

NO. 62508-0-I

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

In re Detention of Richard Hosier,

STATE OF WASHINGTON,

Respondent,

v.

RICHARD HOSIER.

Appellant.

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King County Prosecuting Attorney's Office  
Criminal Division  
Civil Commitment Unit

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

The Honorable Richard Eadie, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The evidence is insufficient to prove appellant was more likely than not to commit future predatory acts of sexual violence. CP 264.

2. The trial court erred in entering the commitment order because the evidence was insufficient to support the verdict. CP 287-88.

3. The trial court erred in using an outdated instruction that improperly limited the jury's consideration of evidence and in rejecting a proposed defense instruction that properly stated the law on this question. CP 94, 134, 266 (Instruction 8). Referenced instructions are attached in appendix A.

4. The trial court erred in refusing the proposed defense instruction establishing the threshold for "likely" and "more probably than not" as a statistical probability greater than 50%. CP 94, 134; 1RP 597-98.<sup>1</sup>

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<sup>1</sup> This brief refers to the transcripts as follows: 1RP – seven volumes of sequentially paginated transcripts dated 9/18/08 to 10/8/08 (James Stach); 2RP – 9/18/08 (Taralynn Bates); 3RP – 9/24/08 (Kevin Moll); 4RP – 10/1/08 (Mike O'Brien); 5RP – 10/6/08 (Stephen Broscheid);

5. The trial court erred in limiting the jury's risk determination by instructing the jury to assume the appellant would be "released unconditionally," where the evidence instead showed the appellant would have substantial sentencing conditions upon his release from confinement. CP 266 (Instruction 8).

6. The trial court erred in refusing the defense request to narrow the risk prediction to the "foreseeable future." CP 38-43; 1RP 42-44.

#### Issues Related to Assignments of Error

1. Was the evidence insufficient to prove the third element necessary for commitment, i.e. that a mental abnormality and/or personality disorder made the appellant likely to engage in predatory acts of sexual violence if not confined to a secure facility? CP 264.

2. Did instruction 8 prevent the appellant from presenting a complete defense when it directed the jury to disregard evidence relevant to whether he was likely to commit predatory acts of sexual violence if not confined to a secure facility? CP 266.

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6RP – 10/6/08 (Joann Bowen); 7RP – voir dire, 9/22/08 to 9/23/08 (James Stach).

3. Where an offered instruction correctly stated the law and was factually supported, did the court err in refusing to instruct the jury that the term “more probably than not” represents a statistical probability greater than 50 percent? CP 94, 134.

4. Did instruction 8 incorrectly bar the jury from considering evidence that appellant would be subject to six years of intensive conditions of community custody and/or probation supervision, where it limited the jury’s risk consideration by directing the jury to consider risk by assuming appellant would be “released unconditionally from detention”? CP 266.

5. Did the trial court deny appellant’s due process rights by failing to limit the risk prediction to the foreseeable future?

B. STATEMENT OF THE CASE

1. Background

Richard Hosier was born July 3, 1947. Ex. 64, at 12. On July 26, 2007, when Hosier was 60 years old, the King County prosecutor filed a petition seeking his incarceration under RCW 71.09. CP 1-2. Hosier was 61 during trial in October 2008.

To justify commitment, the state bore the burden to prove, beyond a reasonable doubt, Hosier suffers from a mental abnormality and/or personality disorder that makes him likely to engage in

predatory acts of sexual violence if not confined to a secure facility. CP 1, 264; RCW 71.09.020(1), (17), (18), 71.09.060. This case was tried to determine whether the state could prove Hosier was more likely than not to commit such acts, and whether the state could prove Hosier had serious difficulty controlling his sexually violent behavior. CP 264; 1RP 228-29, 614-22, 622-30. The “more likely than not” threshold required proof of a statistical probability exceeding 50%. 1RP 384.<sup>2</sup>

The state also bore the burden to prove Hosier had previously been convicted of a “crime of sexual violence.” CP 264, 268. Hosier did not dispute his 1983 conviction for first degree rape while armed with a deadly weapon. Ex. 54; 1RP 227, 609. The evidence did not seriously dispute the state psychologist’s opinion Hosier has a mental abnormality and personality disorder. CP 265; 1RP 227-28, 240, 245, 628; Ex. 67.

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<sup>2</sup> See also, In re Detention of Brooks, 145 Wn.2d 275, 296-97, 36 P.3d 1034 (2001) (fact to be proved is expressed as a “statistical probability”), overruled on other grounds, In re Detention of Thorell, 149 Wn.2d 724, 72 P.3d 708 (2003).

