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NO. 55572-3-1

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

In re the Detention of:

CHARLES POST,

Appellant.

FILED  
COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON  
2007 APR 11 AM 9:29

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

The Honorable Helen Halpert, Judge

BRIEF OF APPELLANT

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Today I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to attorneys of record of ~~respondent~~ appellant/plaintiff containing a copy of the document to which this declaration is attached.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

*Eric Broman*  
Name Done in Seattle, WA Date 4/11/07

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A. ASSIGNMENTS OF ERROR

1. The commitment order is unconstitutional as it relies on an invalid mental diagnosis that fails to legitimately distinguish mentally ill recidivists from typical criminal recidivists.

2. The trial court erred in admitting evidence from the Special Commitment Center (SCC) over defense objection.

3. The trial court erred in permitting the state to present evidence that Post would be subject to court-ordered conditions of release if he were first committed to the SCC.

4. The court erred in refusing the defense proposed instructions to limit the SCC evidence. CP 789-90, attached as appendix A.

5. The trial court erred in preventing the defense from showing the state could refile a commitment petition if appellant committed a "recent overt act" as that term is defined by statute and case law.

6. The trial court erred in allowing state witnesses to offer their opinion that appellant was not credible.

7. Prosecutorial misconduct in the presentation of evidence and closing argument denied appellant his right to a fair trial.

8. The trial court erred in excluding the audiotape of the infraction hearing.

9. This Court should independently review the sealed files to determine whether the trial court erred in failing to release all material evidence to the defense. CP 729-34; Supp. CP \_\_\_\_ (sub no. 190, Order to Seal File, 11/29/04).

**B. ISSUES RELATED TO ASSIGNMENTS OF ERROR**

This case involves two lengthy trials and a verdict committing appellant Charles Post under RCW 71.09. To support the commitment, the state had to prove Post "suffers from a mental abnormality or personality disorder which causes serious difficulty in controlling his sexually violent behavior," which in turn made him "likely to engage in predatory acts of sexual violence if not confined to a secure facility." CP 804. There was no dispute Post had been convicted in 1974 and 1988 of crimes of sexual violence.

In the first trial, the jury could not agree on a verdict. CP 633-34. In the second trial, the defense again presented substantial persuasive evidence Post had transformed from a criminal young man who had opportunistically raped adult women, to a 50-year-old mature and caring human being. During his second prison term he had gotten married, maintained that relationship for 12 years, completed a

bachelor's degree, and had developed a support network through consistent engagement in prosocial spiritual and self-improvement groups. Fifteen people from the community testified to support his release.

The state contrarily theorized Post was a pathological liar who manipulated everyone into supporting him, including the people on his support team and the people who testified for him.

The state offered expert testimony that Post's mental abnormality was a "Paraphilia, Not Otherwise Specified (NOS), Rape or Nonconsent." The defense expert disagreed with the "diagnosis" and the state's expert conceded it was controversial. There were numerous disputed issues.

1. Did the state's reliance on the diagnosis of "paraphilia, NOS – nonconsent, rape" fail to provide legitimate scientific proof to satisfy the state's constitutional burden to differentiate a mentally ill recidivist from a typical criminal recidivist?

2. Did admission of evidence related to the SCC's 6-phase treatment program, coupled with evidence of potential post-commitment decisions, mislead the jury and violate the prohibition on Less Restrictive Alternative (LRA) consideration at a commitment trial?

3. Did the court fail to limit the unfair prejudice from the SCC and LRA evidence by failing to give either of the proposed limiting instructions?

4. Where the state theorized 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 appellant committed a "recent overt act" as that term is defined by statute and case law, and (b) deny appellant his due process right to present a defense?

5. Did the state and trial court violate well-settled case law by presenting and allowing state witnesses to offer their opinion that appellant was not credible?

7. Did prosecutorial misconduct in the presentation of evidence and closing argument deny appellant his right to a fair trial?

8. Did exclusion of the infraction tape unfairly deny appellant his right to present a defense?

9. Did the errors individually or cumulatively deny appellant his right to a fair trial?

10. Where the trial court conducted an in camera review and sealed the undisclosed file materials for this Court's review, should this Court should independently review the sealed files to determine

whether the trial court erred in failing to release all material evidence to the defense?

C. STATEMENT OF THE CASE

1. Procedural Facts

On January 13, 2003, the King County prosecutor filed a petition alleging appellant Charles Post should be committed under RCW chapter 71.09. CP 1-63. The petition was filed the day before Post's scheduled release from the prison term he began serving in 1988. CP 1. On March 7, 2003, after a number of pretrial motions and hearings, the court found probable cause to support Post's continued confinement pending trial. Supp. CP \_\_\_ (sub no. 36, Order Determining Probable Cause).

There were two trials. The first, heard before the Honorable Douglas McBroom, started with pretrial hearings on June 15, 2004. It ended with a mistrial on July 16, 2004, when the jury was unable to agree on a verdict. CP 617; Supp. CP \_\_ (sub no. 125A, Trial Minutes).<sup>1</sup>

The second trial, heard before the Honorable Helen Halpert, began November 15, 2004. It concluded with a state's verdict on

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<sup>1</sup> This brief refers to the 31 volumes of transcripts as set forth in the index in appendix B.

December 16, 2004. CP 823. The court entered the order of commitment on December 17, 2004. CP 824-25. Post timely appealed. CP 841.

Before each trial the parties litigated numerous pretrial motions. CP 111-352, 365-406, 408-34, 436-41, 459-97, 641-53, 654-72, 683-91, 695-713. The court entered numerous in limine rulings. CP 443-55, 498-99, 714-18, 722-25. To avoid repetition, relevant rulings are generally discussed in context in the argument sections, infra.

## 2. General Undisputed Background Facts<sup>2</sup>

The state theorized Post should be committed under RCW 71.09 based on his convictions from 1974 and 1988. Post pled guilty to rapes of Ruth Morgan and Nancy Mears. Those offenses occurred in 1974. Post also admitted raping Carolyn Palmer in 1974, although the Palmer charge was dismissed.

The Morgan rape occurred in the Southcenter Mall parking lot on April 26, 1974 when Post forced Morgan back to her car. He had a

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<sup>2</sup> Evidence referred to in this section was not substantively disputed. Much of the evidence was admitted under ER 703 only to support expert opinion, however. The jury was given limiting instructions throughout the testimony in an effort to make this distinction apparent. Given the amount of evidence offered through the experts, the likelihood that the jury would maintain this distinction seems remote. See e.g., 25RP 157-59; 26RP 9-10.

knife and he threatened to kill her. He raped Morgan vaginally from behind in the back seat of her Camaro. Morgan said Post stopped suddenly and she asked if he was done, at which time Post said he wanted her to enjoy it. During the rape Post said he liked older women. He took \$30 from her. Morgan subsequently identified Post. 19RP 40-52; 23RP 64-65; 25RP 10-12; 30RP 17.

The Palmer rape occurred May 6, 1974, as Palmer left the Seatac Holiday Inn where she worked. Post came up behind her with a knife and walked her over near a dumpster. He raped her vaginally from behind. During the course of the rape he asked if that "felt good." According to records, another person -- perhaps an accomplice -- was waiting in the car and drove away with Post when he returned with Palmer's purse. 20RP 26-27, 97-98, 117-18; 21RP 161; 25RP 12-13. Post was not charged with that offense. 25RP 12-13.

The Mears rape occurred at the Seatac Hyatt Hotel on May 30, 1974. Post came up behind Mears as she opened the door to her room. He had a knife and he threatened her. She said she would not resist. During the course of the night Post had vaginal sex with Mears then he allowed her to shower. He raped her two more times that night and they took a shower together. During the course of the night

they talked and Mears learned details about Post. Post took money from her purse and left in the morning. 21RP 161; 23RP 65; 25RP 13; 30RP 56-57, 118-20.

Post pled guilty to the Mears and Morgan rapes and was released on bail pending sentencing. 25RP 17-18. He did not comply with conditions of release and was charged with two counts of second degree assault and a third count of attempted rape for the Marr-Jacobs incident that occurred August 26, 1974.<sup>3</sup> 18RP 72; 19RP 55; 24RP 43-44; 25RP 20-22; 30RP 126-28, EX 49.

He left Seattle, heading toward Canada. He asked his sister's boyfriend for a ride and offered his grandfather's rifle as payment since he had no money. He was arrested by police in Lynden after he called his family and told them where he was. 25RP 17-24; EX 51,

Post was sentenced on October 28, 1974, to concurrent 20-year terms. Initially he was sent to Western State Hospital for a determination whether he would be accepted into that treatment

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<sup>3</sup> The trial court initially granted the defense motion to exclude the Marr-Jacob allegations, at least as they pertained to Dr. Rawlings' testimony. The court later stated the ruling did not limit the state's questioning of Post. The prosecutor also contended Post opened the door to this evidence by asserting he had not left his mother's supervision while released pending sentencing in 1974. 25RP 20, 63-65.

program. He was evaluated and returned to Shelton, because the hospital was not sufficiently secure. 19RP 49, 56; 20RP 112, 114, 173; 25RP 25.

In 1981, Post was transferred to work release. 19RP 62-63; 20RP 119; EX 170. He left work release and drove to San Francisco with his girlfriend, Sherry Arndt. He was out of custody for 2-3 weeks. He returned and surrendered, then pled guilty to escape. He served another six years. 19RP 59-60; 20RP 122-23; 25RP 25-28.

Post was released October 30, 1987. He went to a liquor store with his girlfriend Kimberly. 19RP 69-70; 25RP 28-30. He was released to live at his mother's house. He was offered employment by his mother's friend, Barbara Premo. He spent time with his sister's husband, attorney Dean Bender (now deceased), in recreational activities and AA meetings. 19RP 69-70, 105-06; 25RP 29-30.

Post's most recent offense occurred February 20, 1988, about four months after his release from custody, when he raped 15-year-old Maile Fiscus. Post had been drinking the night before at a party; Rachel Wagner loaned Post her car so he could return home. Post went to his sister's house, but she was not home. He walked down a few doors to the Fiscus house, where he entered through an open window. 19RP 71-73, 81; 20RP 131; 23RP 9.

Fiscus described the rape, stating she woke up to see a man standing over her bed wearing a ski mask. When she made noise he put his hand over her mouth and then stuffed a T-shirt in her mouth. When she bit his thumb he choked her. She stopped struggling because he threatened to kill her and she feared for her life, as she thought he had some type of table or kitchen knife. 23RP 8-31; 26RP 83.<sup>4</sup>

He tried to penetrate her several times in different positions, as he had difficulty maintaining an erection. She thought he ejaculated because when she went to the hospital the presence of semen was found. She thought the rape lasted about an hour. 19RP 71-82, 86-89; 23RP 15-16, 26-27; 25RP 31-33. At the end, Post said "that wasn't so bad, was it?" 19RP 84, 144; 20RP 97-98; 23RP 16, 27.

He was sentenced to serve 180 months in prison. There were no conditions on his release, such as a parole officer or other supervision. 25RP 33.

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<sup>4</sup> There was substantial argument over what kind of knife was used, because the 1988 jury rejected the state's deadly weapon allegation. E.g., 16RP 134-35. To avoid further micro-litigation on that topic, the court informed the jury it was "a kitchen knife, a table knife, not – of some kind," in a not-very successful effort to clarify the parties' agreement something like a butter knife was alleged to have been used. 26RP 83.

