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No. 83023-1
COA No. 55572-3-1

FILED
MAY 01 2009
CLERK OF THE SUPREME COURT
STATE OF WASHINGTON
[Signature]

IN THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

CHARLES POST,

Respondent.

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2009 APR 27 PM 4:45

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

The Honorable Helen Halpert, Judge

CLERK

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STATE OF WASHINGTON
2009 APR 30 AM 7:52
D. RONALD R. CARPENTER

ANSWER TO PETITION FOR REVIEW

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A. INTRODUCTION

This case illustrates the “damned if you do, damned if you don’t” nature of responding to the state’s allegations under RCW 71.09. A person targeted by a state’s petition for “commitment” to the Special Commitment Center (SCC) can choose to voluntarily engage in the SCC “treatment” program while awaiting trial on the state’s petition. The person can refuse to engage in the program. But by definition, the person cannot complete SCC program before the commitment trial.

The state nonetheless asks this Court to allow trial courts to admit evidence of (a) the person’s “failure [sic] to complete sex offender treatment”¹ at the SCC to prove (b) the person should be committed to the SCC. The state’s errant logic is that simple, circular, and wrong.

The Court of Appeals entered a decision recognizing the unfairness of the state’s position. The decision at least makes an effort to level the playing field. It is factually, logically, and legally correct.

In the trial court the state sought to prove the respondent, Charles Post, should be committed under RCW 71.09 as a “sexually violent predator.” The state had to prove Post: (1) was previously convicted of qualifying crimes of sexual violence, (2) suffers from a mental

¹ PRV at 1.

abnormality or personality disorder which causes serious difficulty in controlling his sexually violent behavior, and (3) the abnormality or disorder makes Post “likely to engage in predatory acts of sexual violence if not confined to a secure facility.” CP 804 (the “to-commit” instruction, setting forth the elements of RCW 71.09.020(16); .060(1)).²

Post offered substantial evidence to rebut the state’s experts on the questions whether he suffers from a qualifying mental abnormality or personality disorder, and whether his age and his treatment plan – with substantial community support – would reduce the risk of reoffense below the “more likely than not” threshold. In the trial court and in the Court of Appeals, Post consistently opposed the state’s effort to admit evidence showing the SCC treatment program and potential court-ordered conditions following a commitment order. BOA at 60-63.³

The state now claims the Court of Appeals mistakenly held the trial court erred in admitting evidence of SCC treatment phases Post had not participated in and evidence of potential less restrictive alternatives

² The Court of Appeals dissent errantly cited several instructions from the first trial, including CP 514, the “to-commit” instruction. Post, 145 Wn. App. at 759 nn. 20 & 21 (Becker, J., dissenting).

³ CP 384-87, 645-46, 662-63, 686-87, 692, 789; 16RP 16-26, 96-98, 112-17, 126; 22RP 104-05; 31RP 46-49.

(LRAs) to confinement that could only be ordered if Post was first committed. See In re Detention of Post, 145 Wn. App. 728, 732, 741-48, 187 P.3d 803 (2008); PRV at 12-20.

The state's petition should be denied for several procedural reasons. It asserts claims the state waived in the trial court. To the extent the Court of Appeals may have "erred" or "overlooked" the "secure facility" definition, the state invited any error by proposing the instructions that are the law of this case.

The state's claims are substantively meritless, as well. For these reasons, the state's petition should be denied.

B. COUNTERSTATEMENT OF ISSUES ALLEGED BY STATE'S PETITION

1. The Court of Appeals held the SCC evidence was excluded as irrelevant and unfairly prejudicial. The state does not challenge that holding, but instead asserts the evidence was admissible as a matter of statutory law. Did the Court of Appeals properly hold the evidence was irrelevant and unfairly prejudicial?

2. The state's petition threatens to reopen a debate this Court previously closed. In a number of 71.09 cases, the state has consistently sought to exclude evidence on the question whether the SCC's "treatment" efforts are scientifically supportable or statistically

valid. The state has convinced this Court, to date, to prevent SCC residents from presenting evidence at a commitment trial to challenge the SCC program's efficacy.

Now, however, the state wants this Court to allow the state to admit evidence of the SCC program to show Post "failed" to complete it. Such a "failure" could only be logically relevant if the state could first prove the treatment program is effective. Does the Court of Appeals decision fairly recognize the state cannot have it both ways?

3. Where the state undercut its "secure facility" claim by making contrary arguments in the trial court and in other appellate cases, and by proposing the only instruction to define "secure facility," is the state's novel claim of error: (a) waived, (2) invited, or (3) barred by principles of judicial estoppel?

C. ISSUE PRESENTED IN ANSWER

Where the state theorized and argued there were no real community checks on Post's behavior short of criminal conviction, did the court: (a) lack any legitimate reason to prevent the defense from showing the state could refile a commitment petition if Post committed a "recent overt act" as that term is defined by statute and case law, and (b) deny Post his due process right to present a defense?

D. COUNTERSTATEMENT OF THE CASE

In every case where the state files a petition under RCW 71.09, the state's target has prior convictions for violent sex offenses. RCW 71.09.030, .020(15). Post is no different; he has three such convictions - two in 1974 and one in 1988. BOA at 6-11. He admitted one other offense for which he was not charged. BOA at 11. Not surprisingly, the state's petition selectively emphasizes some of the undisputed facts leading to Post's prior convictions. The state also emphasizes disputed nonconviction allegations, presenting them to this Court as if they were undisputed fact. PRV at 3-6.⁴

Where this case substantially differs from garden-variety 71.09 cases, however, is the strength of the defense case. As shown at length in Post's brief, he presented sworn testimony from fifteen witnesses who

⁴ The state's citations to the record for these "facts" are oddly limited to allegations in its initial petition for probable cause, and hearsay assertions not offered for their truth, but instead offered to support the opinion of one of the state's experts. PRV at 3-5 (citing CP 1-6 and 19RP 20-106 (Dr. Leslie Rawlings' testimony). For a full, fair, and accurate statement of facts relating to that part of the case, see Brief of Appellant (BOA) at 6-12, 23-26. The state also selectively emphasizes a few controverted assertions made by one Department of Corrections (DOC) employee who did not support Post's treatment efforts when he participated in the treatment program at the Twin Rivers Correctional Center. PRV at 6 (citing testimony from Robin Murphy). For a full, fair, and accurate statement of facts relating to that part of the case, see BOA at 26-31.

knew him and would support his release plan in the community. BOA at 12-20. At the time of trial he had been married for 12 years, earned multiple college degrees, volunteered with numerous prosocial programs and would maintain those contacts once released. Three experts supported the defense. Post also is over 50 years old, and even those who rely on unfairly skewed actuarial evidence recognize the likelihood of reoffense diminishes substantially after 50. BOA at 56-58.

As a result of the defense evidence, the first jury did not reach a verdict. CP 617. The state nonetheless chose to try the case again.⁵

In the second trial, however, the state decided to offer evidence it had agreed to exclude in the first trial. That evidence related to Post's participation in the treatment program at the SCC and the phases of the program to which the SCC staff felt Post had not yet advanced. BOA at 31-26; Post, 145 Wn. App. at 736-41.

⁵ The state's petition dramatically asserts the Court of Appeals reversed "a eight [sic] week . . . commitment trial[.]" PRV at 1. The state is wrong. The second jury was sworn on November 15, 2004, and closing arguments ended December 14, 2004. 17RP 9; 31RP 195-96. There were 14 court days during that span, not eight weeks.

E. ARGUMENT

1. THE COURT OF APPEALS PROPERLY HELD THE SCC EVIDENCE WAS IRRELEVANT AND UNFAIRLY PREJUDICIAL.

Post argued in the trial court and in the Court of Appeals that it was error to admit the SCC evidence. Defense counsel sought to exclude it and to make sure the jury did not consider it for an improper purpose.⁶ The trial court refused the defense-proposed limiting instructions. 31RP 48-49.