2. Evidence Regarding Prior Offenses, Mental Abnormality and/or Personality Disorder

In 2005, the state retained psychologist Charles Lund to evaluate Hosier for potential commitment under RCW 71.09. 1RP 215. Hosier was in prison at that time. 1RP 218. Hosier was cooperative with the state's evaluators and investigators. 1RP 150, 167, 218-21, 379-81.<sup>3</sup>

When Hosier was five years old his 50-year-old uncle fondled his penis on several occasions. Between ages 7 and 10 he played doctor with roughly ten females. He had incidents of fondling and penile/vaginal intercourse with his sister when he was 12 and she was 11. Between the ages of 12 and 18, he fondled the vaginas of five females ages 8-9, several times each. Although he was "caught" a few times there was no punishment. 1RP 142-44.

Between the ages of 30 and 36, he raped an estimated about 30 minor and adult female hitchhikers. He used a knife and they all cooperated. 1RP 142. In 1983, when he was 36, he was convicted of

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<sup>3</sup> Rich Minnich conducted a sexual history interview. 1RP 123, 134. By agreement of the parties, the court excluded mention that Minnick was a polygrapher. 1RP 74-75, 120, 122; 2RP 256.

first degree rape of a 16-year-old female and sentenced to a 20-year term. Ex. 54; 1RP 226-27.<sup>4</sup>

When he was 36 he had penile/vaginal intercourse with his girlfriend's 14-year-old daughter. He also said he touched the vaginas of three young girls over their clothing when he was 50. 1RP 141.

After 1983 he was arrested several times and convicted of a variety of offenses, but none were sexually violent. Ex. 68; CP 268; 1RP 327-29, 381-82, 446-47.

Hosier had substantial experience with pornography, adult bookstores, and X-rated movies. He did not peruse porn on the internet, however, nor any unlawful child porn. 1RP 144, 170-72. He also engaged in cross-dressing and fetish activities. 1RP 144-45, 159-60.

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<sup>4</sup> Testimony from the victim of the 1983 rape opened the state's case. She was hitchhiking in Bellevue on March 26, 1983. Hosier offered her a ride. When they reached the place where she wanted to be dropped off he displayed a knife. He forced her to perform oral sex, then he drove to a wooded area where he raped her vaginally and anally. After she defecated on him, he left while threatening her and her family with harm if she told anyone. She walked to a nearby house and called police. Shortly thereafter she identified Hosier, who was in police custody. 1RP 104-12. Hosier admitted these facts. 1RP 141-42.

In 2002, when he was 55, Hosier wrote about 100 lewd notes and left them around town in Marysville. He took minor female panties from a Goodwill bin and wrote notes on them. He left two at a day care center where they were found. As a result of several graphic notes,<sup>5</sup> he was convicted of two counts of harassment, two counts of communicating with a minor for immoral purposes, and one count of attempted communication. Ex. 101; 1RP 137-39, 154-58, 167-69, 174-76. These are not sexually violent offenses. CP 268; 1RP 381-82.

Hosier was arrested in 2002 for the note-writing incident. Sergeant Robert Barnett interviewed Hosier and searched his house. Barnett found pornography in Hosier's room, along with various fetish props. 1RP 159-60, 170. Barnett also found a vest containing a rope,

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<sup>5</sup> Various notes were admitted as exhibits and read to the jury. 1RP 155-59, 661; Ex. 42, 43. No child ever read the notes. 1RP 465. Although this Court has seen them before, State v. Hosier, 124 Wn. App. 696, 103 P.3d 217 (2004), aff'd, 157 Wn.2d 1, 133 P.3d 936 (2006), the state's brief can be expected to quote them or attach copies as appendices.

knife, vibrator, "hood-like cloth," plastic cups, necktie, candy, and a change of clothes. 1RP 159.<sup>6</sup>

Hosier said he wrote the notes because he was frustrated and battling his sexual dysfunction, a "monster" as he called it. He had not reoffended but was battling the urge. According to Barnett, Hosier said he did not trust women so he would dress as one because that was the only way he could have sex with a woman he trusted.<sup>7</sup> Hosier said he wrote the notes to shock others. He was cooperative and gave Barnett a lot of information. 1RP 160-61, 167-68, 175-76.

Hosier made it clear he was not going to reoffend. As he told Barnett, "I mean it's not like I am not fighting and I am not going to really offend. That's all I can tell you. That is the god's truth. I am not going to rape somebody. I will not do it." 1RP 176.

The state also called Byron Sutton, a community corrections officer (CCO) who supervised released offenders in the community. Sutton was first assigned to Hosier's case in January 2001. When

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<sup>6</sup> The prosecutors decided to call this a "rape kit," although Barnett had not. 1RP 159, 555-59, 609, 625; 6RP 78.

<sup>7</sup> Barnett admitted Hosier said he had decent relationships with four women. 1TP 167-68.

