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STATE OF WASHINGTON

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No. 83023-1

IN THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

CHARLES POST,

Respondent.

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

The Honorable Helen Halpert, Judge

SUPPLEMENTAL BRIEF OF RESPONDENT

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A. INTRODUCTION

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

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

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

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

¹ Petition for Review (PRV) at 1.

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

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

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

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

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

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

The state's claims are substantively meritless. This Court also should reject the state's claims for several procedural reasons. The state first raised its "secure facility" claim in its motion to reconsider in the Court of Appeals. The state waived that claim in the trial court. To the extent the Court of Appeals may have "erred" or "overlooked" the "secure facility" definition, the state invited any error by proposing the instructions that are the law of this case.

B. COUNTERSTATEMENT OF ISSUES IN STATE'S PETITION

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

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

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

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

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

C. ISSUE PRESENTED BY RESPONDENT

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

D. SUPPLEMENTAL STATEMENT OF THE CASE

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

Where this case substantially differs from garden-variety 71.09 cases, however, is the strength of the defense case. As shown at length in Post's brief, he presented sworn testimony from fifteen witnesses who knew him and would support his release plan in the community. BOA at

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

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

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

The defense again presented a substantial case.⁶ In the second trial, however, the state decided to offer evidence it had agreed to exclude in the first trial. That evidence related to Post's participation in the treatment program at the SCC and the phases of the program to which the SCC staff felt Post had not yet advanced. The state also offered evidence of conditions that might be imposed on Post if he was released in the future to a less restrictive alternative (LRA). BOA at 31-26; Post, 145 Wn. App. at 736-41.

⁵ The state's petition wrongly claimed the Court of Appeals reversed "a eight [sic] week . . . commitment trial[.]" PRV at 1. The second jury was sworn November 15 and closing arguments ended December 14, 2004, *i.e.*, 14 court days. 17RP 9; 31RP 195-96; Post, 145 Wn. App. at 733.

⁶ In its harmless error analysis, the Court of Appeals correctly recognized "[t]his was a hotly contested retrial." Post, 145 Wn. App. at 748.

E. SUPPLEMENTAL ARGUMENT

1. THE COURT OF APPEALS PROPERLY HELD EVIDENCE OF POTENTIAL FUTURE LRAs AND OF THE LAST FOUR SCC TREATMENT PROGRAM PHASES WAS IRRELEVANT AND UNFAIRLY PREJUDICIAL.

Post argued in the trial court and in the Court of Appeals that it was error to admit evidence relating to the last four SCC treatment phases and evidence relating to potential future LRAs. Defense counsel sought to exclude it and to make sure the jury did not consider it for an improper purpose.⁷ The trial court admitted the evidence and refused the defense-proposed limiting instructions. 31RP 48-49; Post, 145 Wn. App. at 734-41.

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

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

⁷ CP 384-87, 645-46, 662-63, 686-87, 692, 789; 16RP 16-26, 96-98, 112-17, 126; 22RP 104-05; 31RP 46-49.

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

This is irrelevant and unfairly prejudicial. Post, 145 Wn. App. at 742-46; People v. Rains, 75 Cal. App. 4th 1165, 89 Cal. Rptr. 2d 737 (1999). There is a difference between (1) fair criticism of Post's voluntary treatment program by showing how experts might find it wanting, and (2) unfairly comparing it with the full incapacitation of total confinement. Post, 145 Wn. App. at 744-46. In its petition, the state again struggled to distinguish Rains, suggesting Rains interprets a "significantly different" California statute. PRV at 13.⁸ But Rains instead recognizes the inherently unfair prejudice that occurs when a jury is asked to consider what will happen in the future if a commitment finding is entered, rather than whether the state has proved the statutory criteria for commitment.

⁸ In its appellate brief, a different prosecutor tried to distinguish Rains by calling it "a criminal case." BOR at 42. Curiously, citing a different California case, the state's petition later argues the California scheme is similar to Washington's. PRV at 13-16 (citing People v. Superior Court (Ghillotti), 27 Cal. 4th 888, 927, 44 P.3d 949 (Cal. 2002)). Ghillotti is discussed in more detail, infra.

