predator," meaning a "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(16)(emphasis added).

Under RCW 71.09.020, the term "secure facility" broadly incorporates *all possible placements* for a civilly committed sexually violent predator over the jurisdictional life of an SVP civil commitment, including:

- A "total confinement facility," which is "a secure facility that provides supervisions and sex offender treatment services in a total confinement setting" and includes "the special commitment center and any similar facility designated as a total confinement facility by the secretary." RCW 71.09.020(17);
- A "secure community transition facility," which is "a residential facility for persons civilly committed and conditionally released to

understand why is should be imported into Washington law.

a less restrictive alternative under this chapter." RCW 71.09.020(14); and

- "[A]ny residence used as a court-ordered placement under RCW 71.09.096," which references the private group home and residential family home placement LRAs allowed under RCW 71.09.096.

Thus, a "secure facility" includes not only the Special Commitment Center, but also any less restrictive alternative placements necessary to maintain community safety. A person is subject to civil commitment jurisdiction if his danger exceeds the more likely than not threshold absent the control of a "secure facility," *i.e.* a total confinement facility or court-mandated conditional release placement.

Because the term "secure facility" describes both total confinement and LRA placements, the State acted wholly within the statute by presenting evidence of treatment and conditional release phases that are available to Post had he continued his participation in the SCC treatment program. Under RCW 71.09, Post's risk required (at a bare minimum) placement in a less restrictive alternative following a period of confinement at the SCC. The inclusive definition of "secure facility" leaves the State free to meet its danger burden by demonstrating that Post's risk exceeds the more likely than not standard unless he is placed in either a total confinement facility, a secure community transition facility, or any other residence used as part of an LRA.

Especially when Post was claiming that his voluntary treatment

plans were sufficient to control his danger, the State was free to directly counter this claim with evidence that Post required, at a minimum, court-ordered treatment in a community setting.⁴ Commitment was justified because Post required a level of judicial control over his actions. By presenting evidence that Post was more likely than not to reoffend unless placed in an LRA *or* at the Special Commitment Center, the State was directly meeting its burden of demonstrating that Post required confinement in a "secure facility."

By requiring the State to prove that Post requires civil commitment at a "secure facility" and by allowing the jury to consider the alternative scenario of unconditional release to voluntary treatment, the SVP statute essentially asks if Post is the kind of person whose danger level *requires* confinement in a secure facility, or is he appropriate for purely voluntary treatment measures?

Once Post is civilly committed and subject to the jurisdiction of RCW 71.09, subsequent proceedings under RCW 71.09.090 operate to determine whether Post's actual placement in an LRA is appropriate. In accord with *In re Thorell*, 149 Wn.2d 724, 751-52, 72 P.3d 708 (2003), the decision on actual *placement* in a less restrictive alternative is a matter considered by a subsequent jury under the RCW 71.09.090 procedures.

⁴Post's claim that treatment evidence would somehow make trials about the effectiveness of the SCC program is incorrect. Evidence attacking the effectiveness of the program is not relevant. *In re Turay*, 139 Wn.2d 379, 403-404, 986 P.2d 790 (1999), *cert. denied*

This jury has the benefit of a year of post-commitment observation and treatment of the SVP respondent in a total confinement setting (e.g. the SCC). 149 Wn.2d at 752-53 (Recognizing that "the time for LRA evaluation must be spent in *intensive inpatient treatment*, which occurs only after commitment"). Under RCW 71.09, the LRA *placement* question may be initiated only after one year of commitment at the first annual review.⁵ *Id.*

The Legislature's decision to allow civil commitment of anyone requiring a level of state control makes sense because it captures all relevant classes of sexually violent predators for civil commitment. A sex offender cannot be allowed to avoid civil commitment jurisdiction by arguing that placement in a total confinement facility is "too much," even though voluntary placement in the community is "not enough." If allowed to stand, the 2-1 *Post* majority operates to prevent the civil commitment of persons whose risk requires state civil commitment jurisdiction and control through an LRA, while simultaneously preventing the necessary LRA by depriving the state of civil commitment jurisdiction. Because the challenged testimony on Post's treatment failures at SCC, including his

531 U.S. 1125 (2001).

⁵ Any claim that this would effectively overrule the *Thorell* decision is entirely misplaced. The *Thorell* decision deals with the question of whether equal protection allows a one year post-commitment delay prior to making any LRA placement decision. It does not preclude considering the need for state control when making a commitment decision, particularly when the SVP respondent has claimed that voluntary treatment is sufficient to address risk.

failure to complete advanced treatment phases, directly addresses the "secure facility" inquiry by showing the need for mandated, rather than voluntary treatment, the trial court did not abuse its discretion by admitting it.

D. ANY ERROR WAS HARMLESS

Even if the trial court committed error in admitting testimony on the phases of the SCC treatment program, any error was harmless. In determining to reverse Post's commitment and remand for a new trial, the 2-1 *Post* majority placed particular weight on a portion of the prosecutor's closing argument that was taken out of context.

Throughout her closing argument, the prosecutor focused the jury on the three elements necessary to support an SVP finding. VRP 12/14/2004 at 111. The prosecutor properly pointed out that Post had routinely failed on supervision and needed state control to avoid reoffense. *Id.* at 127. The prosecutor detailed each of the risk factors presented by Post in accord with the evidence. *Id.* at 119-138. She pointed out that his level of sex offender treatment -- which the evidence established was necessary to ameliorate risk -- was low because he had not completed classes available only in higher SCC treatment phases. *Id.* at 132-33. "Community based treatment is not going to help Charles Post. He needs treatment in a secure facility to give him a change to get out without reoffending." *Id.* at 133.