Hosier asked if he had to personally report at the office, Sutton directed him to come. Hosier did what Sutton directed. 1RP 199-200, 206-07. At the time Hosier was arrested for the notes, he had almost completed parole supervision. 1RP 202. By then he was being supervised only for payment of legal financial obligations. 1RP 206.

Based on these facts, the state retained Dr. Lund to evaluate Hosier for potential commitment under 71.09. 1RP 208. Lund had a history of working for the state. He admitted he reached an opinion that favored the state's position in the vast majority of cases where he had been retained. 1RP 214-15.

Hosier was scheduled for release to community custody in 2007. In the summer of 2005 Lund met with Hosier at Stafford Creek Corrections Center. The interview lasted about five and a half hours. In 2008 Lund met with Hosier and his attorney for two-and-a-half hours. Lund described Hosier as cooperative, courteous and respectful. 1RP 218-21; Ex. 64, 101.

Lund diagnosed Hosier with a mental abnormality of paraphilia NOS rape. Lund believed Hosier committed 20+ rapes between 1978 and 1983. He would try to stop himself but would relapse. 1RP 240-

45, 263. At trial, Lund believed Hosier met criteria<sup>8</sup> for pedophilia, although Lund had not reached that conclusion following his initial evaluation in 2005. 1RP 246-52. Lund believed Hosier could be diagnosed with an antisocial personality disorder. 1RP 265-72. Lund also believed Hosier had several substance abuse disorders that were in remission in a controlled environment. 1RP 294-95.<sup>9</sup>

In explaining his diagnoses, Lund repeated much of the historical background information already admitted through Barnett and Minnich. 1RP 241-63. Lund believed the history showed Hosier had serious difficulty controlling his behavior. 1RP 276-80, 494-99.

Lund also mentioned Hosier had not engaged in sex offender treatment during his incarceration for the 2002 convictions. Lund admitted appealed the case and was barred from the treatment program while the appeal was pending. 1RP 272, 464-65, 467, 509-10. Lund also admitted mental health professionals had made

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<sup>8</sup> Lund discussed the diagnostic criteria for paraphilia, pedophilia, and antisocial personality disorder as contained in the Diagnostic and Statistical Manual, Fourth Edition, Treatment Revision (DSM-IV-TR). Ex. 69-70, 72.

<sup>9</sup> Hosier had substantial experience with drug and alcohol use. 1RP 146, 162.

glowing reports about Hosier's progress in rehabilitation during his incarceration for the 1983 offense. 1RP 271. Hosier requested treatment numerous times during his prison term for that conviction. 1RP 464.

Over defense objection, Lund mentioned Hosier had been confined at the special commitment center (SCC) pending trial. Lund said Hosier had been offered treatment at the SCC but declined. 1RP 272, 466-67. Lund admitted the conditions for entering treatment at SCC required Hosier to agree that all statements he made could be used against him in the 71.09 trial. 1RP 468. Hosier had declined to enter the SCC program on his attorney's advice. 1RP 468. Lund admitted Hosier was in a TASC program for alcohol and drug addiction at the SCC, but emphasized that program was not the same as sexual deviancy treatment. 1RP 311.

### 3. Risk Assessment

Two experts testified about risk assessment and prediction. Dr. Brian Abbott testified in the defense case, and Lund testified for the state. Both experts initially agreed the only relevant risk was whether the person was likely to engage in future predatory acts of sexual violence. 1RP 284-85, 338, 384-85; 5RP 19. The state nonetheless asked Lund many vague questions about undefined

“risk” unrelated to predatory acts of sexual violence.<sup>10</sup> A thorough review of the record suggests the state’s primary trial theory was to confuse the jury about this disputed legal question. See e.g., 6RP 38-39, 71-74 (prosecutor points out Hosier reoffended in 1994 and 2002, but declines to point note that none of Hosier’s later offenses were sexually violent); 1RP 659 (prosecutor argues the jury should focus on facts that are socially disturbing, rather than the future risk of predatory sexual violence).

Lund said he conducted a three-prong analysis to try to quantify Hosier’s risk of reoffense. The first he called a “traditional clinical risk assessment.” 1RP 284. The second “could be described as, looking at what is generally true about sexual recidivism rates for certain classes of offenders.” 1RP 286. His third methodology was “an approach called actuarial risk assessment.” 1RP 286.

Lund admitted Hosier’s case is different than most due to advanced age. He admitted his three risk assessment methodologies

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<sup>10</sup> See e.g., 1RP 284, 291, 332-33, 340-41, 496 (noting defense counsel’s objections to the state’s questions about irrelevant and undefined “risk”). The court generally overruled the objections, stating defense counsel could cross-examine Lund on this issue.

were affected by Hosier's age. The actuarial predictions showed the probability of sexual recidivism drops considerably after age 60. 1RP 280-82; 4RP 7; 6RP 73-74.