The SCC evidence was not probative and was unfairly prejudicial and therefore excluded by ER 401 and 403. As the Court of Appeals recognized,

Such evidence was not relevant to the issues before the jury but was highly and unfairly prejudicial to Post. Admission of this evidence allowed the jury to premise its verdict on considerations of the desirability of the LRAs and SCC treatment phases available to Post only if he was first committed as an SVP, rather than focusing the jury's attention on the question before it: whether the State had proved that Post was an SVP.

Post, at 732-33. Without a limiting instruction, the jury was free to use the SCC evidence to decide if it was "better" to commit Post so he could receive treatment, rather than determine whether the state met its

⁶ CP 384-87, 645-46, 662-63, 686-87, 692, 789; 16RP 16-26, 96-98, 112-17, 126; 22RP 104-05; 31RP 46-49.

burden to prove the requisites for commitment. In closing, over objection, the prosecutor asked the jury to do just that. 31RP 196-97.

This is unfairly prejudicial. Post, 145 Wn. App. at 742-46; People v. Rains, 75 Cal. App. 4th 1165, 89 Cal. Rptr. 2d 737 (1999). There is a difference between (1) fair criticism of Post's voluntary treatment program by showing how experts might find it wanting, and (2) unfairly comparing it with the full incapacitation of total confinement. Post, 145 Wn. App. at 744-46. The state again struggles to distinguish Rains, now suggesting Rains interprets a "significantly different" California statute. PRV at 13.⁷ But Raines instead recognizes the inherently unfair prejudice that occurs when a jury is asked to consider what will happen in the future if a commitment finding is entered, rather than whether the state has proved the statutory criteria for commitment.

The SCC evidence is unfairly prejudicial in the abstract, but it is particularly so as this record shows. The state offered Anderson, an SCC therapist, to tell the jury about the SCC program.⁸

⁷ In its appellate brief, a different prosecutor tried to distinguish Rains by calling it "a criminal case." BOR at 42. Curiously, citing a different California case, the state's petition later argues the California scheme is similar to Washington's. PRV at 13-16.

⁸ Anderson was not a state certified treatment provider, so he could not have been considered a sex offender therapist anywhere but within the confines of the SCC. To be fair, Anderson did have experience as a restaurant manager

Anderson admitted there is no confidentiality in the SCC program. He considered “public safety” and “the courts” to be his clients. He admitted he had no working therapeutic relationship with Post. 26RP 68, 84-85, 100. Post confirmed SCC “therapists” essentially engage in “case-building” against residents before commitment trials to utilize residents’ statements against them in commitment trials. The environment is adversarial, not therapeutic. 30RP 78-81, 86, 89-90.⁹

Anderson listed the types of “classes” provided in various “phases” of the treatment program. It became clear through Anderson and the state’s experts that progress through such classes and phases takes residents substantial time and that Post was still only in phase 2. 20RP 70-71; 22RP 100, 136; 26RP 46-49, 67-68, 101-06; 30RP 81-83.

and “child and family therapist” before being hired by the SCC. He also had some training in sex offender treatment, including sessions on how to prepare for cross-examination. 26RP 26-29, 32. The Court of Appeals dissent wrongly characterized him as “Dr. Anderson.” Post, 145 Wn. App. at 760 (Becker, J., dissenting).

⁹ This problem is not novel to Post. As the state argued and this Court recognized in Thorell, “[b]efore commitment, the individuals are preoccupied with their legal challenges. Defense lawyers often direct their clients awaiting trial to limit their participation in treatment by not making any admissions or acknowledgments of past violent sexual acts or desires to commit such acts. Similarly, inmates in prison-based treatment programs while incarcerated are motivated not to discuss their offense cycle in order to avoid SVP commitment upon release.” Thorell, at 752.

Anderson also littered his description of phase 6 of the SCC program (the “release” phase), with references to “tight, court-ordered supervision,” “court ordered conditions of release”, court supervision, “electronic monitoring,” “a CCO or Parole Officer” and “treatment in the community under the umbrella of the court.” 26RP 49-50, 114. Just in case the jury missed the point, the state also offered repetitive criticism of Post’s proposed community-based plan as lacking court-ordered enforcement mechanisms. BOA at 61 (citing record).¹⁰

As this record shows, the state offered the SCC evidence over defense objection so the jury would see: (1) Post would be confined at the SCC for a substantial additional period of time if he was committed, and (2) if he ever did progress in the SCC program, Post’s future liberty would be severely limited through court-ordered conditions. No juror with the slightest insight could have missed these obvious points, and the prosecutor’s improper closing argument corralled any possible straggler. 31RP 196-97.

The dissent’s description of the SCC evidence further shows the inherently unfair prejudice. To the dissent, the SCC testimony

¹⁰ The state also kept the jury from hearing the state could refile a 71.09 petition should state agents believe Post engaged in a “recent overt act.” See BOA at 63-68 (citing the record and arguing why this was error).

“describe[d] the treatment phases that Post failed to complete while he was at the [SCC].” Post, at 759 (Becker, J., dissenting) (emphasis added). But at this commitment trial Post was still a person, not yet proved a “predator,” not yet committed to the SCC. He was voluntarily engaging in treatment phases before a commitment order. This jury should have been focused on the question whether the state could prove, beyond a reasonable doubt, that Post met the 71.09 criteria. But as the dissent brightly illuminated, a juror would instead see this as proof Post “failed to complete” the entire SCC program. This is exactly the unfair prejudice Post properly sought to avoid.

71.09 cases present remarkable challenges in both linguistics and logic. It is difficult to keep a jury’s focus on the narrow issues it should properly determine.

But at some point the linguistic gymnastics stop and reality reveals itself. This case illustrates one such point. The Court of Appeals properly identified the state’s effort for what it was – an unfairly prejudicial appeal to the jury’s prejudice in seeking to protect itself from someone who committed prior crimes. Post, 145 Wn. App. at 741-48. While courts may not be able to eliminate that prejudice, courts can and should remedy the state’s wrongful exploitation of it.

The state's petition does not challenge the Court of Appeals' holding that the evidence was inadmissible under ER 401 and 403. The gist of the state's claim instead appears to be that other statutes require a trial court to admit this evidence when the state seeks its admission, despite contrary evidence rules. PRV at 16-20.

Under basic separation of powers principles, however, courts are the final arbiter of evidentiary rules. State v. Ryan, 103 Wn.2d 165, 178, 691 P.2d 197 (1984); State v. Zwicker, 105 Wn.2d 228, 238, 713 P.2d 1101 (1986). Whenever a court rule and statute are in irreconcilable conflict concerning a matter related to the court's inherent power, the court rule will prevail. Wash. State Council of County & City Employees v. Hahn, 151 Wn.2d 163, 168-69, 86 P.3d 774 (2004). The state has cited no authority allowing the Legislature to direct courts to admit unfairly prejudicial evidence. Because the state's claim relies on legislation, but this issue is governed by evidentiary rules, the claim fails.

In short, the Court of Appeals decision is correct. The state's petition identifies no conflict with this Court's decisions or with decisions from other Divisions of the Court of Appeals. The state raises no

constitutional claim nor does it assert an issue of substantial public interest.¹¹ Review should be denied. RAP 13.4(b)(1) - (4).

2. THE STATE'S "SECURE FACILITY" CLAIM IS SUBSTANTIVELY MERITLESS AND PROCEDURALLY BARRED.

For the first time in its motion for reconsideration in the Court of Appeals, the state asserted the "secure facility" definition, along with two other definitions, allowed it to present SCC evidence to show how a future court might impose future LRA conditions on Post. M2R at 1-11 (citing RCW 71.09.020(7) and (16)). The state renews that claim in its petition. PRV at 16-20.

Post's answer to the motion for reconsideration shows in detail why the state's claim is procedurally barred and substantively meritless. Post adopts and incorporates those arguments here.¹²

¹¹ The state instead cites In re Young, 122 Wn.2d 1, 857 P.2d 989 (1992), as if it were some kind of talismanic guarantee for state-filed petitions seeking discretionary review in 71.09 cases. PRV at 1, 11, 16. Young, of course, involved the first challenges to the 71.09 experiment. It is hardly surprising this Court directly reviewed those fundamental challenges under RAP 4.2. The numerous broad issues in Young are very different than the state's current disgruntlement with the narrowly-limited Post decision.