The SCC and LRA evidence is unfairly prejudicial in the abstract, but it is particularly so as this record shows. The state offered Anderson, an SCC therapist, to tell the jury about the SCC program.⁹

Anderson admitted there is no confidentiality in the SCC program. He considered "public safety" and "the courts" to be his clients. He admitted he had no working therapeutic relationship with Post. 26RP 68, 84-85, 100. Post confirmed SCC "therapists" essentially engage in "case-building" against residents before commitment trials to utilize residents' statements against them in commitment trials. The environment is adversarial, not therapeutic. 30RP 78-81, 86, 89-90.¹⁰

Anderson listed the types of "classes" provided in various "phases" of the treatment program. It became clear through Anderson and the

⁹ Anderson was not a state certified treatment provider, so he could not have been considered a sex offender therapist anywhere but within the confines of the SCC. To be fair, Anderson did have experience as a restaurant manager and "child and family therapist" before being hired by the SCC. He also had some training in sex offender treatment, including sessions on how to prepare for cross-examination. 26RP 26-29, 32. The Court of Appeals dissent wrongly characterized him as "Dr. Anderson." Post, 145 Wn. App. at 760 (Becker, J., dissenting).

¹⁰ This problem is not novel to Post. As the state argued and this Court recognized in Thorell, "[b]efore commitment, the individuals are preoccupied with their legal challenges. Defense lawyers often direct their clients awaiting trial to limit their participation in treatment by not making any admissions or acknowledgments of past violent sexual acts or desires to commit such acts. Similarly, inmates in prison-based treatment programs while incarcerated are motivated not to discuss their offense cycle in order to avoid SVP commitment upon release." Thorell, at 752.

state's experts that progress through such classes and phases takes residents substantial time and that Post was still only in phase 2. 20RP 70-71; 22RP 100, 136; 26RP 46-49, 67-68, 101-06; 30RP 81-83.

Anderson also littered his description of phase 6 of the SCC program (the "release" or LRA phase), with references to "tight, court-ordered supervision," "court ordered conditions of release", court supervision, "electronic monitoring," "a CCO or Parole Officer" and "treatment in the community under the umbrella of the court." 26RP 49-50, 114. Just in case the jury missed the point, the state also offered repetitive criticism of Post's proposed community-based plan as lacking court-ordered enforcement mechanisms. BOA at 61 (citing record).¹¹

As this record shows, the state offered the SCC and LRA evidence over defense objection so the jury would see: (1) Post would be confined at the SCC for a substantial additional period of time if he was committed, and (2) if he ever did progress in the SCC program, Post's future liberty would be severely limited through court-ordered LRA conditions. No juror with the slightest insight could have missed these

¹¹ The state also kept the jury from hearing the state could refile a 71.09 petition should state agents believe Post engaged in a "recent overt act." See BOA at 63-68 (citing the record and arguing why this was error); argument 3, *infra*.

obvious points, and the prosecutor's improper closing argument corralled any possible straggler. 31RP 196-97.

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

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

But at some point the linguistic gymnastics stop and reality reveals itself. This case illustrates one such point. The Court of Appeals properly identified the state's effort for what it was – an unfairly prejudicial appeal to the jury's prejudice in seeking to protect itself from

someone who committed prior crimes. Post, 145 Wn. App. at 741-48. While courts may not be able to eliminate that prejudice, courts can and should remedy the state's wrongful exploitation of it.

The Court of Appeals also was careful and narrow in its analysis and holding. It did not prohibit any mention of Post's participation in the SCC treatment program. It instead recognized that Post had presented evidence to show the voluntary treatment program he would engage in if he was unconditionally released – evidence specifically authorized by statute. RCW 71.09.060(1); Post, 145 Wn. App. at 742. As the court made clear, the state had numerous fair opportunities for rebuttal. Id., at 744-45 (summarizing the “numerous proper avenues” the state was given to dispute Post's proposed voluntary treatment program). This included evidence relating to Post's participation in the first two phases of the SCC program in order to “attempt to discredit the efficacy of the proposed program and the true level of Post's commitment to successful completion thereof.” Id., at 744.

But while it was fair to permit the state to dispute whether Post was truly motivated to continue with his well-documented and supported voluntary community plan, it was not fair to allow the state to compare that plan other SCC phases not yet undertaken, or the possibility of LRA conditions after completion of the first five SCC treatment phases. The

Court of Appeals recognized that jurors who doubt the state's case still would be hard-pressed to ignore real or imagined concerns about public security when presented with the idea that conditions will follow commitment, but not release. Post, 145 Wn. App. at 748. The question is not whether Post might have a better chance of not offending if committed, but whether the state proved he was likely to reoffend if not confined. Post, 145 Wn. App. at 747.