Post was called as a witness by both the state and the defense. He was born March 16, 1954, and was 50 during the trial. 24RP 145. He admitted committing the Mears, Morgan, Palmer, and Fiscus rapes. 24RP 10-13; 30RP 17, 56-57, 46-47.

During Post's institutional commitments he did very well in his educational studies. As a juvenile, he completed his high school GED. In his first prison term he completed associate of arts degrees in welding and general arts. 19RP 64-65; 20RP 126-27; 24RP 166-68.

Post's initial prison term in 1974-1987 also was generally noteworthy for his lack of compliance with rules and regulations. He had numerous infractions during the first incarceration. 19RP 58-59, 65-66. He escaped from work release and was returned to prison in 1981. The infractions decreased in frequency as Post got older. 20RP 128, 175-77.

Post experienced a substantial transformation during his second prison term. He and his wife Nancy met in October 1991 and married on January 16, 1992. 30RP 12, 40-41; 31RP 31-33.

He was active in a substantial number of pro-social self-improvement efforts, as discussed infra. He received a full scholarship and completed a Bachelor's degree in communications

and mediation in international business from Evergreen College. 24RP 166-68; 30RP 13-16; EX 110, 111. He worked a number of DOC jobs to pay off all legal financial obligations. 30RP 33-37.

Both parties offered substantial evidence on Post's participation in the Sexual Offender Treatment Program (SOTP) at Twin Rivers. It was undisputed that Post regularly participated in the "open group" sessions, where the groups would discuss cognitive distortions, offense cycles, triggers, and how to diagram a relapse prevention plan. 25RP 38; 30RP 47-50. For several months in 2001, Post also participated in a more formal treatment group. Counselor Robin Murphy led that group.

Post completed victim awareness and stress/anger management classes from the Gray's Harbor Community College. The instructor described his participation as intelligent with a prosocial attitude. 28RP 4-11. Post completed an intensive 72-hour outpatient program to address drug/alcohol issues. He was always active and participated with a very positive outlook in class and in Alcoholics Anonymous sessions. 28RP 170-78.

### 3. The Release Plan

Fifteen people testified on Post's behalf. Each swore they would support him in the community.

The release plan had multiple elements. EX 126. Post would be living with Nancy in the basement apartment of his mother's house. He would register as a sex offender upon release and would be added to the family cell phone program within a week. The release plan required Post to keep a log of his daily activities and to either be at work or home. His cell phone would be on at all times and he would report to Nancy if traffic or an emergency would make him late. He would attend AA meetings and church regularly. 28RP 46-48, 61-66; 30RP 19-25; 31RP 55; EX 126.

Nancy Post worked with Christine Gage at Boeing in 1991. She graduated with a college degree in 1976 and had an 18- and 20-year-old son from a former marriage. She met Post through the Kairos Prison Ministry, initially trading letters like pen pals. 31RP 31. They married January 16, 1992. 31RP 33.

She described Post as very compassionate, nurturing and gentle, not manipulative. 31RP 32, 40. They had conjugal visits in the Extended Family Visit (EFV) trailer for almost six years. The visits ranged in frequency from 30 to 90 days apart. Post had never been rough with her or asked her to act out any deviant scene. 31RP 60-61.

She had learned a lot about sex offenders from her visits to the SOTP and SCC and through research on the internet. 31RP 56. Although she had previously questioned whether Post needed additional sex offender treatment, she now believed he needed ongoing treatment for reinforcement. 31RP 74-75, 82.

She did not believe Post would do anything illegal on release. If she sensed he was drinking, being shifty or dishonest, or saw any danger signs, she would confront him with the support group and the treatment contract and alert the authorities. 31RP 66-70, 85-86.

Ruth Garber, Nancy's mother, also testified for the defense. She initially was very surprised that Nancy had married a sex offender, then Garber met Post. She confirmed he had matured in the past 12 years, and had expressed great remorse for hurting others. She also confirmed the marriage was strong and Nancy was committed to the release plan. 28RP 154-67.

Shirley Post, Charles' mother, lives in a daylight rambler home with a separate basement apartment. She lived there with her mother and long-time family friend Gladys Neas. After her mother passed away, Neas moved upstairs with Shirley, so Charles and Nancy would live in the basement apartment upon his release. 29RP 43-46, 95-96.

Barbara Premo met Shirley in 1978 and met Post in 1981. She agreed to provide Post with a job upon his release. She managed a variety of small commercial properties where Post could do yard and maintenance work under her constant supervision until he got a full-time job. She believed Post had matured since his last release and shown substantial empathy for others. Premo agreed to be part of Post's support team and would be encouraging his treatment with Dr. Wing. 29RP 21-41. Premo had provided Post with work during his release in 1987-88. 29RP 23-25.

Shirley and Premo discussed how they would be more active in supervising Post and working with Dr. Wing as part of the support team. 29RP 34, 46-48, 90-91. They and Neas highlighted substantial increases in Post's maturity since 1987, noting particularly his relationship with Nancy and her sons. 29RP 26-30, 48-49, 96-99.

The state cross-examined Shirley with letters she wrote supporting Post's release during his previous prison terms. 29RP 53-63. She admitted Post was not closely supervised when he was released pending sentencing in 1974. 29RP 71-72. She had learned a lot about his offenses and problems during the past few years while preparing for his release. 29RP 53-54, 78, 82-85, 90-91.

Shirley and Post's father divorced when Post was five. His father lived a glamorous lifestyle, taught Post to smoke marijuana, and encouraged Post's sexual relationship with a 34-year-old woman when Post was still a juvenile. 29RP 88-89. Shirley's father – Post's grandfather – ended up serving as a father-figure to Post. 29RP 99.

Dr. Sarah (Sally) Wing is a psychologist and certified sex offender treatment provider. She signed a 3-year contract to treat Post upon his release. She had been in contact with him since 1999, when Post hired her to evaluate him for a possible transfer to the honor camp. She planned to work with him in one-on-one therapy, weekly group therapy, and relapse prevention, among other things. 26RP 150-62; 27RP 110-11, 165-67, 170; EX 126. Wing was familiar with Post's criminal history and the fact he would not have CCO supervision in the community. 26RP 167-68. She also recognized Post had worked hard to better himself in prison and had a lot of positive assets. 26RP 172; 27RP 117-19.

Wing agreed with the other experts that Post had long-time indications of ASPD. She also believed he was diagnosed with paraphilia, NOS, rape. 26RP 175-187. She confirmed few rapists continue that behavior after age 50, and believed Post had a

moderate risk of reoffense, between 35 and 50%. 26RP 181; 27RP 121-23, 146-49, 162.

She also planned to work closely with Post's support team to be sure they had an understanding of his offense cycle. 27RP 127-32, 172-74. She believed Post needed structured treatment to address his issues and needed his support team to be aware of his problems. 27RP 141. They were an important part of the plan, because they provided the authority of a mutual relationship where people were working toward a common goal. 27RP 161; EX 126.

Leonard Shaw had been a psychotherapist for more than 40 years. He started a program of "Love and Forgiveness" seminars in prisons around the world to promote deep healing work and nonviolent communication. The sessions would include a "hot seat" where a couple would sit in the middle of the group and work on issues. Post regularly participated in the sessions, also with his wife, Nancy. The experience was intense and helpful. 27RP 4-15.

Ellery and Christine Gage volunteered for Kairos seminars at the prison. The seminars promoted goal setting, life changing behavior, and spiritual counseling. Post consistently attended the seminars. Christine Gage introduced her friend Nancy to Post in October 1991, and Nancy and Charles married three months later.

The Gages believed Post grew as a person over the years they had known him. They planned to keep in contact with him on his release. 27RP 175-86, 141-47.

Charles and Beverly Chahanovich knew Post through the Kairos program. They too described Post's substantial personal growth over the years, particularly after his marriage to Nancy. Post participated regularly and knowledgeably in Charles' bible study classes at McNeil Island. They expected to be part of Post's support team after his release, as good friends, and Post would attend their church. 29RP 100-122.

Lucy Leu, Clifford Marcus, and Walter Armstrong knew Post through his activities with the Freedom Project and the Center for Nonviolent Communication (NVC). The project provided support to former prisoners and accountability for people released without CCOs. Post had been very involved in the NVC workshops at Twin Rivers and volunteered to be an inmate coordinator. Outside the facility, the group meets every Monday for 2 hours to discuss transitional issues with a focus on community and individual safety. Post was active with the group in custody and would continue to participate when released. The group had not had any of its participants reoffend after release. 26RP 126-29; 29RP 4-20, 123-26.

Virginia and Eric Hoyte met Post through Leu's NVC work. They volunteered to help at Monroe and developed a friendship with Post. They believed he had worked very hard to change his life and planned to maintain contact with him on his release. 29RP 131-41.

Post also testified in the state and defense cases. He believed Dr. Wing was truly interested in helping him, and he believed they could develop a healthy therapeutic relationship. 30RP 96-97. Post did not believe he had a sexual disorder and he was not sexually deviant. He nonetheless thought continuing treatment with Dr. Wing would be beneficial and assist his reintegration into the community. 25RP 53-54; 30RP 131-36.

On a scale of 10, post believed his risk of reoffense was 2-3.<sup>5</sup> He would be engaged in treatment with Dr. Wing, he had substantial support in the community, and he was highly motivated to not reoffend. He would not be drinking or doing drugs, he had matured and identified the thoughts and conduct that might put him at risk of reoffense. 30RP 19-29. Contact with the support team, including the AA meetings, NVC workshop friends, and the Freedom Project

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<sup>5</sup> He recognized his need to avoid alcohol, self-assessing the risk as 60-70% if he started drinking again. 25RP 55.

returnee circle would provide accountability and support. 30RP 28-30.

4. Disputed Background Facts

The parties disputed whether Post's motivation for the offenses was simply criminal, or caused by a mental abnormality such as a parahilia. Post asserted throughout his institutional commitments, and during trial, that he intended to rob the women and committed the rapes simply because the opportunity presented itself. He said before each offense he had been drinking and/or doing drugs. 19RP 44-48, 51, 82, 91-92; 20RP 174-75; 25RP 34-37; 27RP 153-54; 30RP 38-39; 31RP 11-13.

Post denied fantasizing to themes of sexual violence or rape. 30RP 39-40. Nancy Post, his wife, confirmed that Post was tender and caring during their conjugal visits, and had never been violent nor expressed any attraction to deviant themes. 31RP 60.

The state nonetheless theorized Post had urges to commit rape, he was attracted to the sexualized violence of nonconsensual sex, and he could not control those urges. E.g. 19RP 47-48.

Post had been in state custody since 1974 for all but about 4 months and more than 13,000 pages of documents were provided to the experts. He had been evaluated by numerous DOC personnel

and state-retained experts. Despite this voluminous record, almost no evidence suggested Post had any deviant fantasies. Much of that "evidence" consisted of assumptions by therapists that Post must have such fantasies and he was simply not disclosing them. 25RP 176-77; 26RP 63, 107.

One document, the DOC presentence report from 1974, stated that Post sat across from the mall in a coffee shop before the Morgan rape, wondering what it would be like to force a woman to have sex with him. The report attributed that statement to Post but was not admitted into evidence. 19RP 42-28; 20RP 156, 159; 25RP 36-37; 30RP 152-53; EX 50; Supp. CP \_\_\_\_ (sub no. 201B, Exhibit List).