#### 4. Lund's First and Second Methodologies

For his first methodology, Lund created a list of 15 items he called "empirically validated/clinically relevant risk factors." Ex. 73. He claimed several studies had generally found the factors to be significant in determining risk of reoffense, although he cited no scientific foundation for his list or his three-prong method. 1RP 288-315; 4RP 3-17; Ex. 76-79.

Lund believed Hosier's history supported a score of 31 on the Hare Psychopathy Checklist-Revised (PCL-R). Ex. 74; 1RP 306-09. Lund admitted he had no formal training in scoring the PCL-R. 1RP 306. Lund said deviant sexual interest is highly associated with "sexual recidivism." 1RP 310. Lund believed Hosier's history showed good evidence that he has deviant interests. 1RP 310.

Lund then put the two items together, citing a "failure table" from a 1997 Rice and Harris study. He said the study showed those with high deviancy and high psychopathy scores, like Hosier, failed most rapidly. According to that table, 70 percent had reoffended

within 10 years. 4RP 12-15; Ex. 76. To his credit, Lund admitted this was the “beginning” study in this scientific field. 4RP 14.

In a follow-up study with different measures of psychopathy, individuals in Hosier’s class reoffended but at lower levels. 4RP 16; Ex. 77. In a third study from 2004, only about 40 percent of offenders had not reoffended sexually after 12 years. 4RP 17; Ex. 78. Lund last relied on a 2006 Canadian study showing deviant psychopaths had the highest failure rates for recidivism. 4RP 17; Ex. 79. Based on this second methodology, Lund testified Hosier was “at very high risk,” 1RP 323, but the prosecutor did not ask Lund to explain what he meant by that.

Lund admitted Hosier would have onerous supervision conditions for 6 years requiring monitoring if he was released. The conditions included participating and making progress in sex offender treatment, as well as urinalysis, breathalyzer, plethysmograph, and polygraph examinations.<sup>11</sup> These conditions were unlike any previous supervision conditions Hosier had experienced. 1RP 468-69, 507-08; 4RP 5-6; Ex. 64, 101 (page 2 noting “total of 6 years probation”).

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<sup>11</sup> A copy of the conditions is attached as appendix B.

Lund said Hosier had a variety of health issues, including cardiac problems with arterial blockage. Hosier takes cholesterol reducing medications and a beta blocker to reduce blood pressure. He has arthritis in his knee and carries a vial of nitroglycerine for cardiac arrest symptoms. 1RP 473-74.

Lund said he would expect that antisocial behavior would diminish with age and there would be a lowered level of sexual preoccupation. 1RP 455-56; 4RP 8-9. He nonetheless thought Hosier remained sexually active and preoccupied, and had engaged in numerous antisocial activities in his 30's and 40's. 1RP 498-500; 4RP 8-9. He admitted Hosier's more recent functioning in custody showed he was well-behaved, providing grounds for cautious optimism. 1RP 448, 501-05.

Although Lund admitted the literature showed that recidivism declined with age, he also said a high PCL-R score was not likely to change. 1RP 429-37.

Lund admitted that increased age leads to a likelihood of remission of drug and alcohol dependency. 1RP 456-57. Hosier had been clean and sober since August of 2002, even though drugs and alcohol were available in custody. 1RP 470-72. Lund also admitted that while paraphilia may persist over time, paraphilic fantasies and

behaviors often diminish with advancing age. 1RP 459-62. Lund reluctantly admitted that a diagnosis of paraphilia carried no implication about the person's ability to control that behavior. 1RP 460-61, 494-95.

Lund also admitted that newer research showed people with higher IQs tended to recidivate at lower rates. 1RP 438-39. The historical documents showed Hosier's IQ as 113 or 133, both well above average. 1RP 442-43.

#### 5. Lund's Third Methodology

Lund relied on actuarial instruments for his third measure of risk prediction. The instruments combine factors that have been scientifically validated to be predictive in determining the risk of recidivism. Lund admitted the actuarial method "tends to be more objective" than his other two methods. 1RP 325.

Believing that one was not enough,<sup>12</sup> Lund scored Hosier on three actuarial instruments – the Static-99, the RRASOR, and the

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<sup>12</sup> A study by Seto showed the use of multiple actuarials did not increase predictive accuracy. 6RP 11.

MnSOST-R.<sup>13</sup> 1RP 325-26. At the end of his discussion he opined Hosier “is in the very high risk category.” 1RP 347-48.

The Static-99 score was 7, placing Hosier in the “6 plus” bin. 1RP 333, 402; Ex. 80. Again over defense objection, Lund said this made Hosier “high risk.” 1RP 332-33. Lund said the Static-99 indicated Hosier was in a category of offenders who recidivated at the following rates: 5 years – 39 percent; 10 years – 45 percent; 15 years – 52 percent. 1RP 333.