¹² Answer, attached as Appendix A, at 10-21.

Reduced to its essence, the state claims the “secure facility” definition renders evidence of the SCC treatment program admissible as a matter of statutory law. PRV at 12-20. But the statute does not so state. Answer, at 13-18.

Furthermore, the state asked the 2009 Legislature to expand the scope of evidence admissible at a commitment trial under RCW 71.09.060, in direct response to the Court of Appeals’ decision in Post. See HB 1246, Sec. 7 (relevant portions attached as appendix B). As that bill’s history shows, the Legislature refused to adopt the state’s amendments. This should put to rest the state’s claim the Legislature intended the statute to require admission of SCC evidence when a court finds it irrelevant and unfairly prejudicial.¹³

Even if the statute could have been stretched to support the state’s claim, the Court of Appeals held the evidence was excluded as

¹³ This is particularly true where the Legislature adopted other proposed amendments to RCW 71.09.060 in SSB 5718, sec. 6. The Legislature is presumed to have acquiesced in an appellate court’s construction of a statute where it has rejected the opportunity to amend the statute in response to the court’s decision. See State v. J.P., 149 Wn.2d 444, 454, 69 P.3d 318 (2003) (legislature’s inaction following judicial construction indicates acquiescence); accord, Manor v. Nestle Food Co., 131 Wn.2d 439, 445-46 n.2, 932 P.2d 628 (1997); Griffin v. Eller, 130 Wn.2d 58, 88-89, 922 P.2d 788 (1996) (the rule applies with particular strength where the Legislature amended other parts of the statute).

irrelevant. Post, 145 Wn. App. at 741-48. As shown in Post's answer, courts have the ultimate authority to interpret rules of evidence, not the Legislature. Appendix A, at 9-10, 21 (citing State v. Ryan, 103 Wn.2d 165, 178, 691 P.2d 197 (1984); State v. Zwicker, 105 Wn.2d 228, 238, 713 P.2d 1101 (1986)).

The state's current claim also threatens to reopen a door this Court previously closed. As shown in Post's answer, the state has persistently argued to this Court and trial courts that commitment trials are not an opportunity for a person to challenge the efficacy of the SCC "treatment" program or the conditions of confinement at the SCC. Appendix A, at 13-14 (citing, inter alia, In re Detention of Thorell, 149 Wn.2d 724, 746-52, 72 P.3d 708 (2003), In re Detention of Brooks, 145 Wn.2d 275, 36 P.3d 1034 (2001), and various amendments).

As a result of several cases and statutory amendments, the state has persuaded this Court and the Legislature to crystallize the stark choice now facing commitment juries: (1) commitment at the SCC, or (2) unconditional release with or without voluntary treatment in the community. The state well knows this stark choice favors its commitment goals. Given societal fear, many jurors are willing to trade

someone else's liberty for perceived community safety.¹⁴ This was, of course, the state's tactical reason for its challenge to Brooks.

Although the defense had prevailed in Brooks, that decision was short-lived. In Thorell, this Court held equal protection is not violated by prohibiting commitment juries from considering LRA evidence at the initial commitment trial. Thorell, at 746-53. A jury "may consider evidence that voluntary treatment on unconditional release is appropriate." Thorell, at 751. But because a court may not order an LRA until after commitment and the first annual review, the propriety of an LRA is not a consideration for the initial commitment trial. Potential LRAs cannot be considered until after the first annual review following commitment. Thorell, at 751.

After having prevailed in the Legislature and in Thorell, the state asks this Court to turn Thorell on its head. According to the state, this jury should have been permitted to consider the SCC evidence and potential future LRA conditions so the state could meet its burden to prove that Post is more likely than not to reoffend "unless he is placed in either a total confinement facility, a secure community transition facility,

¹⁴ Our history shows this kind of short-sighted thinking is unfortunately persistent. Korematsu v. United States, 323 U.S. 214, 233-234, 89 L. Ed. 194, 65 S. Ct. 193 (1944); Boumediene v. Bush, ___ U.S. ___, 128 S. Ct. 2229, ___ L.Ed.2d ___ (2008).

or any other residence used as part of an LRA.” M2R at 4-5; see also, PRV at 17-20. The state’s motion avowed shocked surprise that a court would hold it to the stark choice of “secure facility” versus “voluntary treatment.” See M2R at 5 (asserting this is a “drastic and unsupportable judicial re-writing of the SVP statute”).

The state’s argument is remarkably disingenuous for several reasons. First, the state repetitively opposed any evidence of possible LRAs at Post’s trial. See note 2, supra. The state did not assert Post should be considered for a “secure transition facility” or LRA. The state instead made clear its theory that (1) Post needed to be confined at the SCC and, (2) it would take a long time for him to advance through the SCC treatment phases before he could possibly be considered for some lesser form of confinement somewhere else. For the state to feign surprise that the Court of Appeals held it to that theory shows a bold lack of candor.

Second, the state’s new complaint naturally follows from the statutory amendments it sought and its own arguments in Brooks and Thorell. In those cases, citing those amendments, the state asked the court to preclude any commitment jury from considering potential LRA evidence and to thereby crystallize the stark choice between: (a) unconditional release, and (b) confinement to the SCC. The state got

the rules it requested. Its claimed newfound dislike for how those rules played out in Post's case is not worthy of judicial review, and certainly not judicial relief.¹⁵

In its Court of Appeals motion, the state deceptively posited a hypothetical case where its current position would serve "those individuals whose risk is best addressed by conditional release following a relatively short stay in the total confinement facility." M2R at 7 (emphasis added). The state did not identify anyone – singular or plural – in the SCC's history who might fit within such a "class," nor did it relate that hypothetical concern to Post's case.¹⁶ Here, the trial prosecutors left no qualms about the state's belief that Post should not be a short-timer at the SCC. 31RP 196-97.

¹⁵ See Haslett v. Planck, 140 Wn. App. 660, 665, 166 P.3d 866 (2007) (the doctrine of judicial estoppel precludes a party from taking incompatible positions to its advantage in successive court proceedings; the doctrine preserves respect for judicial proceedings by avoiding inconsistency and duplicity, and prevents a party from playing "fast and loose" with the courts) (citations omitted).

¹⁶ The testimony from the state's witnesses in this record instead made it very clear that new residents committed to the SCC do not get credit for their work in other treatment programs, even DOC's treatment program. They must start at the SCC's phase 1 and go through all 6 phases. 26RP 87-88; 30RP 84-85. Nothing in this record suggests the SCC offers anyone a "relatively short stay." See also, Laws 2005, ch. 344 (findings and intent stating the state's goal in ensuring "very long-term" treatment and "equally long-term" community safety).

Finally, as shown in Post's answer, the state proposed the "secure facility" definition given to the jury. Although it now claims the law should be differently stated, that claim was waived. Answer, at 10-12.

For these reasons, the state's late reliance on the "secure facility" definition is meritless. The state's position would reopen a door to the litigation of SCC treatment efficacy that this Court previously closed. The state cites no provision of RAP 13.4(b) that is met by its contrary claim. The petition should be denied.

3. WHERE THE STATE ARGUES THAT NO COMMUNITY SUPERVISION CONDITIONS WOULD PREVENT A PERSON'S REOFFENSE, THAT PERSON SHOULD BE ALLOWED TO SHOW THE STATE CAN REFILE A 71.09 PETITION BY PROVING A "RECENT OVERT ACT."