The state also offered evidence from Stuart Frothingham, who conducted SOTP assessments at Twin Rivers.<sup>6</sup> In June, 2001, Murphy requested an assessment on the question whether Post had sexually deviant fantasies. According to Frothingham, Post said he had no such fantasies before the 1974 rapes or 1988 rape. Post said he thought deviant thoughts about rape comprised 5-10% of his sexual thoughts, although even those thoughts were not intense. He

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<sup>6</sup> The Court excluded the fact it was a plethysmograph assessment, because the parties essentially agreed a "flatline" assessment was irrelevant. 16RP 34-36, 42-43; 18RP 100-116; EX 15.

said those thoughts trailed off, in part because he was ashamed of them. His sexual thoughts now were of his wife. 18RP 116-30. He was cooperative and appeared normal to Frothingham, although the state also offered Frothingham's, over defense objection, that Post appeared "hesitant" and "less than candid" with him. 18RP 130.

Post admitted in his sexual autobiography at SOTP he had masturbated to the rapes of Mears and Morgan, "getting off on the sexualized violence and the power and control I had over the victims." 25RP 45-47.

In 1974, Felix Massaia was a forensic clinical psychologist at the DOC Reception Center in Shelton. He interviewed Post then, but had no personal recollection of the interview at trial. He read from his report which allegedly related some of Post's early sexual experiences. Massaia said one incident occurred when Post was eight and his five-year-old sister performed fellatio on him.<sup>7</sup> Another involved an incident where Post, 11, and a 16-year-old male engaged in mutual masturbation. Post's mother was upset because she was

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<sup>7</sup> This testimony was admitted over defense pretrial ER 403 objection. No other information corroborated this allegation. 18RP 146-47. Massaia conducted 2-3 interviews a day in 1974. He did not take notes during the interviews, but instead dictated his reports to be typed by his secretary. The report was not shown to Post. 18RP 143-44.

involved in a custody battle with Post's father. Post also had been involved in a sexual relationship with an older woman in Oregon, with his father's approval. Post's mother did not approve and Post returned to Washington. 18RP 133-42; 21RP 104-11. Massaia recommended Post for the Western State Hospital treatment program in 1974, rather than prison. 18RP 148-50.

5. Iris Smith Charge

In the second trial, the state sought to establish that Post raped Iris Smith on June 4, 1974.<sup>8</sup> The state theorized the Smith incident rebutted the "crime of opportunity" defense, because Smith was not robbed during the incident. CP 716-17. Post denied raping Smith. 25RP 61; 30RP 18.

Smith's testimony from the first trial was read into the record at the second trial. Smith was 22 when the rape occurred outside a laundry room at the Sherwood Apartments in Auburn. Smith glanced at the man a couple times, and then as she left he approached her with a knife. He told her to pull her pants down, he demanded oral sex, then he raped her vaginally from behind. 25RP 66-80.

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<sup>8</sup> The defense initially objected to the admission of evidence related to the Smith offense, but later withdrew that objection. CP 111-352, 716-18; 16RP 58-82; 23RP 97.

Auburn Detective Linda Magstadt investigated the incident and wrote reports. She interviewed Smith on several occasions, but did not write reports after each interview. 21RP 175, 194-200. After Smith gave different descriptions of the incident, Magstadt took the very unusual step of asking Smith to take a polygraph test. 21RP 200-03; 25RP 112-13.

Patricia Larson viewed the man outside the laundry room twice and spoke with him briefly. She identified Post from photographs taken of the lineup. She did not recall he had a mustache or was tan, even though others described him with those features. 21RP 6-23; EX 40.

The description of Smith's assailant differed substantially from the descriptions of Post provided by witnesses to the Palmer and Mears rapes. 21RP 48-54, 84-98, 112-14; 25RP 96-110; EX 29, 34.

Magstadt and a former King County Detective related general facts about the Smith investigation, including substantial evidence on the question whether the lineup held June 18, 1974, was fair or suggestive. Although the detectives claimed they followed appropriate procedures in 1974, they admitted they could not remember many details and that several witnesses attended the lineup at the same time. 21RP 58-79, 132-150, 179-187. Magstadt

also admitted she had picked up a photo of Post before she drove Smith to the lineup. 21RP 179-80.

Post had a chipped front tooth at the time of the Morgan rape, the Smith allegation, and the lineup. This was an unusual feature, but neither Smith nor any of the other witnesses who described Smith's alleged assailant noted it. 21RP 94-98, 113-14, 165-68, 210-11; 25RP 105; 27RP 73-76; EX 26.

Dr. Geoffrey Loftus, with substantial expertise on the question of eyewitness identification and memory, testified about procedures to ensure reliable lineups. Multiple witnesses should not view suspects at the same time. Officers conducting the lineup should not know the suspect, to avoid the potential of even subconscious suggestion. 27RP 16-17, 22-32.

None of these bias-reducing methods were used at the lineup where Smith identified Post. Palmer and Mears were both present, and both detectives knew Post was the suspect. 27RP 37-41, 47. The state failed to preserve the lineup photographs, leaving no way to review the procedures for biased participant selection or other suggestiveness. 21RP 73-74, 136, 157, 193; 26RP 123-24; 27RP 31-32, 62.

The defense presented records from Post's job at the time which showed him working north of I-90 in Bellevue, 25-30 miles from Auburn, when Smith was raped. 21RP 185-192. The Smith facts also did not fit the pattern the state ascribed to Post. The assailant did not discuss whether Smith felt good or enjoyed it, and only the Smith rape involved oral sex. CP 717-18; 20RP 96-97, 105-09; 21RP 121-23.

6. Twin Rivers Sex Offender Treatment Program (SOTP)

Robin Murphy identified herself as a supervisor for sex offender treatment specialists at the Twin Rivers SOTP, but on cross she admitted she was not a certified sex offender treatment provider. 25RP 116-17, 197-98. She used to be a clerk-typist, worked up to administrative assistant to the assistant superintendent, and then moved to the SOTP. 25RP 198.

She described the goals of the SOTP as getting offenders to understand what caused their offenses and to manage their arousal. 25RP 119. She testified the SOTP therapy process focused on group therapy for two hours per day, four days a week. She believed the therapy process required honesty and credibility with the group, where group members could share sensitive issues and confide in

each other. 25RP 120, 123-26. She believed her job required her to confront people who are manipulative and not honest. 25RP 128-30.

Post was assigned to Murphy's group in February, 2001. 25RP 130-31. After a few months Murphy said other group members declined to work with Post because they felt he had been dishonest. She also felt he brought "chaos" into the group. 25RP 155-59, 164-65; 26RP 19.

She said Post set goals for the treatment: to identify cognitive distortions, understand his offense cycle, prevent reoffense, and to be authentic, transparent and truthful. In Murphy's opinion, Post made poor progress and did not accomplish these goals. 25RP 136-40, 150-51, 159-65, 178.

Murphy believed Post did not progress because he consistently said he committed the rapes as part of a robbery or burglary. He said he had no deviant fantasies. 25RP 142-44, 219.

According to Murphy, Post would often say he "did not recall" facts related to his offenses, or recent occurrences on the unit. 25RP 146-49. Murphy said Post did this when she confronted him for saying he had typed up copies of the SOTP progress notes, rather admitting he submitted them to the law library for copying on the machine. 25RP 159-61.

Murphy said she asked Post to leave the group, but did not want to terminate him from SOTP completely because she thought he was a high risk to reoffend. She then scheduled one-on-one counseling sessions with Post. 25RP 51, 67-69; 30RP 58-65; EX 165. Despite a fairly clear absence of any working therapeutic relationship, Murphy never tried to transfer Post to work with another therapist. 26RP 21-22.

Murphy said the "open group" sessions Post had participated in were not considered part of the sex offender treatment program. Those were merely classes the therapists volunteered to teach. 25RP 173-77, 230.

Murphy admitted that all SOTP participants must sign a consent form that waives confidentiality and allows DOC to release all the information to the end of sentence review committee, for purposes including use as evidence against the person in seeking civil commitment. A person also could face prosecution for prior crimes that had not resulted in conviction. 25RP 232-38.

Post ultimately was transferred from Twin Rivers due to an infraction involving requests for copies from the law library. He was technically not terminated from SOTP, but because SOTP was located only at Twin Rivers, he could no longer participate in the

program. 25RP 170-71; 26RP 19. Murphy said 99% of offenders complete the program. 55RP 127.

Murphy consistently devalued Post's other accomplishments, including his college degree and training in nonviolent communication. 25RP 190, 199. Although she admitted the SOTP relapse prevention teaching is based on a cognitive behavioral model also used in the alcohol program Post completed at DOC, she gave Post no credit for his understanding of that, either. 25RP 201-02.

Post disagreed with Murphy's assessment that he had not been honest in group sessions. 25RP 41-43. Murphy was described by Nancy and Charles as abrasive and hostile. It was impossible to develop a therapeutic relationship with her due to her hostile attitude and the lack of any confidentiality. 25RP 48-51; 30RP 50, 46-50; 31RP 61-62.

Post's offenses involved rapes of adult women. Murphy's treatment group included pedophiles, child molesters, and people with substantial developmental delays. Post disagreed with DOC's decision to assign him to Murphy's group because those offenders had different offense histories and issues. 30RP 51-55.

#### 7. The Twin Rivers Infractions

The state offered its theory that Post defrauded the Twin Rivers legal copy system in May of 2001 because he submitted copies of his SOTP progress notes to be copied for ten cents per page as legal documents, rather than 35 cents as nonlegal documents. Post received a serious infraction for this. 19RP 102; 28RP 135-36; 30RP 45-46, 108-16; EX 64Q. He presented substantial evidence, however, showing the treatment notes were properly considered legal materials because he was engaged in a lawsuit and settlement negotiations with the AG's office over the amended EFV policy. Post wanted to use the records to show the AAG he was participating in treatment and following the rules, so he requested copies of his SOTP progress notes for that purpose. 24RP 161-65, 30RP 43-46, 65-73.

Post felt he had a good rapport with the law librarian, Ms. Park.<sup>9</sup> She had copied legal documents in the past. Whenever she had a question, she asked. But this time, Murphy's former supervisor was a named defendant in the lawsuit, and Murphy had instructed Park not to copy any progress notes. Post said the shift lieutenant directed Park to write the infraction for fraud. 30RP 65-73; 110-16.

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<sup>9</sup> Park did not testify at trial, as she was deceased.

Post was surprised by the infraction and a month later he went to see Park. They spoke for about five minutes in her open office within a few feet of a corrections officer, then Park became angry and ordered him to leave the office. The shift lieutenant directed Park to write a second infraction for intimidation. 30RP 65-73; EX 64Q.

Post appealed the infractions but was not permitted to have any witnesses or present any evidence. An associate superintendent found the infractions to have been committed. 30RP 72-73; EX 105-06.

At both trials, the defense argued to play the tapes from the "hearings." CP 459-97. The tapes were played in the first trial. 12RP 160; EX 105, 106. In the second trial, however, the court excluded them. CP 726.

#### 8. SCC Evidence

Over defense objection, the state presented evidence about the Special Commitment Center treatment program and Post's participation in it. The defense argued the evidence was irrelevant and unfairly prejudicial because it suggested that Post was not finished with treatment. That question had nothing to do with whether Post met the criteria for commitment, however. CP 384-87, 645-46, 662-63, 686-87, 692, 789 (appendix A); 16RP 16-26, 96-98, 112-17,

126; 22RP 104-05; 31RP 46-49. The trial court admitted the evidence.

Post arrived at the SCC after the state filed this petition. The SCC treatment program is based on cognitive behavioral therapy, much like the SOTP at Twin Rivers. In theory, the idea is to identify negative emotions preceding the offense cycle, to change cognitive distortions, to manage emotions, and to control arousal. Based on an offender's detailed sexual autobiography, the treatment program strives to identify the pattern behind the offenses and develop a means to intervene before reoffense. 26RP 25-26, 32-38. Although an offender might have learned many of the concepts in other programs, SCC refuses to credit that prior experience. Residents must start over. 26RP 87-88; 30RP 84-85.