Lund’s use of the RRASOR led to a score of 3, with risk levels of: 5 years – 25%; 10 years – 37%. 1RP 334.

Lund said the MnSOST-R score was 18, a “very high score” that put Hosier in the “highest” risk category. 1RP 341. In a group of people who scored 13 or higher, the risk of recidivism was 70%. He said the statistical “real probability” was between 60% and 98% within a 6-year period. 1RP 341-42, 348-49, 475-76.

As is customary in these cases, the experts discussed “outcome criteria” for the various actuarial instruments and what type

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<sup>13</sup> “RRASOR” = Rapid Risk Assessment for Sex Offense Recidivism; “MnSOST-R” = Minnesota Sex Offender Screening Tool – Revised. 1RP 325-26.

of “recidivism” the instruments really measured. From the state’s perspective it was important to make sure the jury knew the RRASOR and Static-99 measured reconviction, while the MnSOST-R measured rearrest as the outcome criteria. 1RP 336, 341-42.

By pointing out the actuarials measured conviction and arrest, not the commission of a new crime, the state could plant a seed in the jury’s mind that an unknown but potentially large number of sexual offenses might occur which are never reported to police. 1RP 349-51, 616, 661; see also 6RP 33-34, 39-43. But no such inference could fairly bloom from this seed, since the recidivism criteria also included many irrelevant acts that are not within the narrow definition of “predatory acts of sexual violence.” 5RP 44-45.

The state offered no proof to show these types of serious offenses are underreported in Washington. The only evidence tended to show the opposite. 1RP 560-63; 5RP 44-45; 6RP 39, 43-45.<sup>14</sup> The state also could not quantify how many of these allegedly

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<sup>14</sup> The lack of evidence did not stop the prosecutor from trying to fertilize the seed during defense expert’s cross-examination, by suggesting Hosier had a 1:30 ratio of detected to undetected rape offenses. 6RP 44.

underreported offenses were committed by a single recidivist. A single recidivist committing multiple unreported offenses would undermine the state's theory that unreported offenses increase base rates for an entire group of offenders. 5RP 44-45. The evidence also showed it was scientifically and ethically inappropriate to adjust risk calculations upward based on unknown information. 1RP 559-60.

During the middle of Lund's direct examination, he briefly noted the RRASOR and Static-99 did not measure the risk of "predatory acts of sexual violence." 1RP 337-38. Lund's brief admission received more attention on cross examination. Lund admitted none of the three actuarials measured recidivism under the outcome criteria required under RCW 71.09 – predatory crimes of sexual violence. 1RP 396, 426-27, 483-84. Lund also admitted his opinion that Hosier posed a "high risk" was not supported by the outcome criteria used by the actuarials. A wide variety of offenses committed by people in those developmental samples were either not sexually violent or not predatory. 1RP 396-401, 404-05, 407-10, 414; 6RP 36-37.

Lund also acknowledged substantial problems with his opinion, both on direct and on cross.

First, none of the actuarials measured the risk of "predatory acts of sexual violence." The outcome criteria for each actuarial used

an unquantified number of offenses that were not such acts. 1RP 337-38, 342, 381-83, 396-401, 404-05, 408-09, 413, 426-27, 483-84; 5RP 18-19; 6RP 36-37, 43-45.

Second, Lund admitted the actuarials did not adjust for age. 1RP 344. Hanson, the Static-99 developer and a recognized authority, recognized that base rates for recidivism fell dramatically at higher ages. Although the overall base rate was 18 percent in the developmental sample, the base rate for the 50-59 age group was 8 percent. 1RP 345, 582; Ex. 143.

Third, the best that Lund could say about the actuarials was that the MnSOST-R and Static-99 “are relatively strong and have moderate accuracy in predicting sexual violence.” 1RP 347. He later modified that to say they were “fairly robust in their ability to predict sexual recidivism.” 1RP 416. To show how little these words really meant, Lund later adjusted that to claim the MnSOST-R and the Static-99 were “moderately accurate in characterizing risks,” not “fairly robust.” 1RP 421-22, 474.

Fourth, Lund admitted the MnSOST-R developer cherry-picked and did not cross-validate his samples. He included a sample of offenders who were at higher risk than the individuals used to develop the Static-99. 1RP 342-43,

He admitted the “precise percentage is something that is in dispute, and would be appropriately resolved over a longer period of time with more additional studies.” 1RP 475. It was not yet accepted that the percentage estimates should be applied beyond the MnSOST-R developmental sample. 1RP 474-75.

Lund also agreed with Dr. Calvin Langton’s assessment that the different numerical probabilities from different actuarial instruments required experts to make it clear that the claimed probabilities “do not translate into specific probabilities for a given individual.” 1RP 423. Langton’s study provided what Lund admitted was an “apples to apples” comparison, rather than the kind of “apples to oranges” efforts to compare other studies. 1RP 424.