In the trial court and in the Court of Appeals, Post argued he had the right to present evidence showing the state could refile a 71.09 petition if the state could prove Post committed a "recent overt act" while in the community. BOA at 63-68. This would rebut the state's deceptive insistence that no community controls could limit Post's risk of reoffense. The Court of Appeals rejected the argument. Post, 145 Wn. App. at 654 (citing State v. Harris, 141 Wn. App. 673, 174 P.3d 1171 (2007)). Post adopts and incorporates that argument by reference. If this Court grants review of the state's petition, this issue involves questions of

constitutional law and substantial public interest this Court should review.

RAP 13.4(b)(3), (4).

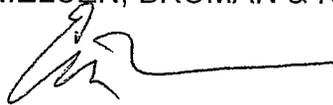
F. CONCLUSION

The state's petition for review should be denied. In the event this Court accepts review, this Court also should review the question whether the trial court erred in excluding all evidence relating to the state's ability to refile a 71.09 petition following a "recent overt act."

DATED this 27th day of April, 2009.

Respectfully submitted,

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FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2009 APR 27 PM 4:45

Today I deposited in the mails of the United States of America a
properly wrapped and addressed envelope directed to the
Federal of respondent State court containing a copy of the
petition and supporting documents.
Petitioner, King County, WA
I certify under penalty of perjury of the laws of the State of
Washington that the foregoing is true and correct.
 4/27/09
Name Date in Seattle, WA Date

APPENDIX A

RECEIVED
COURT OF APPEALS
DIVISION ONE

FFR - q 2009

IN THE COURT OF APPEALS OF WASHINGTON
DIVISION ONE

In Re Detention of Post, STATE OF WASHINGTON, Respondent,)	
)	No. 55572-3-1
vs.)	
CHARLES POST,)	APPELLANT'S
)	ANSWER TO
Appellant.)	TO MOTION FOR
)	RECONSIDERATION
)	

I. IDENTITY OF MOVING PARTY

Appellant Charles Post, through counsel of record, Nielsen, Broman & Koch, requests the relief stated in part II.

II. STATEMENT OF RELIEF SOUGHT

The state's motion for reconsideration should be denied.

III. FACTS RELEVANT TO ANSWER AND GROUNDS FOR RELIEF

The state's motion should be denied for several procedural reasons. It does not cite the record. It asserts claims the state waived in the trial court. To the extent this Court may have "erred" or "overlooked" the "secure facility" definition, the state invited any error by proposing the instructions that are the law of this case.

The state's claims are substantively meritless, as well. For any and all of these reasons, the state's motion should be denied.

The state sought to prove Post should be committed under RCW 71.09 as a "sexually violent predator." The state had to prove Post: (1) had been convicted of qualifying crimes of sexual violence, (2) suffers from a mental abnormality or personality disorder which causes serious difficulty in controlling his sexually violent behavior, and (3) the abnormality or disorder makes Post "likely to engage in predatory acts of sexual violence if not confined to a secure facility." CP 804 (the "to-commit" instruction, setting forth the elements of RCW 71.09.020(16); .060(1)).¹

Post offered substantial evidence to rebut the state's experts on the questions whether he suffers from a qualifying mental abnormality or personality disorder, and whether his age and his treatment plan with substantial community support would reduce the risk of reoffense below the "more likely than not" threshold. In the trial court and in this Court, Post consistently opposed the state's effort to admit evidence showing the treatment program at

¹ The dissent cites several instructions from the first trial, including CP 514, the "to-commit" instruction. Post, 145 Wn. App. at 759 nn. 20 & 21 (Becker, J., dissenting).

the SCC and potential court-ordered conditions following a commitment order. BOA at 60-63.²

The state now claims this Court mistakenly concluded the trial court erred in admitting evidence of SCC treatment phases Post had not participated in and evidence of potential less restrictive alternatives (LRAs) to confinement that could only be ordered if Post was first committed. See Post, 145 Wn. App. at 732, 741-48; M2R at 2-21. The state's claim is procedurally barred and substantively meritless. The state's motion should be denied.

A. An Appellate Court Need Not Review A Motion for Reconsideration That Fails to Cite the Record.

The state's motion is initially noteworthy for one thing it does not cite: the voluminous record in Post's case.³ Despite the motion's 25-page length,⁴ nowhere does the state help this Court find record support for the state's new claims.

As shown in more detail infra, the state has made a new "square peg" of a legal argument without showing how it should fit

² CP 384-87, 645-46, 662-63, 686-87, 692, 789; 16RP 16-26, 96-98, 112-17, 126; 22RP 104-05; 31RP 46-49.

³ The transcripts exceed 4,600 pages, there are more than 900 pages of clerk's papers, and dozens of exhibits were designated.

⁴ The 25-page motion exceeds the 20-page length authorized in RAP 17.4(g) and RAP 12.4(a). This answer cites the record and is limited to 23 pages.

into the existing factual “round hole” of this case. It is manifestly unfair for the state to shift to opposing counsel and this Court the burden of mining the record to support or refute its claims. The state’s motion could and should be denied for this reason alone.⁵

Should the Court consider the merits of the motion, it should be denied for several procedural and substantive reasons.

B. The Evidence Was Unfairly Prejudicial and Not Probative.

In the trial court, the parties repeatedly argued about the SCC evidence. Defense counsel sought to exclude it and to limit make sure the jury did not consider it for an improper purpose. See note 2, supra. The court refused the defense’s proposed limiting instructions. 31RP 48-49.

There is no question the SCC evidence was not probative and was unfairly prejudicial and therefore excluded by ER 401 and 403. As this Court has recognized,

Such evidence was not relevant to the issues before the jury but was highly and unfairly prejudicial to Post. Admission of this evidence allowed the jury to

⁵ An appellate court is not required to search the record to find support for a party’s arguments. In re Estate of Lint, 135 Wn.2d 518, 532, 957 P.2d 755 (1998); Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 819, 828 P.2d 549 (1992); Bostwick v. Ballard Marine, 127 Wn. App. 762, 770, 112 P.3d 571 (2005). This rule applies to motions for reconsideration. RAP 12.4(a) (form of motion for reconsideration); RAP 17.3(a) (motions must reference the record relevant to the motion).

premise its verdict on considerations of the desirability of the LRAs and SCC treatment phases available to Post only if he was first committed as an SVP, rather than focusing the jury's attention on the question before it: whether the State had proved that Post was an SVP.

Post, at 732-33. Without a limiting instruction, the jury was free to use the SCC evidence to decide if it was "better" to commit Post so he could receive treatment, rather than determine whether the state met its burden to prove the requisites for commitment. In closing, over objection, the prosecutor asked the jury to do just that. 31RP 196-97.

This is unfairly prejudicial. Post, 145 Wn. App. at 742-46; People v. Rains, 75 Cal. App. 4th 1165, 89 Cal. Rptr. 2d 737 (1999). There is a difference between (1) fair criticism of Post's voluntary treatment program by showing how experts might find it wanting, and (2) unfairly comparing it with the full incapacitation of total confinement. Post, 145 Wn. App. at 744-46. The state again struggles to distinguish Rains, now suggesting Rains "interprets an entirely different statute." M2R at 10.⁶ But Raines instead recognizes the inherently unfair prejudice that occurs when a jury is asked to consider what will happen in the future if a commitment

⁶ In its appellate brief, a different prosecutor tried to distinguish Rains by calling it "a criminal case." BOR at 42.

finding is entered, rather than whether the state has proved the statutory criteria for commitment.

The SCC evidence is unfairly prejudicial in the abstract, but it is particularly so as this record shows. The state offered Anderson, an SCC therapist, to tell the jury about the SCC program.⁷

Anderson admitted there is no confidentiality in the SCC program. He considered “public safety” and “the courts” to be his clients. He admitted he had no working therapeutic relationship with Post. 26RP 68, 84-85, 100. Post confirmed SCC “therapists” essentially engage in “case-building” against residents before commitment trials to utilize residents’ statements against them in commitment trials. The environment is adversarial, not therapeutic. 30RP 78-81, 86, 89-90.⁸

⁷ Anderson was not a state certified treatment provider so he could not have been considered a sex offender therapist anywhere but within the confines of the SCC. To be fair, Anderson did have experience as a restaurant manager and “child and family therapist” before being hired by the SCC. He also had some training in sex offender treatment, including sessions on how to prepare for cross-examination. 26RP 26-29, 32.