In practice, the SCC treatment program is divided into six phases. Each phase involves numerous classes, or "psycho-education modules." Phase 1 involved 10 classes or assessments, and phase 2 involved 12 classes. According to SCC therapist James Anderson, these preliminary phases involved "classes about therapy," not the "actual therapy." 26RP 45.

Post initially worked with Regina Aiken as his primary SCC therapist for about 14 months. 30RP 74. She initially recommended Post for a phase advancement. 26RP 110.

The SCC then reassigned Post to therapist James Anderson on May 21, 2004. Post did not request this. 26RP 55-56, 110. Anderson was not a state certified treatment provider, although he did have prior experience as a restaurant manager and "child and family therapist." 26RP 26-27, 32. He had some training in sex offender treatment, which included sessions in how to testify effectively and prepare for cross-examination. 26RP 28-29, 32.

Anderson said the "actual" sex offender treatment group started in phase 3. That phase included 18 classes, including "arousal modification." 26RP 46-47. The prosecutor used that opportunity to emphasize Anderson's discussion about "external controls," which include "electronic monitoring" that "at all times electronically alerts authorities to [an offender's] whereabouts." Other "external controls" are "community corrections officers," formerly called "parole officers," who "monitor the person very carefully[.]" 26RP 37.

Anderson described phase 4 as having 18 classes, and phase 5 as having another 18 classes. Each phase built on the prior phases. Phase 6 added 11 more classes. 26RP 47-49.

While describing the SCC treatment program, Anderson was allowed to repetitively testify he thought it was important for an offender to honestly and fully identify the offense cycle and how it plays out on a day-to-day basis. 26RP 33-34, 46, 48 (lines 16-17), 53-55, 65-66, 71-72. Agreeing with the prosecutor's leading question, Anderson said a relapse prevention plan without those elements "is not going to work." 26RP 72.

After the six phases, a resident may be considered for conditional release into the community. 26RP 41. According to Anderson, when a person reached the "advanced phases," they have "demonstrated an ability to manage their . . . risk to reoffend" in the community, 26RP 50, with "tight, court-ordered supervision." 26RP 49. The last phase involves continued treatment with "court ordered conditions of release." 26RP 50. Not satisfied the point had been made obvious, the prosecutor returned on redirect with a series of leading questions. She emphasized that some individuals had been released from SCC "with court supervision" including "electronic

monitoring" and "a CCO or Parole Officer" and "treatment in the community under the umbrella of the court." 26RP 114.

After describing the program, Anderson said Post was currently in phase 2 of 6. 26RP 56.<sup>10</sup> He said Post had "yet to do the relapse prevention plan or arousal control." 26RP 56.

During the course of SCC treatment, Anderson had criticized Post for not admitting a number of prior offenses, but Anderson actually made the mistake. Although Anderson admitted his mistake and apologized to Post, his mistake led to the denial of Post's phase advancement. 26RP 67-68, 101-06; 30RP 81-83. Anderson admitted there is no confidentiality in the SCC program and that he and Post had no working therapeutic relationship. Anderson considered "public safety" and "the courts" to be his clients. 26RP 68, 84-85, 100.

Anderson thought Post was not doing well in the SCC program, opining Post was evasive and disingenuous. Anderson thought Post had hidden his thoughts and feelings, and focused instead on the problems of other residents. 26RP 57-62.

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<sup>10</sup> The prosecutor also asked Post to say he was in phase 2 of a 6-phase program. 25RP 40-41.

On several occasions Anderson offered his opinion that Post's explanations of the offenses, as primarily property crimes, were not credible or plausible. 26RP 64-65, 70, 109; see argument 4, infra.

Anderson admitted, however, Post had no "Behavior Management Reports" (BMRs) at the SCC, and Post is unfailingly polite and respectful. 26RP 90, 110. Post also was regularly employed at the SCC. He initially did janitorial work but was now one of the librarians. 26RP 106-07.

Post agreed with Anderson's statement they had no connection or therapeutic relationship. 25RP 51. The SCC therapists essentially engage in "case-building" against residents before civil commitment trials to utilize anything they say against them in future proceedings. 30RP 78-81, 86. The environment is adversarial, not therapeutic. 30RP 89-90.

9. Dr. Leslie Rawlings

Dr. Leslie Rawlings was the state's expert on the questions of mental abnormality and recidivism risk. He had substantial experience in the evaluation and treatment of sex offenders. 19RP 8-13, 20. He reviewed the 13,000+ pages of discovery generated in the case. 19RP 34-35; 22RP 62. In his opinion, Post met the criteria for

commitment under RCW 71.09. 19RP 29-31, 109, 123; 20RP 24, 28, 65, 88.

To satisfy the "mental abnormality" prong of the criteria, he believed Post could be diagnosed with "paraphilia not otherwise specified [NOS], rape or non-consent." 19RP 109, 119, 146; 20RP 136. Rawlings believed this was a mental abnormality that predisposed Post to commit acts of sexual violence. 19RP 146.

Rawlings admitted this diagnosis was controversial in the psychological community of professionals who treat and diagnose sex offenders and who attempt to determine future risk of reoffense. 19RP 115-17. It was not included as one of the several listed paraphilias in the DSM-IV-TR,<sup>11</sup> but Rawlings said there is a tremendous diversity in disorders, as the DSM does not contain everything. 19RP 108-09, 115; 20RP 136-42. Rawlings claimed the DSM did not include "rape" or "nonconsent" as a paraphilia because of sociological concerns about creating a mental defense for rapists, or insurance issues for treatment of rapists. 19RP 116-17; 20RP 141.

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<sup>11</sup> "DSM" refers to the Diagnostic and Statistical Manual of the American Psychiatric Association. The "DSM-IV-TR" refers to the fourth edition of the DSM, text revision, published in 2000. 19RP 16.

He admitted the American Psychiatric Association (APA) had debated this issue for years. 20RP 141. Despite its deliberate absence from the DSM, he thought the diagnosis was generally accepted in the psychological community. 19RP 117-18, 122; 20RP 142-43.

Rawlings based his diagnosis on a variety of facts in Post's background. Mostly, Rawlings believed Post met the diagnosis because he had fantasies, urges or behavior urges he could not control, he liked the "rush" of the sexualized violence, masturbated to fantasies of rape, had distortions in his thoughts, problems with participation in treatment, and appeared to have a consenting partner available to him when he committed his offense in 1988. 19RP 47-48, 118-122; 20RP 162-63; 22RP 65-66, 72, 133-34. According to Rawlings, the existence of intense, recurrent sexually arousing fantasy, urge or behavior was the main difference between a paraphilic rapist and a criminal rapist. 20RP 162-63. Rawlings could only state his belief that it was "likely that [Post] may have fantasies that involve paraphilic rape." 20RP 167-68. Rawlings believed the "nature of the disorder" is to "deny and minimize." 20RP 171.

Rawlings also diagnosed Post with antisocial personality disorder. 19RP 123, 146; 20RP 136. He believed Post had an

enduring disregard for the rights of others and severe problems conforming his conduct to social norms. Rawlings found evidence of callousness, lack of remorse, impulsivity, and rationalization for hurting others. 19RP 123-45. His review of Post's records, including records of his adult and juvenile offenses, and institutional infraction history, led him to conclude some DOC employees also believed Post was manipulative and had a reputation for being untruthful. 19RP 94-95, 106-07, 127-42; 20RP 16-20, 73-76.

Rawlings believed the records showed Post had exposed his penis to another inmate in 1990 and he had been infraacted for "intimidation." 19RP 100-03. This concerned Rawlings because it suggested difficulty managing behavior, relating to impulse control and judgment, even in a custodial setting. 19RP 100-03.

Rawlings admitted, however, that he did not believe the ASPD diagnosis, on its own, predisposed Post to commit acts of sexual violence. Rawlings therefore relied on the "Paraphilia – NOS, nonconsent or rape" diagnosis to support his ultimate opinion supporting commitment. 19RP 30-31, 146; 22RP 26.

On the risk of recidivism question, Rawlings relied on a variety of theories to support his belief that Post had serious difficulty controlling his behavior. He believed the paraphilia and ASPD

diagnosis showed this, as well as the short amount of time between the offenses. 20RP 6-13, 24-28.

Rawlings believed Post scored high on the Hare Psychopathy Checklist-Revised (PCL-R). Rawlings scored Post as 30.5, half a point above the 30-point cut-off for high psychopathy. 19RP 147-59; 20RP 22-25. Rawlings explained that high psychopathy scores, coupled with sexual deviance, would increase the risk of reoffense, although there was no evidence showing Post was "deviant" as that term was used in the relevant studies. 20RP 8-13.

Rawlings applied what he called a "guided or adjusted actuarial approach" to determine Post's risk of reoffense, even though some in the scientific community disagreed with the validity of that approach. 19RP 19; 20RP 30; 22RP 59. Rawlings stated his belief that the actuarial instruments he used were accepted in the scientific community. 20RP 34.

Rawlings scored Post on three instruments: the Static-99, the Sexual Offender Risk Appraisal Guide (SORAG), and the Minnesota Sex Offender Screening Tool-Revised (MnSOST-R). 20RP 31. Rawlings said the three instruments had been cross-validated, meaning that other studies had confirmed their conclusions about risk prediction for recidivism. 20RP 34-44; 22RP 80.

The three instruments had different elements and measured different things, however. None were developed on American populations. 20RP 34-38, 61.

The SORAG, for example, was developed to measure the risk of violent offenses, not just sexually violent offenses. 20RP 36; 22RP 38-39. It therefore is doubly prejudicial to the defense: (1) it not only overstates the risk of sexual offenses, but (2) juries are also told that people like Post may be likely to commit violent but nonsexual offenses too. This is irrelevant and unfairly prejudicial, because under RCW 71.09, the question is whether a person is likely to commit a future crime of sexual violence. CP 804-812; RCW 71.09.060(1). The defense therefore objected to the admission of the SORAG, but the trial court allowed Rawlings to testify about his conclusions from the SORAG.

In its sample population, the SORAG and MnSOST-R both counted a new offense as occurring when a member of its sample was merely charged with a new offense or returned to the institution. 20RP 36-37. Unlike the SORAG, the STATIC-99 measured the risk of reoffense based on actual reconviction statistics. 20RP 36.

Rawlings admitted that increased age significantly reduces recidivism risk, particularly for adult rapists as opposed to child sex

offenders. 20RP 39; 22RP 9-10. Rawlings admitted there was substantial uncertainty in the professional community on how much risk is reduced by age. 20RP 67-68. Nonetheless, Rawlings claimed the three instruments all accounted for Post's age. 20RP 46-47, 63.

On cross, Rawlings admitted a study by Porter showed that age had a remarkable effect on reducing recidivism. Recidivism risk dropped considerably for offenders 50 and older. EX 175; 22RP 5-6.

Rawlings also admitted subsequent studies showed recidivism rates substantially lower than those in the initial MnSOST-R predictions. In other words, the MnSOST-R overpredicted the risk of reoffense. 20RP 42-44.

After calculating Post's score on the three instruments, Rawlings offered these conclusions. The MnSOST-R predicted persons with Post's score of 19 would recidivate 78% of the time within 6 years of release. The margin of error was plus/minus 18%. 20RP 48-53.