But Lund’s methodologies were exposed as an exercise in comparing irrelevant apples to statutory oranges. For example, Lund’s second method relied heavily on his assertion that Hosier’s deviance was comparable to that exhibited by subjects in the development samples of the cited studies, including the Hildebrand study. But the measure of deviance in the Rice/Harris study was based on phallometric or plethysmograph analysis (PPG), i.e. the subject’s physiological response showing an absolute preference to deviant stimuli. Ex. 140 at 237-38; 1RP 363-64, 368, 484-85, 504-05;

6RP 17-18. Hosier was cooperative with Lund and was interviewed twice. He did everything Lund asked. But Lund never asked Hosier to participate in a PPG. 1RP 366, 379-81. Lund reluctantly admitted PPG procedures would allow a more valid comparison. 1RP 368.

Lund's weak reliance on the Hildebrand study was further exposed on cross. That study involved a small sample of 94 rapists admitted to a psychiatric hospital in Holland after being found to have diminished responsibility for their crimes. The offenders were released in Holland between 1975 and 1996. The mean age of offenders was 24.5, not 60+ like Hosier. 1RP 369-74. Lund also admitted he did not know the relevant law in Holland regarding diminished capacity. 1RP 512-13.

Abracen and Looman's 2006 article, "Evaluation of a Civil Commitment Criteria in a High Risk Sample of Sex Offenders" criticized the Hildebrand study as failing to recognize the limitations of the treatment methodologies used in the Holland hospital. Ex. 102 at 136; 1RP 376-78.

Despite these problems, Lund obediently opined Hosier was likely to commit sexually violent future acts, not just deviant future acts like writing notes. 1RP 229, 514-15.

6. Dr. Brian Abbott

Any legitimate scientific foundation for Lund's claims was severely shaken by the defense case and testimony from clinical psychologist Brian Abbott. 5RP 3. Abbott limited his testimony to a discussion of the scientific foundation for risk assessment and how risk estimates should be applied to Hosier's case. 5RP 11-12; 6RP 21-25, 45, 72-75. Abbott stated Hosier's risk of reoffense is below the "more likely than not" threshold for commitment. 1RP 585-86.

Several parts of Abbott's testimony went unchallenged. He stated the research showed clinical judgment is not accurate and correlates lowest with predicting sexual recidivism. 5RP 13-14; 6RP 8, 75-76. Although the actuarial instruments had been shown to have a higher predictive validity, their development sample sizes were small. 5RP 16-17. For this reason, the actuarials had "moderate predictive accuracy." 5RP 21. He explained there was a 25-30 percent error rate in terms of falsely predicting a non-recidivist as being a likely offender. 5RP 21.

Each of the actuarials suffered substantial scientific problems when applied to Hosier's situation.

The MnSOST-R had the most problems. Its developer did not publish in peer-reviewed journals and had skewed the developmental

sample by inserting 14-15 known recidivists to artificially increase the recidivism rate in the group. 5RP 22-25. The small sample numbers made it even more difficult to determine whether the results of that sample could be applied beyond that sample. 5RP 25. Compounding that was Lund's error in using percentages the developer found unreliable. 5RP 28.

The "risk level 3" group had a sample size of only 83 people. The recidivism risk for that group was 57 percent, with a confidence interval between 45 and 67 percent. 5RP 28. That only meant the risk for that sample of 83 was 57 percent, not anyone else, 5RP 29, because the MnSOST-R risk percentages had not been cross-validated on other populations. 5RP 30. Researchers in a variety of studies had determined the Static-99 was a more reliable predictor than the MnSOST-R. 6RP 11-12.

Abbott discussed the Static-99 risk percentages and how efforts to cross-validate them on other populations had failed. 5RP 34; 6RP 67-68.<sup>15</sup> A 2004 study by Doren recombined samples from a

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<sup>15</sup> Much of Abbott's testimony referred to powerpoint slides; paper copies were admitted as Ex. 143.

variety of researchers and determined the Static-99 6-plus score overpredicted risk by 119 to 177%. 5RP 37; 6RP 64-65. One sample underpredicted risk by about 10%. The differentiation showed the percentages tend to be unstable and unreliable. 1RP 553-54, 571; 5RP 38.

Other studies confirmed the Static-99 significantly overpredicted risk. 1RP 571-72; 5RP 37-39; Ex. 143 (“Unreliable Risk Percentages”). A 2008 study by Helmus, whose research was overseen by Hanson, determined the 10-year prediction for the 6-plus bin was 33.5%, not 45% as expected by the Static-99. 5RP 40-41.

The problem is best illustrated by reviewing base rates for reoffense in different states and in different offender age groups. Low base rates lead to less predictive accuracy and more error. 5RP 47, 60-61; 6RP 75.

