

**F I V E D**  
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STATE OF WASHINGTON

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

WASHINGTON SUPREME COURT

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COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON  
2009 MAY 15 PM 4:41

In re the Detention of  
  
CHARLES W. POST

RECEIVED  
SUPREME COURT  
STATE OF WASHINGTON  
2009 MAY 19 AM 7:51  
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**STATE'S REPLY TO ANSWER TO PETITION FOR REVIEW**

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**ORIGINAL**

In his answer to the State's Petition for Review, respondent Charles Post raises two new issues. First, whether the State's interpretation of the "if not confined in a secure facility" statutory language is somehow barred from appellate review, and second, whether the Court of Appeals erred in preventing respondent from raising the possibility of a future civil commitment confinement for a "recent overt act" as a "defense" to the current civil commitment petition. Although the court should grant the State's petition for review from the 2-1 appellate court opinion, the additional issues raised in respondent's answer do not merit expanding the issues raised in the State's petition.

**I. THE STATE IS NOT BARRED FROM ARGUING A PROPER INTERPRETATION OF THE "IF NOT CONFINED IN A SECURE FACILITY" LANGUAGE**

In a clear effort to skirt the page limitations of RAP 13.4(f), respondent "incorporates" eleven pages of his answer to the State's Motion for Reconsideration and attaches this answer as an "appendix" to his answer. Respondent essentially claims that various procedural barriers bar the State from relying upon the RCW 71.09.020 definition of sexually violent predator, including the "if not confined in a secure facility" language. This court should not expand the issues contained in the State's petition to include an issue that respondent has failed to argue in his answer.

Under RAP 13.4(f), a "petition for review, answer, or reply *should not exceed 20 pages double spaced*, excluding appendices." (Emphasis added). This court has repeatedly admonished parties that it is improper to violate the page limitations in the Rules of Appellate Procedure by attempting to incorporate arguments from other pleadings. *See U.S. West Communications, Inc. v. Washington Util. & Transp. Comm'n*, 134 Wash.2d 74, 111-12, 949 P.2d 1337 (1997).

In *State v. Kalakosky*, 121 Wash.2d 525, 540, 852 P.2d 1064, 1072 (1993), this court explained that a party cannot expand the scope of appellate review by attempting to reference and incorporate other pleadings:

The defense brief includes a footnote which "refers" this court to trial memorandum. . . . However, such a statement does not expand the scope of appellate review. Only issues raised in the assignments of error or related issues and argued to the appellate court are considered on appeal. RAP 10.3; RAP 12.1; RAP 13.7. *See, e.g., State v. Hoffman*, 116 Wash.2d 51, 71, 804 P.2d 577 (1991); *State v. Fortun*, 94 Wash.2d 754, 756, 626 P.2d 504 (1980); *Howell v. Spokane & Inland Empire Blood Bank*, 114 Wash.2d 42, 46, 785 P.2d 815 (1990); *Painting & Decorating Contractors of Am., Inc. v. Ellensburg Sch. Dist.*, 96 Wash.2d 806, 815, 638 P.2d 1220 (1982); *State v. Cunningham*, 93 Wash.2d 823, 836, 613 P.2d 1139 (1980).

*If this court allowed parties to expand the issues subject to appeal by reference to trial memoranda, the Rules of Appellate Procedure would be rendered meaningless.* Respondents would have no idea what issues required a response, and appellate courts would have to search trial court records and clerk's papers and address all issues raised below. Such an "end run" around the Rules of Appellate Procedure will not be sanctioned; the primary

purpose of the rules is to afford fairness and notice of the scope of review to the court and all litigants.

(Emphasis added).

A party that attempts to make arguments on appeal through reference to other pleadings abandons those arguments. "We therefore hold that Holland has abandoned the issues for which he attempted to incorporate arguments by reference to trial briefs or otherwise." *Holland v. City of Tacoma*, 90 Wash.App. 533, 538, 954 P.2d 290, 292 (1998). Respondent should not be allowed to expand the issues open to review by incorporating arguments from other pleadings in violation of RAP 13.4.