The trial court also erred in failing to limit the jury's consideration of the evidence. The prosecution in fact used the evidence to exact its maximum unfair prejudice. Post, 145 Wn. App. at 746-47.

The Court of Appeals also properly cited Rains, a case decided in 1999 that has not been criticized or overruled in California.¹² Nonetheless, in its petition for review, the state suggested the Court of Appeals erred in relying on Rains and overlooked People v. Superior Court (Ghillotti), 27 Cal. 4th 888, 927, 44 P.3d 949 (Cal. 2002).¹³

¹² See also, People v. Calderon, 124 Cal.App.4th 80, 21 Cal.Rptr.3d 92 (2004), (evidence of amenability to voluntary treatment is relevant on question of current dangerousness, but evidence of amenability to involuntary treatment is not).

¹³ The state's motion for reconsideration in the Court of Appeals also claimed the decision conflicts with In re Dennis Law, 146 Wn. App. 28, 204 P.3d 230 (2008). M2R, at 21-24. As Post showed in his answer to the state's motion, Law addressed very different facts, a lack of defense objection, and harmless prosecutorial misconduct. There is no conflict with Law. Answer to M2R, at 21-23.

Ghillotti, however, is not an initial commitment case, nor did the court hold a jury may consider the potential conditions of custodial treatment programs in determining whether to first commit a person. By omitting its factual context and the issues the court addressed, the state's petition seriously misrepresents Ghillotti.

Ghillotti had been committed in 1998 by jury verdict. He stipulated to an extension of the term to December 31, 2001. In November 2001, following the California statute, the state sought to recommit him for another two-year period. Ghillotti, 44 P.3d at 954-55.

Inconveniently for the state, however, its two chosen evaluators did not support the state's recommitment effort. They concluded Ghillotti no longer met the criteria for commitment because he could be treated with various drug therapies in the community. Id., 44 P.3d at 953, 955.

The trial court dismissed the state's petition, finding it failed to meet statutory requirements because it was not supported by evaluations from two approved evaluators. The director of the state "hospital" disagreed with the evaluators and asked the trial court to determine they had made legal errors. The trial court disagreed and dismissed. The state then sought mandamus. Id.

The court first held a trial court has authority to preliminarily determine whether an evaluator made a material legal error in an evaluation. Ghilotti, 44 P.3d at 963-67.

The court next addressed the meaning of the California statute allowing recommitment if the state proves “the person has a diagnosed mental disorder so that he or she is likely to engage in acts of sexual violence without appropriate treatment and custody.” Ghilotti, 44 P.3d at 967 (court’s emphasis). The court addressed whether that language permitted an evaluator to conclude that a person’s amenability to voluntary treatment reduces the level of potential danger below the level of a “serious and well-founded risk of reoffending.” Id., at 968.

The court spent substantial time determining that “likely” in California has a different meaning than “likely” in Washington. Ghilotti, 44 P.3d at 968-72 (holding that the state can meet its prima facie burden to file a petition based on proof that the person presents a “serious and well-founded risk” of future sexually violent offenses, which can be less than 50 percent). This Court, however, has made it clear that “likely” in Washington means greater than 50 percent. In re Detention of Brooks, 145 Wn.2d 275, 296-97, 36 P.3d 1034 (2001), overruled on other grounds, In re Detention of Thorell, 149 Wn.2d 724, 72 P.3d 708 (2003).

The last issue in the lengthy decision addressed the state's burden in California to show a person was likely to reoffend "without appropriate treatment and custody." Ghilotti, 44 P.3d at 974. Citing that California statute, Ghilotti argued evaluators may consider whether treatment conditions would reduce the risk of reoffense. But the state opposed consideration of voluntary treatment at the petition stage, arguing "treatment is irrelevant to whether the person meets the criteria for commitment or recommitment as an SVP." Id., at 974.

The Ghilotti court rejected the state's position, reasoning that a person who is dangerous without treatment is not necessarily dangerous with treatment. If the person can be treated in the community then confinement is not required. Ghilotti, 44 P.3d at 975.