Each of the actuarials Lund used overpredicted the risk of reoffense for someone like Hosier. The problem with the samples was both source-based and age-based. The actuarials were developed on foreign populations, but later studies from 10 different state sources showed substantially lower base rates (ranging from 3.2% to 10%) over 3-10 years than did the actuarials in 5 and 6-year followup periods. 1RP 553-54, 563-70, 582-83, 589; 5RP 48-51; Ex.

143 (Rates of Sexual Recidivism).<sup>16</sup> A clinician relying on the Static-99 would therefore overpredict actual risk. 5RP 50, 53-54, 81.

Washington populations had base rates ranging from a low of 2.7% to 23%. The one high rate resulted from a small biased sample of people who had been referred for consideration for a petition under RCW 71.09, but on whom prosecutors declined to file. 5RP 52-53.

The base rate problem is even more remarkably pronounced when age is considered. The majority of the actuarial samples were younger offenders released in their 20's and 30's. At higher ages, the rate of reoffense declines. 5RP 35, 62; 6RP 59-61.

Since 2001, a dozen published studies showed that age limits risk in all types of sex offenders, even when adjusting for high scores on the actuarial instruments. There were dramatic reductions in base rates for offenders over 50 in every study and every follow-up period. 5RP 64-80, 85-86; 6RP 44-47, 55-61.<sup>17</sup> Although the Static-99 predicted a risk of 39 percent for 6+ scores after 5 years, that rate

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<sup>16</sup> The actuarials had the following base rates: MnSOST-R (6 years) 23%; Static-99 (5 years) – 18%; RRASOR (5 years) – 13.2%.

<sup>17</sup> Abbott's testimony was illustrated by a series of slides in Ex. 143 marked "Age and Sexual Recidivism."

dropped to 9.1 percent when considering only offenders over 60 years of age. 5RP 82.<sup>18</sup> Abbott unequivocally stated the Static-99 predictions fail to account for the effect of advancing age on reducing recidivism. 5RP 46-47.

Not surprisingly, Abbott said the literature is beginning to adjust risk predictions based on age. 5RP 83; 6RP 69-70, 76-77. Lund did not disagree. 1RP 344-45. The only question among the researchers was how to best reduce the risk estimates to account for advanced age. 6RP 69-70.

Abbott used Bayes' theorem to calculate the changes in risk percentages from the Static-99 based on lower Washington base rates. The source-based overprediction was astounding. Applying the Washington base rates<sup>19</sup> to the Static-99 led to 5-year risk estimates of 20.8 percent and 7.7 percent. When applied to the MnSOST-R, the risk prediction was lowered to 31.5 percent and 12.7 percent. 5RP 90-93. When applied to the RRASOR, the risk

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<sup>18</sup> Ex. 143 ("Comparing Younger and Older age Sexual Offenders (Hanson, 2006)").

<sup>19</sup> The Washington rates were from two WSIPP studies, 1995 and 2005. 5RP 90; 6RP 40; Ex. 143.

prediction was 16.4 percent and 5.8 percent. 5RP 96-97; Ex. 143 (“Base Rate Adjusted 5-Year Risk Estimate for RRASOR Risk Level 3: Washington Example”).

Abbott also calculated the reduction when Washington base rates are adjusted for age. For offenders older than 55.8, the rate after 5 years was 12.7%. For 60.8 and older, the rate was 10.2%. 5RP 84-85; 1RP 549-55.<sup>20</sup> These are well below the 50+ percent minimum threshold needed for commitment.

Given these disparities, Abbott stated the risk percentages on the actuarials will “overpredict sexual recidivism leading to a high potential of making erroneous decisions that a person will reoffend when they are unlikely to reoffend.” 5RP 98-99; see also 1RP 528-29, 552-53; 6RP 73-74.

Unable to disrupt Abbott’s scientific approach during cross, the state reverted to hindsight and scare tactics. The prosecutor asked Abbott whether the actuarials would have predicted Hosier’s offenses in 2002, when he was 55. From this, the prosecutor asked whether a

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<sup>20</sup> Ex. 143 (“Downward Adjustment for Advancing Age: Washington Example”).

scientific approach that accounts for age would have failed to predict Hosier's 2002 reoffense. Abbott replied the actuarials are predictive tools, not retrospective tools. They also address group data, not an individual's risk for reoffense. 6RP 70-76. Abbott admitted the actuarials might be "trumped" if there were particularly pressing evidence of current risk, based for example on a person's self-report that he planned to offend again soon. 1RP 543, 556, 585; 6RP 31.