Even if this court were to sanction respondent's violation of RAP 13.4, respondent mischaracterizes the State's position in order to create alleged procedural hurdles. In seeking to reverse the trial court, Post claimed that evidence regarding treatment phases that he had failed to complete was not *relevant* under the statute. *In re Post*, 145 Wash.App. 728, 741, 187 P.3d 803, 810 (2008). The majority below analyzed the trial court's decision as a relevance question and recognized that this question turned on an interpretation of RCW 71.09:

Of concern on appeal is the relevance of evidence concerning the content of the remaining four phases of the SCC program, in which Post did not participate, as well as evidence that, should he first be committed as an SVP, Post could be conditionally released in the future. To determine whether this evidence was relevant, we must consider the elements that the State is required to prove beyond a reasonable doubt in order to establish that someone is an SVP: (1)

that the respondent had been convicted of or charged with a crime of sexual violence; (2) that the respondent suffers from a mental abnormality or personality disorder; and (3) that such mental abnormality or personality disorder makes the respondent likely to engage in predatory acts of sexual violence if not confined in a secure facility.

145 Wash.App. at 742.

Because this is a statutory relevance question, there is no merit to respondent's claim that the State's argument is barred by the jury instructions. In determining error by the trial court, the majority below examined the language of the statute, but overlooked the fact that the statutory definition of "secure facility" includes more than total confinement facilities. *See* RCW 71.09.020. The jury instructions that were given contain nothing that is contrary to the statutory definition of "secure facility" so this is not a case of invited error. CP 516, 518.

Respondent fails to cite any case where the interpretation of a statute is limited to the definitions provided in the jury instructions, especially when the instructions given to the jury were consistent with all portions of the statute. The appellate court majority reversed Post's commitment because it did not perceive any relevance to the challenged evidence under the statutory criteria. 145 Wn.App. at 743. When properly viewed as a question of statutory relevance, the State clearly preserved its

arguments that the challenged evidence was relevant to the question of respondent's status as a sexually violent predator.

Finally, respondent's claim that the State's arguments are barred by recent amendments to RCW 71.09 is without authority. *See* Laws of 2009, ch. 409. Respondent is correct that an earlier version of the bill would have directly reversed the *Post* decision. *See* SB 5718. However, respondent's claim that this somehow shows legislative disapproval of the State's position cannot be sustained. As this court has noted, when the Legislature rejects a proposed amendment, the court "will not speculate as to the reason the Legislature rejected the proposed amendment." *Wilmont v. Kaiser Aluminum and Chemical Corp.*, 118 Wn.2d 46, 64 (1991). Indeed, it is equally likely that the amendment was withdrawn because the *Post* decision was on appeal and RCW 71.09 already contains effective language through the definition of "if not confined in a secure facility."<sup>1</sup>

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<sup>1</sup> For this same reason, respondent's claim that the "Legislature is presumed to have acquiesced in an appellate court's construction of a statute" is premature. Respondent has cited no case where legislative acquiescence is presumed prior to finalization of the appeal and issuance of a mandate. There is no requirement for the Legislature to amend a statute when the Supreme Court is engaged in the process of considering a lower court error.

**II. THE APPELLATE COURT CORRECTLY RULED THAT EVIDENCE OF A POTENTIAL FUTURE SVP PROCEEDING BASED ON A "RECENT OVERT ACT" IS BARRED BY THE STATUTE**

The State initiated civil commitment proceedings against respondent prior to his release from prison on a sexually violent conviction. As a result, there was no due process requirement for the State to plead and prove a recent overt act. *In re Detention of Lewis*, 163 Wash.2d 188, 199, 177 P.3d 708, 713 (2008).

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

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

*Post*, 145 Wn.App. at 753.

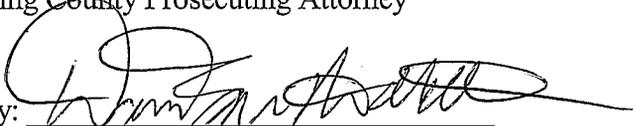
In fact, the statute limits the finder of fact to considering "only placement conditions and voluntary treatment options that would exist for the person if unconditionally released from detention on the sexually violent predator petition." RCW 71.09.060(1). Because the possibility that Post might one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

Post provides no argument challenging this holding. Instead, he again requests that this court "adopt and incorporate" arguments in his opening court of appeals brief. As noted above, this is an improper abuse of the RAP 13.4 page limitations and the remedy is for this court to ignore respondent's unsupported arguments. Because respondent has failed to properly preserve this argument in his answer to the State's Petition for Review and there is no indication that the lower court erred on this point, the court should not accept this issue for review.

For the foregoing reasons, the State asks that the court accept the State's petition to review of the 2-1 Court of Appeals opinion in this case and limit review to the issues raised in the State's petition.

DATED this 15th day of May, 2009.

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