With Post's score of 29, the SORAG risk (including the prejudicial but irrelevant risk of violent nonsexual offenses) predicted these rates of recidivism: 75% over 7 years (plus/minus 16%), or 89% over 10 years (plus/minus 14%).

The STATIC-99 score of 7 predicted these rates: 39% over 5 years, 45% over 10 years, and 52% over 15 years. Not surprisingly, Rawlings claimed these estimates may understate the true risk of reoffense, because the rates were based on new convictions which may, as a result of underreporting, be lower than the number of actual new offenses. 20RP 59-60.

From this variety of sources, Rawlings offered his opinion that Post was more likely than not to sexually reoffend. 20RP 65. Rawlings did not give an outer limit for his prediction that might take into account Post's continually advancing age.

Rawlings offered snippets from other studies to support his "modified actuarial" approach. He said Hanson's meta-analysis concluded the factor with the highest correlation for recidivism was whether the person had previously violated conditions of release. Rawlings would apply that to Post. 19 RP 90-91; 20RP 83-84.

Rawlings cited a study by Hildebrand on a Dutch population to state that 82% of "deviant psychopaths" were reconvicted. EX 90; 20RP 9-12. On cross, Rawlings admitted the 94 Hildebrand study subjects had an average age of 24.5, 17 were deviant psychopaths, all had been committed to psychiatric hospitals, and the average time in custody was only 53 months. 22RP 18-22. Rawlings decided Post

could be considered "deviant" as defined in the Hildebrand study based on Rawlings' belief that Post was paraphilic. 22RP 21-22.

Rawlings believed the risk of reoffense would not be lessened by Post's release plan. 20RP 77-87.

To support his opinion, Rawlings also relied on records from Post's ongoing SCC commitment. 19RP 21; 22RP 96-98.<sup>12</sup> He asserted his belief that Post continued to focus on the issues of others in treatment, rather than his own offenses. Post disagreed with his therapist, Jim Anderson, and had similar issues with Anderson as he had with Robin Murphy. Rawlings believed Post had a pattern of trying to manipulate his therapists. 20RP 71-76. Rawlings stated his belief that "current research suggests that by and large individuals who complete sex offender treatment are at lower risk for future sexual offending than those who did not complete the sex offender treatment." 19RP 25.

On cross, Rawlings admitted the literature showed a remarkable drop in recidivism rates as offenders age past 50. In the

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<sup>12</sup> The defense objected to the SCC evidence. See argument 2, infra.

samples used to validate the actuarial tools, the average age of the offenders were much younger than Post. 22RP 5-8, 28; EX 175.

Rawlings also admitted his recidivism estimates failed to take into account the deterrent effect of 2 and 3 strikes laws or the effect of an offender's educational advancement. 22RP 26.

Rawlings made about \$50,000 working on SVP evaluations in 2003, in addition to his clinical practice. 19RP 10. In this case alone he made more than \$20,000. 22RP 60.

10. Dr. Theodore Donaldson

The defense presented testimony from two additional experts, Dr. Theodore Donaldson and Dr. Luis Rosell. Briefly summarized, Donaldson testified Post did not have a mental abnormality that would satisfy the criteria for commitment. Donaldson also discussed the actuarial instruments and opined that Post was not likely to reoffend. Rosell reviewed the elements of the release plan and offered his opinion Post was likely to comply with it.

Donaldson is a clinical psychologist who specializes in forensic psychology. He had evaluated about 355 persons to determine commitment criteria under California and Washington commitment petitions. 23RP 33-41; EX 102.

Donaldson discussed the various psychological disorders listed in the Diagnostic and Statistical Manual, Fourth Edition, Text Revision (DSM-IV-TR). Of the potentially applicable disorders, only a "paraphilia" would constitute a mental abnormality that might justify Post's commitment. 23RP 41-44. Donaldson opined there was insufficient evidence to conclude Post met the essential features of a paraphilia diagnosis. 23RP 154; 24RP 20.

Donaldson explained that the DSM Committee had on several occasions considered, but had never adopted, a diagnosis for Paraphilia NOS Rape or Nonconsent. In an effort to provide diagnostic criteria, Dr. Gene Able, a leading name in the field, had suggested a diagnosis for "Paraphilic Coercive Disorder," with concrete criteria. The DSM Committee rejected it. 23RP 44-46, 51, 144, 181-83.

Even though the Paraphilia NOS Rape diagnosis had become popular with psychologists, there was no known reliability for it. Different forensic judges reach different conclusions with very poor interjudge correlations. For these reasons, it was not adopted by

experts in the research and academic arenas. 23RP 47-48, 144-46, 155; 24RP 19-20, 90-93, 118-19.<sup>13</sup>

To satisfy the criteria, the person would have to have an intense urge for nonconsensual sex and a preference for it over consensual sex. 23RP 44-52, 140, 146-48, 121-22. The voluminous materials in Post's case did not show Post had a preference for nonconsensual sex. 23RP 153-54, 158-60. If Post preferred nonconsensual sex, he would not have been concerned about how the victims felt. There was no ritualistic or scripted behavior. Donaldson believed Post was simply attracted to the sex, not the nonconsensual nature of it. 23RP 52-61, 64; 24RP 14-15.

Although Post had committed several rapes over a relatively short time span, that was not one of the diagnostic criteria. Simply being bad, or a criminal rapist, does not establish mental illness. 23RP 53-55.

Donaldson believed it likely that Post had Antisocial Personality Disorder (ASPD). He made it clear, however, that a personality

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<sup>13</sup> Dr. Luis Rosell confirmed the interreliability of the Paraphilia, NOS - Rape diagnosis was very poor. It was not uncommon for experts to disagree on that diagnosis. 28RP 21.

disorder like ASPD would not meet the statutory criteria for a mental abnormality – only a paraphilia would do that. 23RP 70-72.

On the actuarial question whether Post would be likely to reoffend, Donaldson opined that Post's risk of reoffense was 15-30%, substantially below 50%. Although Post was in a high risk category by virtue of static risk factors, his age substantially reduced that risk. 24RP 31, 141. Donaldson noted the SORAG was based on a population with an average age of 34 and was not normed on 50 year-old men like Post. 23RP 78-79.

Recent research on age, as it related to recidivism for rapists who have adult victims, showed a consistent drop in recidivism base rates for persons over 50 years old. A meta-analysis by Carl Hanson included 45 rapists over age 60, and none recidivated. The more recent studies showed a consistent drop in recidivism after age 50. Base line rates went from 17% of 34-39 year-olds, to 10-13% of 50-59 year-olds. 23RP 79-90, 121-22; 24RP 58-62, 100-01, 104, 135; EX 177, 178. A study by Porter further showed the reduction in recidivism with advanced age. 24RP 52-56. A recent presentation by Dr. Thornton showed Post's risk at 13%. 24RP 88-89; EX 100. The research further showed that psychopathy and ASPD also decrease with age, as did violent behavior. 23RP 99-101.

Donaldson showed how the SORAG and Static-99 do not account for the advanced age of offenders like Post. 23RP 89-91; 24RP 38, 69-70, 100-02. He further explained the "confidence interval" for the Static-99 showed that an estimate of a 52% chance of recidivism actually suggested the true value was somewhere between 43 and 61%. 24RP 115.

In a recent effort to cross-validate the SORAG, Calvin Langton had shown that it substantially overpredicted recidivism base rates. 24RP 74-75, 108-09, 142; EX 182.

Donaldson discussed several studies regarding the risk of reoffense. The Rice/Harris study showed that sexual deviance, coupled with high psychopathy, had a substantial correlation with sexual recidivism. But it measured "deviance" with phallometric assessment, and no evidence showed Post had deviant phallometric responses. Before the Rice/Harris study would apply, the evidence would have to show a higher plethysmograph response to nonconsensual sex than consensual sex. 23RP 75-77, 98, 178-79; 24RP 11-12, 128-29.

The Hildebrand study<sup>14</sup> Rawlings relied on had no application to Post. That study involved a sample of young unmarried men with an average age under 25, the oldest was 44, all of the sample had been committed to psychiatric hospitals, and most had not even completed grammar school. 23RP 76-78.

The Hanson meta-analysis concluded the strongest predictor of recidivism was noncompliance with supervision. Donaldson admitted Post had a history of failed supervision, including during his release on bail in 1974, his escape from work release in 1981, and his rape of Fiscus in 1987. 24RP 42-44. Donaldson thought tight supervision with polygraph monitoring would be useful, but recognized that Post's sentence conditions required no supervision and the risk was mitigated by Post's age. 24RP 46-49.

The state made efforts to discredit Donaldson. The state contended Donaldson was "fired" by the California state mental health board, but Donaldson explained his contract was not renewed based on disagreements over the use of actuarials for prediction. Ultimately, California discontinued use of the actuarial instrument Donaldson had

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<sup>14</sup> Martin Hildebrand et al, Psychopathy and Sexual Deviance in Treated Rapists: Association With Sexual and Nonsexual Recidivism, 16 Sexual Abuse: J. Res. & Treatment 1 (2004).

criticized. 23RP 166-67; 24RP 83-86. The state also offered evidence showing he considered himself a "defense" expert and he expected to make about \$280,000 in 2004 doing forensic defense work. 24RP 78-82.

11. Dr. Luis Rosell

Psychologist Luis Rosell had substantial experience treating sex offenders. He started work in 1991 with Fred Berlin at the Johns Hopkins sexual disorders clinic, and was the director of the Iowa Sex Offender Treatment Program at the Mount Pleasant Prison for 3 ½ years. 28RP 14-19. He had led hundreds of treatment groups. 28RP 35.

Rosell reviewed the almost 14,000 pages of discovery, met with Charles, Nancy, and viewed the house where they would live. 28RP 18. Of the hundreds of sex offenders, very few had achieved what Post had achieved in custody – advanced education, sustaining a marriage for over a dozen years, social support, and preparing himself for release. 28RP 27-29. Post clearly is intelligent and processes information better than many offenders. 28RP 29, 37.

Rosell reviewed Post's release plan and opined that very few offenders have plans as detailed as Post's, with plans for home, work, social network, social support, family, and treatment. 28RP 46-48,

61-6; EX 126. Post had identified what he needed to do to avoid reoffending. 28RP 90-91. The plan had many strengths, with a weakness that it was not court-ordered. 28RP 65-66, 69, 86, 147-48. Post nonetheless had demonstrated his the ability to follow-through and succeed with the plan. His advancing age substantially reduced his actuarial risk. 28RP 122-25, 140. Rosell believed Post would comply with the plan and was likely to succeed in the community. 28RP 64-67, 122-25.

Rosell described sex offender treatment programs, which generally consist of group therapy. The group should have similar focus, with similar offense histories and similar issues relating to sexual attractions, substance abuse, and anger. 28RP 34. Individuals with developmental delays should be grouped with similarly situated offenders, otherwise they may not understand the group's discussions. 28RP 37-42.

Rosell described Robin Murphy's SOTP group as including pedophiles, whose offenses and issues were very different than Post's. 28RP 42-43, 554-55. Rosell thought it was unfortunate the SOTP did not allow Post to return to the program after the copying/intimidation infractions. 28RP 30-31.

Rosell disagreed with the SCC's one-size-fits-all mode of treatment. He believed individuals should be treated as individuals, and if they progress faster, they should be recognized. 28RP 38-45. Rosell rebutted the state's repeated emphasis on Post's alleged manipulation, stating that manipulative behavior is not generally a roadblock to treatment. 28RP 27-28. He confirmed the SCC is a very difficult environment to develop a therapeutic relationship, and that Anderson and Post in fact had no therapeutic relationship. 28RP 51-57.