⁸ This problem is not novel to Post. As the state argued and the Supreme Court recognized in Thorell, “[b]efore commitment, the individuals are preoccupied with their legal challenges. Defense lawyers often direct their clients awaiting trial to limit their participation in treatment by not making any admissions or acknowledgments of past violent sexual acts or desires to commit such acts. Similarly, inmates in prison-based treatment programs while incarcerated are motivated not to discuss their offense cycle in order to avoid SVP commitment upon release.” Thorell, at 752.

Anderson listed the types of “classes” provided in various “phases” of the treatment program. It became clear through Anderson and the state’s experts that progress through such classes and phases takes residents substantial time and that Post was still only in phase 2. 20RP 70-71; 22RP 100, 136; 26RP 46-49, 67-68, 101-06; 30RP 81-83.

Anderson also littered his description of phase 6 of the SCC program (the “release” phase), with references to “tight, court-ordered supervision,” “court ordered conditions of release”, court supervision, “electronic monitoring,” “a CCO or Parole Officer” and “treatment in the community under the umbrella of the court.” 26RP 49-50, 114. Just in case the jury missed the point, the state also offered repetitive criticism of Post’s proposed community-based plan as lacking court-ordered enforcement mechanisms. BOA at 612 (citing record).⁹

As this record shows, the state offered the SCC evidence over defense objection so the jury would see: (1) Post would be confined at the SCC for a substantial additional period of time if he was committed, and (2) if he ever did progress in the SCC program,

⁹ The state also kept the jury from hearing the state could refile a 71.09 petition should state agents believe Post engaged in a “recent overt act.” See BOA at 63-68 (citing the record and arguing why this was error).

Post's future liberty would be severely limited through court-ordered conditions. No juror with the slightest insight could have missed these obvious points, and the prosecutor's closing argument corralled any possible straggler. 31RP 196-97.

The dissent's description of the SCC evidence further shows the inherently unfair prejudice. To the dissent, the SCC testimony "describe[d] the treatment phases that Post failed to complete while he was at the [SCC]." Post, at 759 (Becker, J., dissenting) (emphasis added). But Post was still a person, not yet proved a "predator," not yet committed to the SCC. He was voluntarily engaging in treatment phases before a commitment order. This jury should have been focused on the question whether the state could prove, beyond a reasonable doubt, that Post met the 71.09 commitment criteria. But as the dissent brightly illuminates, a juror would see this as proof Post "failed to complete" the entire SCC treatment program. This is exactly the unfair prejudice Post properly sought to avoid.

71.09 cases present remarkable challenges in both linguistics and logic. It is difficult to keep a jury's focus on the narrow issues it should properly determine.

But at some point the linguistic gymnastics stop and reality reveals itself. This case illustrates one such point. This Court properly identified the state's effort for what it was – an unfairly prejudicial appeal to the jury's prejudice in seeking to protect itself from someone who committed prior crimes. Post, 145 Wn. App. at 741-48. While courts may not be able to eliminate that prejudice, courts can and should remedy the state's wrongful exploitation of it. State v. Neidigh, 78 Wn. App. 71, 79-80, 895 P.2d 423 (1995) (where in-limine orders and objections are timely made, prosecutorial misconduct should be remedied).¹⁰

The state's motion does not challenge this Court's holding that the evidence was inadmissible under ER 401 and 403. The gist of the state's claim instead appears to be that other statutes require a trial court to admit this evidence when the state seeks its admission, despite contrary evidence rules. M2R at 2-7.

Under basic separation of powers principles, however, courts are the final arbiter of evidentiary rules. State v. Ryan, 103 Wn.2d 165, 178, 691 P.2d 197 (1984); State v. Zwicker, 105 Wn.2d 228, 238, 713 P.2d 1101 (1986). Whenever a court rule and statute are

¹⁰ See also, Dylan Thomas, The Poems of Dylan Thomas 207-08 (Daniel Jones ed. 1971) (. . . "Do not go gentle into that good night. Rage, rage against the dying of the light.").

in irreconcilable conflict concerning a matter related to the court's inherent power, the court rule will prevail. Wash. State Council of County & City Employees v. Hahn, 151 Wn.2d 163, 168-69, 86 P.3d 774 (2004). The state has cited no authority allowing the Legislature to direct courts to admit unfairly prejudicial evidence. Because the state's claim relies on legislation, but this issue is governed by evidentiary rules, the claim fails.

C. The State's Statutory Claim Is Procedurally Barred.

The state first complains the opinion "fails to account for the statutory definition of 'secure facility'" in RCW 71.09.020(16). M2R at 1.¹¹ According to the state, this definition permits the jury to consider not only SCC treatment evidence but also any LRA placement that might follow SCC confinement. M2R at 3-4.

The state's current complaint overlooks a key fact: in both trials the state proposed the only instruction defining "secure facility." CP 516, 807.¹² If the state wanted the jury or this Court to consider its current statutory theory, it was obligated to propose

¹¹ See also, M2R at 3 ("Although the majority does not address the 'secure facility' definition and its role in defining the risk necessary for commitment, the statutory language is dispositive of this appeal.").

¹² The state has not designated the state's proposed instructions to this Court, but the proposed defense instructions do not include it. CP 505-06, 787-96. There is no question it is the state's.

instructions correctly stating that theory. CR 51; Crossen v. Skagit County, 100 Wn.2d 355, 361, 669 P.2d 1244 (1983).

The law of this case is set forth in instruction 7 (CP 807).¹³ It defines and limits what evidence the jury could consider in reaching its conclusion.

“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 released unconditionally from detention in this proceeding.

In determining this issue, you may consider only placement conditions and voluntary treatment options that would exist for the person if unconditionally released from detention in this proceeding.

CP 807. The same instruction was given in the first trial. CP 516.¹⁴

The state is well acquainted with concepts of waiver and invited error. The state is subject to these procedural bars just like any other party.¹⁵ Because the state’s new claim is nothing more

¹³ Instructions given without objection become the law of the case. State v. Brockob, 159 Wn.2d 311, 336, n.16, 150 P.3d 59 (2006); State v. Hickman, 135 Wn.2d 97, 102, 954 P.2d 900 (1998).

¹⁴ The state took no exception to the instruction. 31RP 45-46.

¹⁵ In re Detention of Ambers, 160 Wn.2d 543, 557 n.6, 158 P.3d 1144 (2007) (court found state’s claim was waived); In re Detention of Audett, 158 Wn.2d 712, 724, 147 P.3d 982 (2006) (court agreed with state’s argument that Audett’s claim was waived); In re Detention of Gaff, 90 Wn. App. 834, 845, 954 P.2d 943 (1998) (a party proposing an instruction in the trial court invited any error), rev. denied, 1998 Wash. LEXIS 939

than an argument against the law it proposed to the trial court, its claim is waived and any error invited.

The state's motion does not mention either procedural bar, nor does it argue why this Court should reach the merits of the new claim. The state did not previously brief this issue in this Court.¹⁶ These failures also should be fatal to review.¹⁷

For these procedural reasons, the state's motion should be denied.

(1998); accord, City of Seattle v. Patu, 147 Wn.2d 717, 720-21, 58 P.3d 273 (2002).

¹⁶ The motion notes that pages 42-43 of the state's appellate brief cited the "secure facility" definition, M2R at 3, n.1, but does not mention that the "secure facility" definition played no part in the court's instructions or the law given to the jury. CP 802-07 (instructions 2-7).