The court recognized a person like Ghilotti might have a disorder that can be effectively treated in the community. For that reason, the evaluators, when conducting the initial evaluation, were free to determine whether voluntary treatment in the community would reduce the person's risk of reoffense below the filing threshold. Ghilotti, 44 P.3d at 975-76. The court also mentioned "the evaluators" could consider other factors, including "the person's progress, if any, in any mandatory SVPA treatment program he or she has already undergone[.]" Ghilotti, 44 P.3d

at 976. The court offered a final comment, noting it would be reasonable for the evaluators to also consider

the person's refusal to participate in any phase of treatment, provided by the Department, particularly a period of supervised outpatient treatment in the community, as a sign that the person is not prepared to control his untreated dangerousness by voluntary means if released unconditionally to the community.

Ghilotti, 44 P.3d at 977.

The state's petition is misleading, by emphasizing these last comments without context. PRV at 14-15. The Ghilotti court allowed professional evaluators to review progress in treatment when deciding whether the evaluation criteria would support filing a petition for further commitment.

Post's case involves a jury trial to determine whether Post should be committed in the first place. The state's suggestion that Ghilotti has persuasive value on these different issues is meritless. The Ghilotti court did not review a jury verdict from a commitment trial. Nor did the Ghilotti court cite, criticize, or distinguish Rains.

Ghilotti instead involved the state's prima facie burden when it files a petition to recommit a person under California's statute. It allowed professional evaluators to consider whether community based treatment would lower the risk of reoffense below the "likely" threshold. It did not

hold a jury can or should compare a custodial treatment program with a voluntary treatment program when deciding to commit someone. It did not approve a state's improper closing argument and improper use of treatment evidence. These are the issues in Post's case, and none were discussed in Ghilotti.¹⁴

For these reasons, the state's effort to criticize Rains and the Court of Appeals decision in Post lacks merit.

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

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

¹⁴ The state's petition also cited People v. Sumahit, 128 Cal.App.4th 347, 354, 27 Cal.Rptr.3d 233 (2005); PRV at 15. The Sumahit facts, like those in Ghilotti, did not involve a jury trial on an initial commitment. Even so, the Sumahit court merely suggested Sumahit's refusal to engage in voluntary treatment could be "potent evidence" he would not control his behavior voluntarily in the community. Sumahit, 128 Cal.App.4th at 354-55. But Post was not refusing to participate in the SCC treatment program, and this was a jury trial on the initial commitment. Sumahit, like Ghilotti, is not on point.

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

The Court of Appeals decision reached a narrow, logical, and fair conclusion. The state's criticism is meritless.

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

For the first time in its motion for reconsideration in the Court of Appeals, the state asserted the "secure facility" definition, along with two other definitions, allowed it to present SCC evidence to show how a future court might impose future LRA conditions on Post. M2R at 1-11 (citing RCW 71.09.020(7) and (16)). The state renewed that claim in its petition. PRV at 16-20; Reply, at 3-5.

Post's answer to the motion for reconsideration showed in detail why the state's claim is procedurally barred¹⁵ and substantively

¹⁵ Answer to M2R, at 10-12.

meritless. Post adopts and incorporates those arguments,¹⁶ and summarizes them here.

Reduced to its essence, the state claims the "secure facility" definition renders evidence of the SCC treatment program admissible as a matter of statutory law. PRV at 12-20. But the statute does not so state. Answer to M2R, at 13-18. See also, Post, 145 Wn. App. at 743-44 (recognizing "the legislature did not choose to provide the State with statutory authority to present to the jury evidence of treatment programs or opportunities that would be available to the respondent only if he were committed as an SVP, or conditions of release that could be imposed on him after such a committal.").

Furthermore, the state asked the 2009 Legislature to expand the scope of evidence admissible at a commitment trial under RCW 71.09.060, in direct response to the Court of Appeals' decision in Post. See HB 1246, Sec. 7. As that bill's history shows, the Legislature refused the state's amendments. This should put to rest the state's

¹⁶ In its reply, the state took issue with Post's adoption of the argument and attachment of the appendix. Reply, at 2-3. But Post's answer in this Court also summarized and fully notified the state that Post was preserving the arguments. Answer to PRV, at 13-19. The state had no difficulty understanding Post's arguments. Reply, at 3-5. This Court should not be misled by the state's meritless procedural detour. RAP 1.2(a). The state's procedural claim also has a noteworthy "glass house" feel to it, given that the state first raised its "secure facility" claim in a motion to reconsider.

claim the Legislature intended the statute to require admission of SCC evidence when a court finds it irrelevant and unfairly prejudicial.¹⁷

Even if the statute could have been stretched to support the state's claim, the Court of Appeals held the evidence was excluded as irrelevant. Post, 145 Wn. App. at 741-48. As shown above, courts have the ultimate authority to interpret rules of evidence, not the Legislature. Ryan, 103 Wn.2d at 178; Zwicker, 105 Wn.2d at 238.