Rosell confirmed the interreliability of the Paraphilia NOS – rape diagnosis was very low and it was not uncommon for experts to disagree on that diagnosis. 28RP 21. He downplayed the importance of that diagnosis in developing a treatment plan for Post. 28RP 22-24, 50.

Rosell pointed out the Catch-22 in which the treatment program placed Post. Even if he did not have deviant fantasies, it would be easier for him to just admit he did because the therapists refused to approve his advancement because they thought he denied them. But if he admitted to having them, the state would use that as proof of a paraphilia. 28RP 51-52.

Rosell stated the scientific studies revealed no significant difference between the recidivism rates for treated and untreated sex offenders. 28RP 145, 150-53.

D. ARGUMENT

1. THE "PARAPHILIA, NOS – NONCONSENT OR RAPE" DIAGNOSIS, AND THE BROAD APPLICATION OF ACTUARIAL INSTRUMENTS WITHOUT REGARD TO ADVANCING AGE, ARE SCIENTIFICALLY UNSOUND AND CONSTITUTIONALLY UNSUSTAINABLE.

The state's proof of a mental abnormality was based on the diagnosis of "paraphilia NOS – nonconsent or rape." Because this diagnosis fails to satisfy fundamental principles of sound science and fails to reliably distinguish an ordinary criminal recidivist from a mentally-ill recidivist, it fails to satisfy substantive due process. Because the commitment order depends on the insufficient diagnosis, the order must be reversed.

The state and federal constitutions guarantee the right to substantive due process. U.S. Const. amends 5, 14; Const. art. 1, § 3; Kansas v. Crane, 534 U.S. 407, 413, 122 S.Ct. 867, 151 L.Ed.2d 856 (2002). In the context of a 71.09 commitment, due process requires the state to prove

serious difficulty in controlling behavior. And this, when viewed in light of such features of the case as the nature of the psychiatric diagnosis, and the severity of

the mental abnormality itself, must be sufficient to distinguish the dangerous sexual offender whose serious mental illness, abnormality, or disorder subjects him to civil commitment from the dangerous but typical recidivist convicted in an ordinary criminal case. 521 U.S., at 357-358, 117 S.Ct. 2072; see also Foucha v. Louisiana, 504 U.S. 71, 82-83, 112 S.Ct. 1780, 118 L.Ed.2d 437 (1992) (rejecting an approach to civil commitment that would permit the indefinite confinement "of any convicted criminal" after completion of a prison term).

Crane, 534 U.S. at 413. See also, Seling v. Young, 531 U.S. 250, 121 S. Ct. 727, 148 L. Ed. 2d 734 (2001); Kansas v. Hendricks, 521 U.S. 346, 117 S. Ct. 2072, 138 L. Ed. 2d 501 (1997).

In the context of 71.09 trials, valid scientific proof is necessary to support a jury's differentiation between mentally-ill and typical recidivists. See generally, Prentky, Janus, Barbaree, Schwartz, and Kafka, Sexually Violent Predators in the Courtroom: Science on Trial, 12 Psychol. Pub. Pol'y & L. 357, 364 (Nov. 2006) (hereafter, "Science on Trial"). Unfortunately, as a result of strong advocacy pressure and concerns for public safety, there is an increasing tendency for experts to distort science in RCW 71.09 trials. Science on Trial, at 360.

The clearest example of this is the manipulation of a mental disorder diagnosis. And the "paraphilia – NOS, nonconsent" diagnosis is likely the easiest to manipulate. Science on Trial, at 366-70.

As the record shows, this diagnosis is not found in the DSM. The DSM committee instead rejected it on several occasions. See also, Science on Trial, at 367-68.<sup>15</sup>

To the extent the diagnosis could be valid in the abstract, the state would at least need to establish the offender preferred nonconsensual sex over consensual sex. The nonconsent itself would have to "be the specific stimulus for the intense sexual urges." Science on Trial, at 367. Rawlings did not use this criteria to support his opinion, however. Nor was there any evidence that consensual sexual partners inhibited Post's sexual arousal. Science on Trial, at 367-38.

The state therefore failed to meet its substantive burden to differentiate Post from a typical criminal recidivist. Without that proof, the commitment order should be vacated.

The lack of scientific validity is further exacerbated by the unprincipled use of actuarial instruments without due regard for the

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<sup>15</sup> See also, DSM-IV-TR, at 566-76 (discussing paraphilias); Alexander Brooks, The Constitutionality and Morality of Civilly Committing Violent Sexual Predators, 15 U.P.S. L. Rev. 709, 731-32 (1992) (discussing the amendment history of the DSM as it relates to rejecting rape as a paraphilia) (citing, inter alia, Gene G. Abel, Paraphilias, in V COMPREHENSIVE TEXTBOOK OF PSYCHIATRY 1069, 1079-80 (Harold I. Kaplan et al. eds., 1989)).

effects of Post's advancing age. Science on Trial, at 376-77. Recent data question whether the actuarials are of any real use in 71.09 determinations, but those problems are magnified when the actuarials are applied to men 50 or older. Experts who rely on these actuarials for all but the youngest age groups will be wrong most of the time. Wollert, Low Base Rates Limit Expert Certainty When Current Actuarials Are Used to Identify Sexually violent Predators: An Application of Bayes's Theorem, 12 Psychol. Pub. Pol'y & L. 56, 71-73 (2006).

This abuse of science violated Post's due process rights. The state cannot establish the error was harmless under any standard.

As discussed in argument 7, infra, Post presented a substantial defense case. Fifteen civilian witnesses supported his release and would support him in the community. 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 also supported the defense.

These would be substantial accomplishments in the incarceration of any inmate, but they are particularly remarkable in the

context of the past 18 years of Washington corrections policy, with ever-shrinking rehabilitation opportunities.<sup>16</sup>

Given these competing theories, the one thing a rational juror would need in making a fair commitment decision would be fair and accurate science. Here, however, even the science was corrupted to serve the state's ends.

In response, the state may claim the error is harmless, contending its case was supported not only by the paraphilia diagnosis, but also by an ASPD diagnosis. This claim would overlook Rawlings' own admission he would not find a qualifying mental abnormality based on ASPD alone, as well as the state's repeated efforts, over defense objections, to present this evidence and to emphasize it in opening statement and closing argument. E.g. 18RP 75; 31RP 192. This Court does and should closely scrutinize a party's claim of harmlessness on appeal after the party expends great effort

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<sup>16</sup> Post's successes were consistently minimized by the prosecutors and state witnesses, who condemned his transformation as mere "image-management" or manipulation, with an eye toward an eventual civil commitment trial. Of course, had Post not used the custodial time wisely, the state would argue his recidivism risk was higher because he had learned nothing during his incarceration. The state's consistently cynical "catch-22" approach infects many parts of this record.

to make sure the jury heard the evidence. State v. Aaron, 57 Wn. App. 277, 282, 787 P.2d 949 (1990).

Even if Rawlings had said ASPD was itself a qualifying diagnosis, there is no way for the state to now establish the jury relied solely on the ASPD alternative. The state did not seek a special verdict on that theory, and this Court does not require the jury to unanimously determine whether the person suffers from a mental abnormality, a personality disorder, or both. In re Detention of Halgren, 124 Wn. App. 206, 212-17, 98 P.3d 1206 (2004), aff'd, 156 Wn.2d 795, 809-812, 132 P.3d 714 (2006).<sup>17</sup>

Finally, the Halgren cases reviewed the "mental abnormality or personality disorder" language of RCW 71.09.020(16) and analogized it to "alternative means" analysis in criminal cases. Halgren, 156 Wn.2d at 809-12. Under "alternative means" analysis, reversal is required if one of the alternatives is not supported by substantial evidence. Halgren, at 811 (citing State v. Kitchen, 110 Wash.2d 403, 410-11, 756 P.2d 105 (1988)). Because the "paraphilia NOS

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<sup>17</sup> One of the unintended consequences of decisions like Halgren is they embolden the state in later cases to use even less precision to identify the basis for the jury's verdict. That lack of precision may make the job of appellate courts more difficult in the long run.

nonconsent – rape" diagnosis was wrongly admitted, and because there is no way to determine the jury unanimously relied on the evidence of a personality disorder, reversal is required.

In short, under any logical or fair prejudice analysis, the error in admitting the diagnosis should require reversal of the commitment verdict.

2. THE TRIAL COURT ERRED IN ADMITTING THE SCC EVIDENCE AND EVIDENCE SUGGESTING POST COULD BE RELEASED WITH CONDITIONS AFTER COMPLETING THE SCC TREATMENT PROGRAM.

In a RCW 71.09 case, the defense has a right to present evidence of voluntary treatment plan to show the respondent is not likely to reoffend and therefore does not meet the commitment criteria. RCW 71.09.060(1); CP 807 (instruction 7). The state, however, has no corresponding right to present evidence that a person would receive treatment at the SCC, or to show what conditions might govern his release following commitment to the SCC.

Nonetheless, over defense objection, the trial court allowed the state to present substantial evidence about the SCC treatment program. The state not only used this opportunity, it injected additional evidence about the type of conditions that could be imposed on Post after an SCC commitment. The trial court also

denied the defense request for a limiting instruction to ensure the jury did not improperly consider possible release conditions, or commit Post based on a belief he should have conditions on his release. CP 384-87, 645-46, 662-63, 692, 789-90 (appendix A); 16RP 16-26, 96-98, 112-17, 126; 31RP 46-49. These were prejudicial errors.

One of the state's trial themes was to emphasize that Post's sentence did not require him to report to a Community Corrections Officer (CCO), and there would be no conditions on his release. In so doing, the state consistently devalued the elements of Post's release plan – from his planned residence, work, participation in sex offender treatment, alcoholics anonymous, and church, to his monitoring by members of the support team. E.g. 18RP 23; 25RP 33-34; 27RP 132-36; 28RP 86; 29RP 112-14; 31RP 85-86. The jury clearly picked up on the state's theme, asking Nancy and Dr. Wing what, if anything, they could do if Post violated the release plan. 27RP 157-161; 31RP 85-86.

The legal and factual question the jury should have been deciding was whether the state proved a mental abnormality that made Post likely to reoffend. CP 804. The SCC and LRA evidence was irrelevant to that question. The evidence instead prompted the jury to consider whether court-ordered conditions would be a good

idea, and informed the jury such conditions would be available after an SCC commitment, but not before.

In RCW 71.09 trials, unfair prejudice to the defense is always near the surface. Jurors are naturally reluctant to release anyone with prior rape convictions, and the public both hates and fears sex offenders. The state knows this.<sup>18</sup> If presented with the idea that conditions will follow commitment, but not release, even a juror with reason to doubt the state's case would be hard pressed to ignore real or imagined concerns about public security.

In short, the evidence misled the jury from its true task and was irrelevant and unfairly prejudicial. It should have been excluded. ER 402, 403; RCW 71.09.060(1). See e.g., People v. Rains, 75 Cal.App.4th 1165, 89 Cal.Rptr.2d 737 (1999) (error to admit evidence that treatment at a "hospital," as opposed to confinement at a prison, would follow a state verdict). The Rains court had no difficulty concluding this was clear error. Rains, at 740-41.

The court found it harmless, however, because Rains "presented virtually no defense," the state's proof was overwhelming,

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<sup>18</sup> The authority for this paragraph is the latin phrase "res ipsa loquitur." If the state seriously disputes this, authority will be cited in reply.

and this evidence was very briefly presented. Rains, at 741. Furthermore, in closing the Rains prosecutor argued the jurors should not let the evidence confuse them from their true task. Rains, at 741 ("It is not your function to decide what should happen to him").