¹⁷ See e.g., State v. Avila, 78 Wn. App. 731, 738, 899 P.2d 11 (1995) (where a potential procedural bar is obvious, a reviewing court will not address a party's claim for first time on appeal where the party fails to argue reasons why the claim is not barred). Numerous cases show this Court's general refusal to consider issues raised for the first time in a motion for reconsideration. See generally, Nostrand v. Little, 58 Wn.2d 111, 120, 361 P.2d 551 (1961), dismissed, 368 U.S. 436 (1962); Housing Auth. of King County v. Ne. Lake Wash. Sewer & Water Dist., 56 Wn. App. 589, 595 n.5, 784 P.2d 1284, 789 P.2d 103, rev. denied, 115 Wn.2d 1004 (1990); 1515-1519 Lakeview Blvd. Condo. Ass'n v. Apartment Sales Corp., 146 Wn.2d 194, 203 n.4, 43 P.3d 1233 (2002); State v. Leffler, 142 Wn. App. 175, 185, 173 P.3d 293, 178 P.3d 1042 (2007).

D. The Statutes Do Not Mean What the State Claims, Nor are the Statutes Executed in the Manner the State Asserts.

Assuming arguendo the state's current complaint with the "secure facility" definition was not waived or invited, it is substantively meritless. Essentially, the state now claims the SCC evidence could be admitted to show how a court might impose future LRA conditions on Post. According to the state, a future LRA is one of the "possible placement options open" to a person committed under 71.09, as shown by the "secure facility" definition in RCW 71.09.020(13). M2R at 3-5. The state's claim ignores this record and substantial history on this question, thereby stretching the "secure facility" definition well beyond its breaking point.

In Brooks, citing parallel provisions in RCW 71.05, the defense argued the limitation of LRA consideration at a commitment trial violates equal protection. In re Detention of Brooks, 145 Wn.2d 275, 36 P.3d 1034 (2001). The Brooks court agreed, holding the defense could offer and the jury could consider evidence of proposed LRAs at the commitment trial. Brooks, 145 Wn.2d at 292-93.

Ironically, the language in the second paragraph of instruction 7 comes from a 2001 amendment to RCW 71.09.060(1)

the state sought in response to Brooks. The amendment was intended to prevent commitment trial juries from considering evidence of potential future LRA conditions. In re Detention of Thorell, 149 Wn.2d 724, 746-52, 72 P.3d 708 (2003) (citing, inter alia, Laws of 2001, ch. 286). In this way, the state could crystallize the stark choice that now faces commitment juries: (1) commitment at the SCC, or (2) unconditional release with or without voluntary treatment in the community.

The state well knows this stark choice favors its commitment goals. Given societal fear, many jurors are willing to trade liberty for perceived community safety.¹⁸ This was, of course, the state's tactical reason for its challenge to Brooks.

The Brooks decision was short-lived. In Thorell, the Supreme Court held equal protection is not violated by prohibiting commitment juries from considering LRA evidence at the initial commitment trial. Thorell, at 746-53. A jury "may consider evidence that voluntary treatment on unconditional release is appropriate." Thorell, at 751. But because a court may not order an LRA until after commitment and the first annual review, the

¹⁸ That kind of short-sighted thinking is unfortunately persistent, as our history shows. Korematsu v. United States, 323 U.S. 214, 233-234, 89 L. Ed. 194, 65 S. Ct. 193 (1944); Boumediene v. Bush, ___ U.S. ___, 128 S. Ct. 2229, ___ L.Ed.2d ___ (2008).

propriety of an LRA is not a consideration for the initial commitment trial. Potential LRAs cannot be considered until after the first annual review following commitment. Thorell, at 751.

After having prevailed in the Legislature and in Thorell, the state now asks this Court to turn Thorell on its head. According to the state, this jury should have been permitted to consider the SCC evidence and potential future LRA conditions so the state could meet its burden to prove that Post is more likely than not to reoffend “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.” M2R at 4-5. The state’s motion avows shocked surprise that a court would hold it to the stark choice of “secure facility” versus “voluntary treatment.” M2R at 5 (asserting this is a “drastic and unsupportable judicial re-writing of the SVP statute”).

The state’s current argument is remarkably disingenuous for several reasons. First, the state repetitively opposed any evidence of possible LRAs at Post’s trial. See note 2, supra. The state did not assert Post should be considered for a “secure transition facility” or LRA. The state instead made clear its theory that (1) Post needed to be confined at the SCC and, (2) it would take a long time for him to advance through the SCC treatment phases before

he could possibly be considered for some lesser form of confinement somewhere else. For the state to feign surprise that this Court would hold it to that theory shows a bold lack of candor.¹⁹

Second, the state's new complaint naturally follows from the statutory amendments it sought and its own arguments in Brooks and Thorell. In those cases, citing those amendments, the state asked the court to preclude any commitment jury from considering potential LRA evidence and to thereby crystallize the stark choice between: (a) unconditional release, and (b) confinement to the SCC. The state got the rules it requested. Its claimed newfound dislike for how those rules played out in Post's case is not worthy of judicial review, and certainly not judicial relief.²⁰

And third, the state posits a hypothetical case where its current position would serve "those individuals whose risk is best addressed by conditional release following a relatively short stay in the total confinement facility." M2R at 7 (emphasis added). The

¹⁹ Perhaps this explains why the state's motion does not cite the record. If so, a reminder about RPC 3.3 is warranted.

²⁰ See Haslett v. Planck, 140 Wn. App. 660, 665, 166 P.3d 866 (2007) (the doctrine of judicial estoppel precludes a party from taking incompatible positions to its advantage in successive court proceedings; the doctrine preserves respect for judicial proceedings by avoiding inconsistency and duplicity, and prevents a party from playing "fast and loose" with the courts) (citations omitted).

state does not identify anyone – singular or plural – in the SCC’s history who might fit within such a “class,” nor does it relate that hypothetical concern to Post’s case.²¹ Here, the trial prosecutors left no qualms about the state’s belief that Post should not be a short-timer at the SCC. 31RP 196-97.

For these reasons, the state’s reliance on the “secure facility” definition is meritless. The state’s motion should be denied.

E. The State’s Claim Finds No Support in Standard Statutory Construction Analysis.

To the extent the state’s current claim depends on statutory interpretation, the statutes and the above-described history do not support it. No case supports the state’s position. This is likely why the state is currently asking the Legislature to amend RCW 71.09.060(1) to permit juries to consider this otherwise inadmissible evidence. See HB 1246.

The state’s current position also is inherently inconsistent with RCW 71.09.060(1). That statute precludes the jury’s

²¹ The testimony from the state’s witnesses in this record instead made it very clear that new residents committed to the SCC do not get credit for their work in other treatment programs, even DOC’s treatment program. They must start at the SCC’s phase 1 and go through all 6 phases. 26RP 87-88; 30RP 84-85. Nothing in this record suggests the SCC offers anyone a “relatively short stay.” See also, Laws 2005, ch. 344 (findings and intent, making clear the state’s goal in ensuring “very long-term” treatment and “equally long-term” community safety).

consideration of conditions of confinement at the SCC. It was amended to relieve the state from defending the efficacy of the SCC program at commitment trials. The state no longer need prove the SCC provides constitutionally adequate treatment (rather than merely warehousing people who have served their prison sentences but who the state believes might still present a future danger).²² However, by arguing the SCC program will provide a better treatment program than Post's community program, the state threatens to open this door wide again. The state cannot offer a one-sided claim the SCC program will work and prevent the defense from presenting contrary evidence in response.²³

F. The State's Position is Unfair in Practice.

The state's position is manifestly unfair as a practical matter, as well. Before a commitment order, a person may be under cloud of the state's 71.09 accusation, but he is still a person, not a "predator." That person may choose to participate in the SCC

²² It should not be forgotten that the SCC program was under federal court injunction for at least a decade due to its failure to provide meaningful treatment. Experts still question the SCC's efficacy, although time and length limitations prevent this answer from expanding into a thorough discourse on this question.