The state's current claim also threatens to reopen a door this Court has kept closed. The state has persistently lobbied for statutes and argued to this Court that commitment trials are not an opportunity for a person to challenge the efficacy of the SCC "treatment" program or the conditions of confinement at the SCC. This Court has, at least so far, accepted those arguments.¹⁸

¹⁷ This is particularly true where the 2009 Legislature adopted other proposed amendments to RCW 71.09.060 in SSB 5718, sec. 6. The Legislature is presumed to acquiesce in an appellate court's construction where it has rejected the opportunity to amend the statute in response to the court's decision. See State v. J.P., 149 Wn.2d 444, 454, 69 P.3d 318 (2003) (legislature's inaction following judicial construction indicates acquiescence); accord, Manor v. Nestle Food Co., 131 Wn.2d 439, 445-46 n.2, 932 P.2d 628 (1997); Griffin v. Eller, 130 Wn.2d 58, 88-89, 922 P.2d 788 (1996) (the rule applies with particular strength where the Legislature amended other parts of the statute).

¹⁸ In re Restraint of Duncan, 167 Wn.2d 398, 408-09, 219 P.3d 666 (2009); In re Detention of Thorell, 149 Wn.2d 724, 746-52, 72 P.3d 708 (2003), In re Detention of Brooks, 145 Wn.2d 275, 36 P.3d 1034 (2001); Laws of 2001, ch. 286. The state seems to be growing bolder in its hypocritical efforts to admit

As a result of several cases and statutory amendments, the state has persuaded this Court and the Legislature to crystallize the stark choice now facing commitment juries: (1) commitment at the SCC, or (2) unconditional release with or without voluntary treatment in the community. The state well knows this stark choice favors its commitment goals. Given societal fear, many jurors are willing to trade someone else's liberty for perceived community safety.¹⁹ This was, of course, the state's tactical reason for its challenge to Brooks.

Although the defense had prevailed in Brooks, that decision was short-lived. In Thorell, this Court held equal protection is not violated by prohibiting commitment juries from considering LRA evidence at the initial commitment trial. Thorell, at 746-53. A jury "may consider evidence that voluntary treatment on unconditional release is

SCC evidence to show that treatment is available, while precluding fair cross examination and presentation of counterevidence showing the SCC treatment program is not particularly effective. Cf. Duncan, 167 Wn.2d at 408-10 (state was allowed to show Duncan refused to participate in treatment, but Duncan was prohibited from showing one reason for his refusal, i.e. the general ineffectiveness of the program). As a matter of simple logic, unless the state can show its treatment program is effective, a person's participation or refusal to participate is not relevant to show the person's risk of reoffense would be higher or lower with or without treatment.

¹⁹ Our history shows this kind of short-sighted thinking is unfortunately persistent. Korematsu v. United States, 323 U.S. 214, 233-234, 89 L. Ed. 194, 65 S. Ct. 193 (1944); Boumediene v. Bush, ___ U.S. ___, 128 S. Ct. 2229, 171 L.Ed.2d 41 (2008).

appropriate.” Thorell, at 751. But because a court may not order an LRA until after commitment and the first annual review, the propriety of an LRA is not a consideration for the initial commitment trial. Potential LRAs cannot be considered until after the first annual review following commitment. Thorell, at 751.

After having prevailed in the Legislature and in Thorell, the state now asks this Court to turn Thorell on its head. According to the state, this jury should have been permitted to consider the SCC evidence and potential future LRA conditions so the state could meet its burden to prove that Post is more likely than not to reoffend “unless he is placed in either a total confinement facility, a secure community transition facility, or any other residence used as part of an LRA.” M2R at 4-5; see also, PRV at 17-20. The state’s motion avowed shocked surprise that a court would hold it to the stark choice of “secure facility” versus “voluntary treatment.” See M2R at 5 (asserting this is a “drastic and unsupportable judicial re-writing of the SVP statute”).