No similar prejudice-mitigating facts save the state here. The SCC evidence in the second trial was pervasive and intentional. In closing, the prosecutor emphasized the evidence several times, twice going so far as to state, over objection, that "Post's best chance of reducing his risk before he's released is to complete the treatment program at the SCC[.]" 31 RP 196. When the SCC evidence was excluded from the first trial, CP 451, the result was very different. Because the state cannot show the error is harmless, this Court should reverse the commitment order and remand for a fair trial.

3. THE COURT ERRED IN EXCLUDING EVIDENCE RELATING TO THE STATE'S OPTION TO REFILE UPON SUSPICION OF A "RECENT OVERT ACT".

Under RCW 71.09 and settled case law, if the jury entered a defense verdict, the state could file a new petition if it could prove Post had committed a "recent overt act" while in the community. RCW 71.09.060(1). That term is defined as:

any act or threat that has either caused harm of a sexually violent nature or creates a reasonable apprehension of such harm in the mind of an objective

person who knows of the history and mental condition of the person engaging in the act.

RCW 71.09.020(10). Numerous cases show the state understands this definition and has no tactical difficulty applying it.<sup>19</sup> The ability to refile upon proof of a recent overt act provided the state with a substantial hammer over Post's head to avoid reoffense.

In the state's case and argument, the prosecution outlined what it believed to be a predictable pattern among Post's offenses. E.g., 18RP 70-76 (opening statement). Dr. Rawlings himself stated there was a pattern to Post's offenses. 20RP 96.

The state wanted to have it both ways, however. It also repetitively asserted that no court-ordered conditions would govern Post's release; if Post were drinking, and cruising hotels and mall parking lots, there would be "nothing anyone could do about it." 18RP 85.

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<sup>19</sup> See e.g., In re Detention of Broten, 130 Wn. App. 326, 335-36, 122 P.3d 942 (2005) (state proved "recent overt act" where Broten had, without a chaperone, parked in a parking lot near a playground where children were playing), rev. denied, 158 Wn.2d 1010 (2006); In re Detention of Albrecht, 129 Wn. App. 243, 256-57, 118 P.3d 909 (2005) (Albrecht offered young boy 50 cents to follow him and attempted to grab the boy's hand), rev. denied, 157 Wn.2d 1003 (2006).

In an attempt to respond to the state's "heads I win, tails you lose" tactic, the defense sought to ask Dr. Rawlings what type of "recent overt act" might support a new commitment petition. As the state's experienced expert, Rawlings should have been able to answer this fairly easily. But the prosecutor then shifted into reverse, claiming "we're not familiar with Mr. Post's offending pattern because he hasn't been straightforward in treatment." "It probably wouldn't arise to the level of a recent overt act if he was cruising hotels." 22RP 53-54. The trial court excluded the evidence, reasoning "[i]t implies that someone would be monitoring outside of the general police behaviors of Mr. Post if he were released would be subject to [sic]." 22RP 56.

The state also opposed the defense proposal to ask Dr. Wing what she would do if she thought Post had done something that could be considered a recent overt act. The trial court prevented the defense from asking questions about recent overt acts, reasoning that Wing could not report to the police anything she learned in a therapeutic relationship with Post. 26RP 10-13.

Finally, the court prevented Post from testifying about why the threat of refiling would prevent him from even committing a recent overt act. 30RP 10-12. Each of these rulings was error.

Post has the due process right to present a defense, i.e. respond to the state's theory that there were no effective restrictions on his conduct if he were released. U.S. Const. amends. 5, 14; Const. art. 1, § 3; Washington v. Texas, 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967). Under the Rules of Evidence, Post also had the right to present relevant evidence tending to establish or rebut the state's proof of a material fact. ER 402, 403. Courts generally cannot exclude highly probative evidence. State v. Darden, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002); State v. Hudlow, 99 Wn.2d 1, 15, 659 P.2d 514 (1983); State v. Reed, 101 Wn. App. 704, 709, 6 P.3d 43 (2000).

There was no legitimate reason for the trial court's exclusion of testimony from any of the witnesses. Given the community notification statutes, sex offender registration requirements, and Post's release plan, much more than "general police behaviors" would be monitoring Post. The purpose behind notification statutes is to increase public vigilance over sex offenders and to prevent secrecy.

Furthermore, it was not for the trial court to rule, as a matter of law, that Dr. Wing would be precluded from notifying authorities that Post had engaged in what she considered a recent overt act. The private treatment contracts of psychologists can include an agreement for nonconfidentiality, and psychologists may be released from the

privilege when a client poses an imminent danger to the public. EX 208; see generally, RCW 18.83.110; RCW 71.05.360(9); RCW 26.44.060(1), (3). In fact, the Supreme Court in Post's criminal appeal held communications with a psychologist were not privileged where there was no expectation they would be confidential. State v. Post, 118 Wn.2d 596, 612-13, 826 P.2d 172 (1992).

Dr. Wing's contract with Post expressly recognized this situation:

If you [Dr. Wing] become aware that I [Post] have violated the conditions of my treatment program, or have committed a criminal offense, you will report to my wife and mother, and/or appropriate law enforcement officials.

EX 208 (treatment contract page 2, Bates no. 001434). The trial court's contrary assumption was simply wrong.

In light of the state's repeated theory that society lacked any means to prevent Post from actually reoffending if he was released, all of the excluded evidence became highly probative. The court's error was prejudicial because it prevented Post from showing the state had a legitimate option, short of a post-offense arrest and prosecution, that would promote his compliance with the law and limit the risk of reoffense. The error also compounded the prejudice from

the erroneous admission of SCC and LRA evidence, discussed in argument 2. The commitment order should be reversed.

4. THE COURT DENIED DUE PROCESS BY PERMITTING THE STATE'S WITNESSES TO OFFER EXPERT OPINION THAT POST WAS NOT CREDIBLE.

Over defense objection, the trial court allowed two state's witnesses to offer opinions on Post's credibility. 18RP 130 (Frothingham); 26RP 65, 108-09, 118, 120 (Anderson). This was prejudicial error.

The state asked Frothingham if "it was your opinion that Mr. Post was being less than candid with you?" Over defense objection, he said "Yes, it was my opinion that Mr. Post was being a bit hesitant . . . there was some hesitation in his presentation." 18RP 130 (emphasis added). The prosecutor then asked whether it made it harder to make a recommendation because of Post's "lack of candor." Again over defense objection, Frothingham answered, "It does make it more difficult to make treatment recommendations without full candor, yes." 18RP 130.

Anderson said he found it "implausible" that Post's crime of opportunity explanation was true, 26RP 64-65, that Post's description of the Mears rape was "not plausible," 26RP 70, and he personally did not find it "plausible" that Post would only have sexual fantasies about

his wife. 26RP 109. In response to a jury question, Anderson further stated the discrepancy between his and Aiken's assessments of Post were "because [Aiken] frankly bought his story. It's as simple as that, I think . . . he successfully convinced her that he was not a person to be concerned about and she bought it." 26RP 118. Anderson further opined that Post "had successfully manipulated" Aiken. 26RP 120. None of Anderson's testimony would have been admitted if the court had granted the defense motion to exclude the SCC evidence.

A trial court errs when it allows a state's witness to offer an opinion of a defense witness' credibility.

"[S]uch testimony is unfairly prejudicial to the defendant "because it 'invad[es] the exclusive province of the [jury].'" City of Seattle v. Heatley, 70 Wash.App. 573, 577, 854 P.2d 658 (1993) (citing State v. Black, 109 Wash.2d 336, 348, 745 P.2d 12 (1987)).

State v. Demery, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001); accord, State v. Kirkman, \_\_\_ Wn.2d \_\_\_, \_\_\_ P.3d \_\_\_, 2007 WL 1018228 (No. 76833-1, 4/5/07). Admission of such opinion testimony also denies due process. U.S. Const. amend. 5, 14; Const. art. 1, § 3; Demery, at 759 (citing Dubria v. Smith, 224 F.3d 995, 1001-02 (9th Cir.2000), cert. denied, 531 U.S. 1148 (2001)).<sup>20</sup>

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<sup>20</sup> See also, State v. Carlson, 80 Wn. App. 116, 122- 23, 906 P.2d 999 (1995) (such an expert opinion will not "assist the trier of fact"

The rules stated and applied in these cases reveal the error. On two occasions, the state solicited Frothingham's opinion that Post lacked candor. On numerous occasions, Anderson offered his opinion Post was not credible. Anderson went even further, offering his opinion that Post was so not worthy of belief that he had effectively "manipulated" another non-testifying therapist into "buying his story." This was clear error, deliberately pursued by the prosecution.

The jury's determination of Post's testimony and candor was very important to the defense. Where these improper opinions were

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within the meaning of ER 702, because there is no scientific basis for such an opinion); State v. Alexander, 64 Wn. App. 147, 154, 822 P.2d 1250 (1992) (introduction of counselor's testimony that he believed the complaining witness was not lying, along with other trial errors, denied the defendant his right to a fair and impartial jury trial); State v. Wilber, 55 Wn. App. 294, 299, 777 P.2d 36 (1989) (Washington courts have not yet accepted as reliable any "scientific" method for discerning the truthful from the untruthful); State v. Fitzgerald, 39 Wn. App. 652, 657, 694 P. 2d 1117 (1985) ("An expert may not go so far as to usurp the exclusive function of the jury to weigh the evidence and determine credibility"). It is misconduct for a prosecutor to ask a witness to express an opinion as to whether or not another witness is lying or mistaken. It is improper to invite a witness to comment on another witness' accuracy or credibility. Such misconduct violates the due process right to a fair trial. State v. Jerrels, 83 Wn. App. 503, 507-08, 925 P.2d 209 (1996); State v. Walden, 69 Wn. App. 183, 186-87, 847 P.2d 956 (1993).

not offered in the first trial, the state cannot meet its burden to show the error is harmless beyond a reasonable doubt. See argument 7, infra.

5. PROSECUTORIAL MISCONDUCT DENIED POST HIS RIGHT TO A FAIR TRIAL.

The state and federal constitutions guarantee the right to due process and a fair trial; prosecutorial misconduct can deny that right. U.S. Const. amend. 14; Const. art. 1, § 3; Dye v. Hofbauer, 546 U.S. 1, 126 S.Ct. 5, 6, 163 L.Ed.2d 1 (2005). A prosecutor is a quasi-judicial officer, obligated to seek verdicts free of prejudice and based on reason. State v. Charlton, 90 Wn.2d 657, 664-65, 585 P.2d 142 (1978). A prosecutor has a special duty in trial to act impartially in the interests of justice and not as a "heated partisan." State v. Reed, 102 Wn.2d 140, 147, 684 P.2d 699 (1984). A prosecutor may "strike hard blows, [but] [s]he is not at liberty to strike foul ones." Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 2d 1314 (1935).

a. The Comments on Post's Rights to Trial and to Remain Silent in 1988 Were Classic Misconduct.