²³ State v. Gefeller, 76 Wn.2d 449, 455, 458 P.2d 17 (1969) "[t]o close the door after receiving only a part of the evidence not only leaves the matter suspended in air at a point markedly advantageous to the party who opened the door, but might well limit the proof to half-truths."

treatment program, or that person may decline. Myriad factual and legal reasons justify both choices. Thorell, 149 Wn.2d at 752.²⁴

But the state's current "head's I win, tails you lose" argument shows the state wants both choices to disadvantage the person. If he chooses not to participate, the state will produce evidence of the SCC program to tell the jury the person would be held in total confinement until he participates and shows progress. If he chooses to participate, the state will offer the SCC program as proof of a "better" treatment program than one the person constructs through diligent long-term work and the support of community resources dedicated to continued law-abiding behavior. In this way, the state will offer unfairly prejudicial evidence in every commitment trial.²⁵

²⁴ See also, Commonwealth v. Chapman, 444 Mass. 15, 825 N.E.2d 508, 519-20 & n.8 (2005) (Marshall, C.J., dissenting) (noting the "perverse disincentives to treatment" from the state's policies requiring waivers of confidentiality for offender participation in "treatment" programs).

²⁵ The state's reliance on Commonwealth v. Chapman further reveals the state's long-range goal. M2R at 15-16. In 1977 Chapman was convicted of pedophilic offenses and sentenced to a 15-30 year term. While serving his sentence he was found to be a "sexually dangerous person" (SDP) under Massachusetts' commitment provisions, so he was transferred to a treatment center. In 1991 a court found the treatment successful, Chapman was no longer an SDP, and transferred him back to serve the remainder of his prison term. For the next 13 years, Chapman allegedly "refused" to participate in treatment groups in prison. Shortly before his anticipated release date, the state petitioned for his commitment as an SDP. The state sought to meet its burden, in part, by showing

There can be no real question this is the state's goal. As this answer is being drafted, the state lobbies for shortsighted legislation to admit evidence of a person's agreement or refusal to participate in the SCC program, and whether a person's recidivism risk is "best ameliorated over the course of the person's expected lifetime by immediate release on the current petition, or through a continuing opportunity for treatment in a secure facility followed by the possibility of a less restrictive alternative or unconditional release at a later time." HB 1246, § 7 (proposing amendment to RCW 71.09.060(1)).²⁶ It appears the state intends for § 7 to be an "end run" around this Court's decision in future cases.

Chapman's "refusal" to participate in the prison program. Chapman argued the 1991 ruling estopped the state from relitigating this question. In a 5-2 decision, the Massachusetts court disagreed, reasoning the evidence of Chapman's "refusal" could be new evidence not available in 1991. For this reason, the majority held the trial court erred in dismissing the state's petition as a matter of law. Chapman, 825 N.E.2d at 515-16. Chapman is distinguishable for at least one key reason – in ruling on pleadings, a court must take the allegations in a state's petition as true. No such requirement follows the two trials in Post's case.

²⁶ A copy of this section is attached as appendix A. The proposal is richly ironic on multiple grounds, including: (1) using the phrase "a continuing opportunity for treatment" to describe involuntary confinement is masterful Orwellian doublespeak, and (2) it seeks to permit consideration of potential future events "over the course of the person's expected lifetime" to determine present risk, even though the state has previously fought tooth-and-nail to prevent the same person from contesting continued commitment by proving risk decreases over "the course of the person's expected lifetime." Cf., In re Detention of Young, 120 Wn. App. 753, 86 P.3d 810, rev. denied, 152 Wn.2d 1035 (2004); with the 2005

Whether the legislation will pass, or achieve the state's purpose, remains to be seen. If this Court remains stalwart in its correct analysis of the present law, the new statute's lawfulness can be litigated in a future case. Whether a legislature has the power to instruct an appellate court to admit unfairly prejudicial evidence is the kind of question that has perplexed many thoughtful courts and legislatures throughout our history. See, e.g., Ryan, Zwicker, and Hahn, supra (courts are final arbiters of evidentiary rules); Elmore, 162 Wn.2d at 35-37 (discussing retroactivity of amendments). The state apparently seeks to continue this debate.

G. THERE IS NO CONFLICT BETWEEN POST AND IN RE DENNIS LAW.

The state's final claim asserts the decision conflicts with In re Detention of Dennis Law, 146 Wn. App. 28, ___ P.3d ___ (2008). M2R at 21-25. The state overlooks several important points.

Law had been convicted of three counts of communicating with a minor for immoral purposes and first degree kidnapping with sexual motivation. He was released from prison where he was on community placement and submitted to polygraphs for several years. During those years he continued to act out on his pedophilic

amendments to RCW 71.09.090 in Laws of 2005, ch. 344 § 1; see generally, In re Detention of Elmore, 162 Wn.2d 27, 168 P.3d 1285 (2007) (discussing the amendment).

impulses in the community. Three years after his release, and after several recent overt acts in the community, the state petitioned for Law's commitment. Law, 146 Wn. App. at 34-35.

Unlike Post, Law did not participate in the SCC's "treatment" program. At trial he did not present evidence of substantial community support for his release. Instead, he moved in limine to prevent the state from arguing the SCC was a treatment facility or the best place for Law. Law, 146 Wn. App. at 51.

The trial court ruled that the State could mention that the SCC was a treatment facility only in the context of Law's failure to engage in treatment and that Law could not introduce evidence that the facility is inadequate and has been criticized.

Law, 146 Wn. App. at 51. Despite benefitting from this one-sided ruling, the prosecutor still could not refrain. The prosecutor argued it did not take a "rocket scientist" to determine that Law should be committed to a treatment facility and that the SCC hopefully would provide him treatment. Law did not object. Law, at 51.

On appeal, this Court applied the familiar standard of review for misconduct without objection. If it was not so "flagrant and ill-intentioned that no curative instruction could have obviated the prejudice," reversal was not warranted. Law, at 50-51. This, of course, prevents counsel from speculating on a favorable verdict

while using the claimed misconduct as a "life preserver . . . on appeal." Law, at 51 (citation omitted).

In the context of Law's case, the misconduct was not so egregious to require reversal. The state's proof was overwhelming and Law offered no evidence of any treatment program in the community. A curative instruction could have obviated the prejudice. Law, at 52-53.

Law's case is quickly distinguished. Law did not request a limiting instruction for the SCC evidence or object to the prosecutorial misconduct. Post did. And the state's proof in Post's case was far from overwhelming. Post, 145 Wn. App. 748-49 ("[t]his was a hotly contested retrial of a matter on which a prior jury had been unable to reach a verdict").

There is no true conflict between Law and this decision.

IV. CONCLUSION

This Court should deny the motion for reconsideration.

DATED THIS 9th day of February, 2009.

Respectfully submitted,

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ERIC BROMAN, WSBA 18487

Office ID No. 91051

Attorneys for Appellant

APPELLANT'S ANSWER TO MOTION
FOR RECONSIDERATION - 23

Today I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to attorneys of record for respondent/appellant/plaintiff containing a copy of the document to which this declaration is attached.
King County, WA Hacked
I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.
 2/9/09
Name Done in Seattle, WA Date

APPENDIX B

HOUSE BILL 1246

State of Washington

61st Legislature

2009 Regular Session

By Representatives Pearson, Shea, Hurst, Parker, O'Brien, Ross, Hope, Smith, Kirby, Kelley, Kristiansen, Dammeier, and Morrell; by request of Attorney General.

Read first time 01/15/09. Referred to Committee on Public Safety & Emergency Preparedness.

1 AN ACT Relating to the commitment of sexually violent predators;
2 amending RCW 71.09.020, 71.09.025, 71.09.030, 71.09.040, 71.09.050,
3 71.09.060, 71.09.080, 71.09.090, 71.09.092, 71.09.096, 71.09.098,
4 71.09.112, and 71.09.350; and adding new sections to chapter 71.09 RCW.

5 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

6 **Sec. 1.** RCW 71.09.020 and 2006 c 303 s 10 are each amended to read
7 as follows:

8 Unless the context clearly requires otherwise, the definitions in
9 this section apply throughout this chapter.

10 (1) "Department" means the department of social and health
11 services.

12 (2) "Health care facility" means any hospital, hospice care center,
13 licensed or certified health care facility, health maintenance
14 organization regulated under chapter 48.46 RCW, federally qualified
15 health maintenance organization, federally approved renal dialysis
16 center or facility, or federally approved blood bank.