The state’s argument is remarkably disingenuous for several reasons. First, the state repetitively opposed any evidence of possible LRAs at Post’s trial. See note 3, supra. The state did not assert Post should be considered for a “secure transition facility” or LRA. The state instead made clear its theory that (1) Post needed to be confined at the

SCC and, (2) it would take a long time for him to advance through the SCC treatment phases before he could possibly be considered for some lesser form of confinement somewhere else. For the state to feign surprise that the Court of Appeals held it to that theory shows a bold lack of candor.

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

In its Court of Appeals motion, the state deceptively posited a hypothetical case where its current position would serve "those individuals whose risk is best addressed by conditional release following a relatively short stay in the total confinement facility." M2R at 7

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

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

Finally, as shown in Post’s answer, the state proposed the “secure facility” definition given to the jury. Although it now claims the law should be differently stated, that claim was waived. Answer to M2R, at 10-12.

For these reasons, the state’s late reliance on the “secure facility” definition is meritless. The state’s position would reopen a door to the litigation of SCC treatment efficacy that this Court has closed. This Court should reject the state’s claims.

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

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

In the trial court and in the Court of Appeals, Post argued he had the right to present evidence showing the state could refile a 71.09 petition if the state could prove Post committed a "recent overt act" while in the community. This would rebut the state's deceptive insistence that no community controls could limit Post's risk of reoffense. Post adopts and incorporates that argument by reference. BOA at 63-68.²²

The argument is both simple and persuasive. The facts: (1) the statute exists; (2) the statute allows the state to file a new petition when it can prove a "recent overt act" in the community, RCW 71.09.060(1); (3) Post knows the statute exists.

The logic is as simple as the facts. Our society enacts statutes to aid us make pro-social behavioral choices. The criminal law is a societal cornerstone we are all presumed to know. Claimed ignorance is no defense. We are all presumed to make choices accordingly.

²² A copy is attached as appendix A. To prevent the state from filing a meritless procedural objection (see note 16, supra), counsel cordially reminds the state this is a "supplemental" brief. RAP 13.7.

In its reply, the state suggests the argument depends on proof of a hypothetical possibility of a chain of unknown future occurrences. Reply, at 7. But the argument only depends on the statute's existence and Post's knowledge of it. The evidence was offered to rebut the state's claim there were no legal conditions on Post's release. After all, the personal injunction of a sentence condition operates the same way as the societal injunction of a statute. As a matter of basic fairness, the state should not be allowed to argue one side of the same logical coin while preventing Post from arguing the other.

As Post argued below, the trial court reversibly erred by allowing the state to hide this statute's existence from the jury. This Court should reverse the commitment order. BOA at 63-68, 78-80.

4. IF THE COURT OF APPEALS IS REVERSED ON THE STATE'S LEAD CLAIM, PREJUDICIAL MISCONDUCT NONETHELESS REQUIRES REVERSAL OF THE VERDICT.

Post argued the prosecutor committed misconduct by commenting on the exercise of his Fifth Amendment rights at his criminal trial. BOA at 72-74. The Court of Appeals agreed this was misconduct, but declined to determine whether it required reversal, noting its confidence the "issue will not arise again on remand." Post, 145 Wn. App. at 758. If this Court determines there was no error in admitting the

LRA and SCC evidence, either this Court or the Court of Appeals must then determine whether the misconduct required reversal.²³ As Post argued in his opening brief, on these close facts, the errors individually and cumulatively require reversal. BOA at 78-80.

F. CONCLUSION

For the reasons in arguments 1 and 2, this Court should affirm the Court of Appeals' reversal of the commitment order. For the reasons in argument 3, this Court should reverse the commitment order. For the reasons in argument 4, this Court should find the prosecutorial misconduct to be prejudicial error, or should remand to the Court of Appeals for that determination. RAP 13.7.

DATED this 10th day of February, 2010.

Respectfully submitted,

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²³ RAP 13.7 provides in part, "If the Supreme Court reverses a decision of the Court of Appeals that did not consider all of the issues raised which might support that decision, the Supreme Court will either consider and decide those issues or remand the case to the Court of Appeals to decide those issues."

APPENDIX A

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.¹⁹ 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.

¹⁹ 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