During Post's cross-examination, prosecutor Jennifer Ritchie commented several times on Post's exercise of the constitutional rights to a jury trial and to remain silent. Initially, she asked about the Maile Fiscus trial in 1988. She asked Post whether he watched Fiscus testify in 1988, whether he watched his attorney cross examine her in 1988, and whether he watched her mother testify. 30RP 146. Then, in an effort to rebut Post's statement he was upset to watch her testify in this trial, the prosecutor repeatedly said "you put her through a trial" in 1988. 30RP 146.<sup>21</sup>

In the second series of improper questions, Ms. Ritchie asked why Post refused to discuss the charges with a DOC presentence report writer after the 1988 offense, and why he allegedly "declared his innocence" then. Post denied it but she persisted, even going so far as to state Post's right to remain silent was "over" at the time of the presentence report. 30RP 148-51; EX 60. In response to defense objections, the court gave limiting instructions, stating Post had an absolute right to plead not guilty and put the state to its proof in 1988,

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<sup>21</sup> Ms. Burbank had previously asked Dr. Rosell a similar question, and the court overruled the defense objection. 28RP 101.

he had a right to remain silent "at the time of trial," and that this was being introduced "for the limited purpose of your evaluation of his current state of mind." 30RP 148, 151 (emphasis added).

The prosecutor's actions were egregious misconduct. A prosecutor cannot ask a jury to make a negative inference from an accused's exercise of a constitutional right, such as the right to trial, to confront witnesses, and to remain silent. U.S. Const. amends 5, 6, 14; Const. art. 1, § 9. Such inferences amount to a "penalty imposed . . . for exercising a constitutional privilege." Griffin v. California, 380 U.S. 609, 614, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965); accord, Zant v. Stephens, 462 U. S. 862, 103 S. Ct. 2733, 77 L. Ed. 2d 235 (1983); State v. Johnson, 80 Wn. App. 337, 339-40, 908 P.2d 900 (1996).

The right to remain silent continues beyond the trial, through sentencing, and during an appeal of a sentence. This is well-settled law that an experienced prosecutor well knows.<sup>22</sup> Mitchell v. United States, 526 U.S. 314, 119 S.Ct. 1307, 143 L.Ed.2d 424 (1999); State v. Post, 118 Wn.2d 596, 604-05, 826 P.2d 172 (1992). Where there

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<sup>22</sup> The prosecutors were Jennifer Ritchie, admitted to practice in Washington in 1994, and Brooke Burbank, admitted 1997.

can be no question the prosecutor knew it was misconduct to ask these questions, the misconduct is flagrant and ill-intentioned.<sup>23</sup>

In response, the state may suggest there is no misconduct because the current proceedings are "civil," not criminal. This response would lack merit, because the comments continue to ask the jury to hold Post's exercise of constitutional rights against him, and because prosecutorial misconduct can deny a fair trial in a civil case, too. See In re Detention of Griffith, 136 Wn. App. 480, 485-86, 150 P.3d 577 (2006) (the rules against prosecutorial misconduct apply to RCW 71.09 actions); In re Detention of Gaff, 90 Wn. App. 834, 841, 954 P.2d 943 (1998) (same).

The state may also cite to the "limiting" instruction, but that inadequate effort failed to recognize the misconduct's full extent, as it mentioned only Post's trial rights and did nothing to prevent the jury from following the prosecutor's theory that Post's exercise of the right to remain silent pending sentencing should be held against him.

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<sup>23</sup> This is particularly true where Ms. Ritchie undoubtedly knew Post had appealed his exceptional sentence. State v. Post, supra.

b. The Prosecutor's Last Remarks Violated Clear In Limine Rulings.

In pretrial orders, the court and the parties clarified the state was not permitted to present a theory that Post should be committed because his risk of recidivism could be reduced by commitment to the SCC, or because release conditions could be imposed later. 16RP 24-25; 98-99, 112-17; 28RP 125-26.

Despite this, Ms. Burbank boldly asked Dr. Rosell, "don't you think that the community would be better protected if Mr. Post completed the treatment program at the SCC?" The court sustained the defense objection and struck the question. 28RP 126. Ms. Burbank immediately did it again: "[w]ell, is it your understanding that if Mr. Post completes the treatment program at the SCC that then he could be released with court supervision?" The court again had to ask the jury to disregard. 28RP 127.

In closing, Ms. Burbank concluded her rebuttal by stating Post's "best chance of reducing his risk of recidivism is to complete the treatment program at the SCC." 31RP 196. In response to defense counsel's immediate objection, the court said "the jury will decide the case based on the elements the State is required to prove beyond a reasonable doubt. This is argument as to how that standard

is to be applied." 31RP 196. Again undeterred, Ms. Burbank felt free to repeat it, concluding:

Charles Post's best chance to reduce his chance of recidivism is to stay in a secure facility and complete the treatment program. That way he can learn his offense cycle, he can put together a relapse prevention plan that is based on the offense cycle, and his family and friends can know him for what he really is.

31RP 196-97.

This too was clear error. Prosecutors are not free to pick and choose which court rulings the state will abide in closing argument. State v. Smith, 189 Wash. 422, 428-29, 65 P.2d 1075 (1937) (it is misconduct to violate in limine rulings); accord, State v. Stith, 71 Wn. App. 14, 22, 856 P.2d 415 (1993); Gaff, 90 Wn. App. at 844 ("[p]rosecutors must also take care not to confuse juries about their function and purpose."). The state's misconduct was a flagrant end-run around the trial court's prior rulings.

c. The Errors Were Prejudicial.

In response, the state may claim the misconduct did not prejudice the verdict. This Court has rejected similar claims, stating "trained and experienced prosecutors . . . do not risk appellate reversal of a hard-fought conviction by engaging in improper trial tactics unless the prosecutor feels that those tactics are necessary to

sway the jury in a close case." State v. Fleming, 83 Wn. App. 209, 921 P.2d 1076 (1996), rev. denied, 131 Wn.2d 1018 (1997). Ms. Ritchie's remarks repetitively asked the jury to commit Post for exercising his rights in 1988. Ms. Burbank's remarks, during an important defense expert's testimony, then repeated at the very close of rebuttal, were designed for maximum impact and imparted maximum prejudice as the jury retired to deliberate. Neither of these instances of misconduct occurred in the first trial, and the state was well aware that this was a key issue for the jury in the first trial. CP 633-35. Reversal should be required.

6. THE COURT ERRED IN EXCLUDING THE AUDIOTAPE OF THE INFRACTION HEARINGS.

The state repetitively argued Post was manipulative and dishonest. To support that theory the state offered evidence Post was terminated from treatment at the Twin Rivers SOTP because he "fraudulently" requested copies and then "intimidated" the law librarian. The state repeated this in an effort to bolster its theory that Post had not changed and that he continued to lie and manipulate.

In response, the defense sought to play a tape of the hearing where the infractions were reviewed by a hearing officer, to rebut the state's claim Post was a liar and the infraction matter had been fairly

determined against him. The tape was played in the first trial. 12RP 160. In the second trial, the prosecutors opposed and the court excluded the tape. CP 459-63; 18RP 104, 112-13; 19RP 4-6; 26RP 74-81.

Post had a due process right to present evidence in his defense. U.S. Const. amend. 14; Const. art. 1, § 3; Washington v. Texas, State v. Darden, State v. Hudlow, supra. The state had no interest other than expedience in excluding the tape. The court therefore erred.

In response, the state may claim the error was harmless. This claim would lack merit, as the tape was played in the first trial but not in the second. 12RP 160. The tape itself shows Post was respectful and patient, while a biased hearing officer treated him very poorly and condescendingly. These aspects were not fairly transmitted to the jury. CP 464-97. The trial court's error was therefore prejudicial.

**7. INDIVIDUALLY OR CUMULATIVELY, NONE OF THE ERRORS ARE HARMLESS.**

In the brave new world of RCW 71.09 litigation, lopsided trials are not rare. The state's job may be no more challenging than shooting a large fish in a shallow barrel, particularly given the

Legislature's near-habitual penchant for amending RCW 71.09 following appellate reversals.

This is not such a case. The defense presented testimony from three experts showing why the state failed to prove its case and why Post's release plan would limit the risk of reoffense. Fifteen witnesses came forward to offer their belief in Post and to pledge to support him in the community, including Post's mother-in-law. There was substantial evidence that Post transformed himself remarkably during the second prison term – evidence that could easily persuade a rational juror to doubt the state's case.

In contrast, for one element the state relied on a concededly controversial "diagnosis" never accepted by the DSM Committee. For the other it offered opinions cobbled together from actuarial instruments developed on populations facially unlike Post. Subsequent studies showed all of the actuarials overestimated the risk of reoffense, particularly so in their failure to account for the mitigating factor of age over 50.

Each of the individual errors was prejudicial and intentional. This Court will closely scrutinize the state's claim that an error is harmless when the error results from the prosecution's deliberate attempts to get prejudicial evidence before the jury. State v. Aaron,

57 Wn. App. at 282. This Court has also recognized that trained and experienced prosecutors do not toy with the threat of appellate reversal unless they believe the tactics are necessary to sway the jury in a close case. State v. Fleming, 83 Wn. App. 209, 216, 921 P.2d 1076 (1996), rev. denied, 131 Wn.2d 1018 (1997).

Furthermore, the errors cumulatively prejudiced the defense by emphasizing the state's pervasive themes – Post was an untreated sex offender, he was manipulative, he should not be released until he had gone through the SCC treatment program, and certainly not until a court could impose additional conditions on his release.

Cumulative error can deny the defense of due process and a fair trial. U.S. Const. amend. 5, 14; Const. art. 1, § 3; State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); State v. Johnson, 90 Wn. App. 54, 74, 950 P.2d 981 (1998); State v. Alexander, 64 Wn. App. at 154. This is such a case.

8. THIS COURT SHOULD REVIEW THE TRIAL COURT'S IN CAMERA REVIEW OF THE PROSECUTION'S 1974 FILES.

Prior to trial the defense moved for in camera review of the prosecution's 1974 files. The trial court reviewed the files, released two documents to the defense, and sealed the remaining parts of the

file for appellate review. CP 729-34; Supp. CP \_\_\_\_ (sub no. 190, Order to Seal File).

Post had a due process right to discover evidence in the state's possession that might lead to admissible defense evidence. U.S. Const. amends 5, 14; Pennsylvania v. Ritchie, 480 U.S. 39, 58 n. 15, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987). When discovery materials are sealed by the trial court following in camera review, the appellate court should review the sealed files. If the files contain material evidence that could assist the defense and lead to admissible evidence, this Court should reverse the commitment order and remand to the trial court for release of the documents and a new trial. State v. Gregory, 158 Wn.2d 759, 794-800; 147 P.3d 1201 (2006).

E. CONCLUSION

For the reasons stated above, this Court should reverse the commitment order and remand for a fair trial.

DATED this 11<sup>th</sup> day of April, 2007.

Respectfully Submitted,

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Attorneys for Appellant

# APPENDIX A

No. 55572-3-1

Instruction No.2

Jim Anderson testified about 6 phases of treatment available at the Special Commitment Program, including conditional release. This testimony may only be considered only to rebut Mr. Post's plan for voluntary treatment in the community. You may not consider such testimony for any other purposes. You may not vote to commit Mr. Post merely because you would prefer that he have conditions upon his release or that you prefer the Special Commitment Program to his voluntary program. Your role is limited to determining whether the State has proven that Mr. Post is a sexually violent predator.

Instruction No.2A

Evidence was offered about 6 phases of treatment available at the Special Commitment Program, including conditional release. This testimony may only be considered to evaluate Mr. Post's plan for voluntary treatment in the community. You may not vote to commit Mr. Post merely because you would prefer that he have conditions upon his release or that you prefer the Special Commitment Program to his voluntary program. Your role is limited to determining whether the State has proven that Mr. Post is a sexually violent predator.

# APPENDIX B

No. 55572-3-1

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