17 (3) "Health care practitioner" means an individual or firm licensed
18 or certified to engage actively in a regulated health profession.

1 person is indigent, the court shall appoint counsel to assist him or
2 her. The person shall be confined in a secure facility for the
3 duration of the trial.

4 (2) Whenever any person is subjected to an examination under this
5 chapter, he or she may retain experts or professional persons to
6 perform an examination on their behalf. When the person wishes to be
7 examined by a qualified expert or professional person of his or her own
8 choice, such examiner shall be permitted to have reasonable access to
9 the person for the purpose of such examination, as well as to all
10 relevant medical and psychological records and reports. In the case of
11 a person who is indigent, the court shall, upon the person's request,
12 assist the person in obtaining an expert or professional person to
13 perform an examination or participate in the trial on the person's
14 behalf.

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

19 (4) The prosecuting agency shall have the right to have the person
20 evaluated by experts chosen by the state.

21 **Sec. 7.** RCW 71.09.060 and 2008 c 213 s 13 are each amended to read
22 as follows:

23 (1) The court or jury shall determine whether, beyond a reasonable
24 doubt, the person is a sexually violent predator. In determining
25 whether or not the person would be likely to engage in predatory acts
26 of sexual violence if not confined in a secure facility, the fact
27 finder may consider all admissible evidence, subject to the limitations
28 in this chapter. A finder of fact may consider only placement
29 conditions and voluntary treatment options that would exist for the
30 person if unconditionally released from detention on the sexually
31 violent predator petition. The community protection program under RCW
32 71A.12.230 may not be considered as a placement condition or treatment
33 option available to the person if unconditionally released from
34 detention on a sexually violent predator petition. When the
35 determination is made by a jury, the verdict must be unanimous. In
36 evaluating a person's mental condition and future danger, the fact
37 finder may consider evidence relating to the person's participation in

1 treatment or treatment refusal, including observations of the person
2 while awaiting trial in the custody of the department. The fact finder
3 may also consider whether the person's mental condition and recidivism
4 risk are best ameliorated over the course of the person's expected
5 lifetime by immediate release on the current petition, or through a
6 continuing opportunity for treatment in a secure facility followed by
7 the possibility of a less restrictive alternative or unconditional
8 release at a later time. The finder of fact may not consider
9 procedural details of the less restrictive alternative or unconditional
10 release process, evidence addressing conditions of confinement, or the
11 possibility of a future petition based on a recent overt act.

12 If, on the date that the petition is filed, the person was living
13 in the community after release from custody, the state must also prove
14 beyond a reasonable doubt that the person had committed a recent overt
15 act. If the state alleges that the prior sexually violent offense that
16 forms the basis for the petition for commitment was an act that was
17 sexually motivated as provided in RCW 71.09.020(15)(c), the state must
18 prove beyond a reasonable doubt that the alleged sexually violent act
19 was sexually motivated as defined in RCW 9.94A.030.

20 If the court or jury determines that the person is a sexually
21 violent predator, the person shall be committed to the custody of the
22 department of social and health services for placement in a secure
23 facility operated by the department of social and health services for
24 control, care, and treatment until such time as: (a) The person's
25 condition has so changed that the person no longer meets the definition
26 of a sexually violent predator; or (b) conditional release to a less
27 restrictive alternative as set forth in RCW 71.09.092 is in the best
28 interest of the person and conditions can be imposed that would
29 adequately protect the community.

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

33 If the jury is unable to reach a unanimous verdict, the court shall
34 declare a mistrial and set a retrial within forty-five days of the date
35 of the mistrial unless the prosecuting agency earlier moves to dismiss
36 the petition. The retrial may be continued upon the request of either
37 party accompanied by a showing of good cause, or by the court on its
38 own motion in the due administration of justice provided that the

1 respondent will not be substantially prejudiced. In no event may the
2 person be released from confinement prior to retrial or dismissal of
3 the case.

4 (2) If the person charged with a sexually violent offense has been
5 found incompetent to stand trial, and is about to (~~(be)~~) be or has
6 been released pursuant to RCW 10.77.086(4), and his or her commitment
7 is sought pursuant to subsection (1) of this section, the court shall
8 first hear evidence and determine whether the person did commit the act
9 or acts charged if the court did not enter a finding prior to dismissal
10 under RCW 10.77.086(4) that the person committed the act or acts
11 charged. The hearing on this issue must comply with all the procedures
12 specified in this section. In addition, the rules of evidence
13 applicable in criminal cases shall apply, and all constitutional rights
14 available to defendants at criminal trials, other than the right not to
15 be tried while incompetent, shall apply. After hearing evidence on
16 this issue, the court shall make specific findings on whether the
17 person did commit the act or acts charged, the extent to which the
18 person's incompetence or developmental disability affected the outcome
19 of the hearing, including its effect on the person's ability to consult
20 with and assist counsel and to testify on his or her own behalf, the
21 extent to which the evidence could be reconstructed without the
22 assistance of the person, and the strength of the prosecution's case.
23 If, after the conclusion of the hearing on this issue, the court finds,
24 beyond a reasonable doubt, that the person did commit the act or acts
25 charged, it shall enter a final order, appealable by the person, on
26 that issue, and may proceed to consider whether the person should be
27 committed pursuant to this section.

28 (3) Except as otherwise provided in this chapter, the state shall
29 comply with RCW 10.77.220 while confining the person (~~(pursuant to this~~
30 chapter, except that)). During all court proceedings where the person
31 is present, the person shall be (~~(detained in a secure facility)~~)
32 totally confined in the county jail. If the proceedings last more than
33 one consecutive day, the person shall be held in the county jail for
34 the duration of the proceedings, except the person may be returned to
35 the department's custody on weekends and court holidays if the court
36 deems such a transfer feasible. The county shall be entitled to
37 reimbursement for the cost of housing and transporting the person
38 pursuant to rules adopted by the secretary. The department shall not

1 place the person, even temporarily, in a facility on the grounds of any
2 state mental facility or regional habilitation center because these
3 institutions are insufficiently secure for this population.

4 (4) A court has jurisdiction to order a less restrictive
5 alternative placement only after a hearing ordered pursuant to RCW
6 71.09.090 following initial commitment under this section and in accord
7 with the provisions of this chapter.

8 **Sec. 8.** RCW 71.09.080 and 1995 c 216 s 8 are each amended to read
9 as follows:

10 (1) Any person subjected to restricted liberty as a sexually
11 violent predator pursuant to this chapter shall not forfeit any legal
12 right or suffer any legal disability as a consequence of any actions
13 taken or orders made, other than as specifically provided in this
14 chapter, or as otherwise authorized by law.

15 (2) Any person committed pursuant to this chapter has the right to
16 adequate care and individualized treatment. The department of social
17 and health services shall keep records detailing all medical, expert,
18 and professional care and treatment received by a committed person, and
19 shall keep copies of all reports of periodic examinations made pursuant
20 to this chapter. All such records and reports shall be made available
21 upon request only to: The committed person, his or her attorney, the
22 prosecuting attorney, the court, the protection and advocacy agency, or
23 another expert or professional person who, upon proper showing,
24 demonstrates a need for access to such records.

25 (3) At the time a person is taken into custody or transferred into
26 a facility pursuant to a petition under this chapter, the professional
27 person in charge of such facility or his or her designee shall take
28 reasonable precautions to inventory and safeguard the personal property
29 of the persons detained or transferred. A copy of the inventory,
30 signed by the staff member making it, shall be given to the person
31 detained and shall, in addition, be open to inspection to any
32 responsible relative, subject to limitations, if any, specifically
33 imposed by the detained person. For purposes of this subsection,
34 "responsible relative" includes the guardian, conservator, attorney,
35 spouse, parent, adult child, or adult brother or sister of the person.
36 The facility shall not disclose the contents of the inventory to any
37 other person without consent of the patient or order of the court.