In the context of Post's extreme risk to reoffend if left on his own, the prosecutor argued that "Mr. Post's best change of reducing his risk before he's released is to complete the treatment program at the SCC." *Id.* at 196. The defense offered a non-specific objection and the court clarified that the case was decided on the elements alone.⁶ *Id.* The prosecutor then re-phrased her statement without reference to the SCC, which the defense allowed to proceed without objection. Given the lack of objection to the rephrased statement, the court should find that any error was harmless. A party "may not remain silent when it is time to speak, and then urge [the argument] for the first time on a motion for a new trial." *Agranoff v. Morton*, 54 Wn.2d 341, 346-47, 340 P.2d 811 (1959).

Post's current challenge to the transition phase evidence, in particular, cannot survive a harmless error analysis. For strategic benefit, Post presented evidence (over the prosecutor's objection) that there had been no one unconditionally released from the SCC due to treatment completion. VRP 12/7/2004 at 86-87. On re-cross, without objection, the prosecutor elicited evidence that persons completing treatment had been conditionally released because Post had opened the door to this testimony.

⁶ In light of the court's instruction during closing argument that the jury was not to decide the case beyond the elements, *i.e.* by focusing on the "consequences of commitment," the claim in the 2-1 *Post* majority that there was no limiting instruction cannot be reconciled with the record.

Id. at 113-14. Post can claim no prejudice when the challenged evidence was properly before the jury in other forms.⁷

The potential prejudice of treatment evidence was recently analyzed, in depth, by the Wisconsin Court of Appeals in *In re Kaminski*, ___ N.W.2d ___, 2009 WL 3818495, 7 (Wis.App. 2009). There, the SVP respondent claimed that evidence of the state-offered SVP treatment program "introduced an irrelevant comparative analysis that favored the treatment regimen at Sand Ridge" and "implicitly suggested that [his] commitment was in his best interests and that of the community." *Id.* The court held that "[n]one of the allegedly prejudicial testimony prevented the real controversy -- whether Kaminski was a 'sexually violent person' under Wis. Stat. Sec. 980.01(7) -- from being fully tried." *Id.*

The court further noted with regard to testimony on treatment and re-evaluation that "[t]estimony regarding prior treatment is not uncommon . . . evidence of which is relevant and admissible at trial to determine the respondent's current dangerousness." *Id.* A jury could "reasonably infer that Kaminski, once committed, would receive occasional re-evaluations as part of the treatment regimen [because] . . . the state is prepared to provide specific treatment to those committed under ch. 980 and not simply warehouse them." *Id.* Prejudicial error was unlikely because "[w]e

⁷ Similarly, Post elicited testimony regarding the SCC treatment phases on cross-examination. VRP 12/7/2004 at 86.

are not persuaded that vague references to a post-commitment treatment regime that includes re-evaluation prevented the jury from accurately determining whether the State met its burden of proof on each element, particularly where the jury could infer the existence of the treatment program in the first instance." *Id.* See also *People v. Castillo*, 89 Cal.Rptr.3d 71, 84 (Cal.App. 2009) (the challenged testimony was not particularly lengthy and there is no substantial likelihood the jury would have considered it for an improper purpose).

IV. THE TRIAL COURT ACTED WITHIN ITS DISCRETION AND RCW 71.09.060(1) BY REFUSING EVIDENCE OF A SPECULATIVE FUTURE RECENT OVERT ACT FILING

Post argued below that he was entitled to use the recent overt act doctrine as a *defense* to civil commitment by claiming that he did not need to be committed now because a recent overt act might allow him to be committed later. The Court of Appeals correctly ruled that the statute precludes Post's argument:

Post argues that evidence that he could face another commitment proceeding if he committed a recent overt act while out of custody was relevant to show his motivation not to reoffend. Thus, he contends, it tended to prove that he was less likely to reoffend. However, recent overt acts were not at issue in Post's commitment trial because he was not living in the community when the State filed its petition seeking his commitment. The legislature has expressly provided that a jury should be presented only with "conditions that would exist or that the court would have the authority to order in the absence of a finding that the person is a sexually violent predator." RCW 71.09.015.

Post, 145 Wn.App. at 753.

In fact, the statute limits the finder of fact to considering "only placement conditions and voluntary treatment options that would exist for the person if unconditionally released from detention on the sexually violent predator petition." RCW 71.09.060(1). Because the possibility that Post might one day commit a recent overt act, be detected committing that recent overt act, and face a petition for civil commitment based on that recent overt act is highly contingent on many circumstances, the Court of Appeals correct ruled that "[s]uch a hypothetical scenario was beyond the scope of the issues properly before the jury." *Id.* at 754.

Post has presented no colorable argument for finding the "would exist" language of RCW 71.09.060 unconstitutional. Indeed, it is a reasonable limitation designed to focus the risk inquiry on real-world conditions of release.

V. **CONCLUSION**

For the foregoing reasons, this court should reverse the decision of the Court of Appeals. Petitioner Post should remain civilly committed as a sexually violent predator.

DATED this 8th day of February, 2010.

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