Abbott also criticized Lund's non-actuarial methodologies. Research showed that clinical judgment is not accurate, at least not on U.S. populations. Lund's first methodology, where he created 15 factors to "guide" his judgment, either duplicated factors already contained in the actuarials or relied on factors not shown to be predictively valid by legitimate research. 1RP 529, 534-48; 5RP 99-104; 6RP 4-10.

Lund also erred in relying on studies with substantially higher base rates than Washington populations, as well as different outcome criteria and inapplicable measures of deviance. 6RP 14-19, 27-29.

## 7. Closing

In closing, both parties recognized the only real issues for the jury were whether the state could prove Hosier had serious difficulty controlling his behavior and whether he was likely to commit a future

predatory act of sexual violence. 1RP 613, 622-36. Citing “common sense” and Lund’s “multi dimensional approach” to element 3, the prosecutor argued Hosier was likely to commit future acts of sexual violence. 1RP 614-16. The prosecutor contended Hosier still had a “monster” in him who would reoffend. 1RP 621.

In contrast, defense counsel relied on the scientific testimony. The outcome criteria for the actuarials did not measure the likelihood of predatory sexual violence in Washington populations. Given Hosier’s advanced age and its acknowledged effect on limiting risk, there was more than enough reasonable doubt on the questions of control and risk of reoffense. On top of that, substantial conditions, including polygraphs and plethysmographs, would monitor Hosier in the community for the next six years. 1RP 636-57.

In rebuttal, the prosecutor asked the jury to speculate that Hosier may have committed another sexually violent offense, based on the text of one of Hosier’s 2002 notes. 1RP 661. Ironically, this was shortly after the same prosecutor had argued “there is no room for speculation in the jury room.” 1RP 659.

C. ARGUMENT

1. THE STATE FAILED TO PROVE ELEMENT 3.

The state justifies RCW 71.09's system of risk-based preventive detention on the premise that our society can scientifically predict who is "likely" to reoffend in a relevant and undefined "future."<sup>21</sup> In overseeing this science-based "system," courts must ensure such predictions occur fairly, accurately, and with scientific validity. Otherwise we will legalize detention based on nothing more than societal dislike and distrust of a person who has been convicted for committing a sexually violent offense.<sup>22</sup> Such a system would be unconstitutional. Foucha v. Louisiana, 504 U.S. 71, 82-83, 112 S.Ct. 1780, 118 L.Ed.2d 437 (1992).

Due process requires the state to establish three commitment elements beyond a reasonable doubt. In re Detention of Audett, 158 Wn.2d 712, 727, 147 P.3d 982 (2006); U.S. Const. amend. 14; see also, RCW 71.09.060; CP 264. A commitment order should be

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<sup>21</sup> The state opposed limiting the risk period to the "foreseeable" future. See argument 3, infra.

reversed where no rational trier of fact, viewing the evidence in a light most favorable to the state, could find the elements beyond a reasonable doubt. In re Detention of Thorell, 149 Wn.2d 724, 744, 72 P.3d 708 (2003), cert. denied, 541 U.S. 990 (2004).

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 also requires the state to prove the person facing commitment has “serious difficulty in controlling behavior.” Thorell, 149 Wn.2d at 744-45.

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).

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<sup>22</sup> See e.g., 1RP 659 (prosecutor’s closing argument stating the jury should focus on “disturbing” facts rather than facts showing the risk of predatory acts of sexual violence).

Crane, 534 U.S. at 413.

Speculation and conjecture are not substantial evidence. In re Restraint of Dyer, 157 Wn.2d 358, 365, 139 P.3d 320 (2006) (Dyer I);<sup>23</sup> State v. Colquitt, 133 Wn. App. 789, 796, 137 P.3d 892 (2006); State v. Hutton, 7 Wn. App. 726, 728, 502 P.2d 1037 (1972). Speculative expert opinion lacking adequate foundation is inadmissible. Safeco Ins. Co. v. McGrath, 63 Wn. App. 170, 177, 817 P.2d 861 (1991), rev. denied, 118 Wn.2d 1010 (1992); In re Detention of Twining, 77 Wn. App. 882, 889-90, 894 P.2d 1331 (1995). Expert opinion is admissible under ER 702 only if the witness qualifies as an expert and the testimony would be helpful to the trier of fact. State v. Yates, 161 Wn.2d 714, 762, 168 P.3d 359 (2007). “[T]here is no value in an opinion that is wholly lacking some factual basis.” Queen City Farms, Inc. v. Central Nat. Ins. Co. of Omaha, 126 Wn.2d 50, 102-03, 882 P.2d 703 (1994).

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<sup>23</sup> Dyer I was a 5-4 decision reversing and remanding the Indeterminate Sentence Review Board’s (ISRB) decision not to find Dyer parolable. After remand, a different 5-4 majority reaffirmed that “reliance upon speculation and conjecture” constitutes an abuse of discretion. In re Restraint of Dyer, 164 Wn.2d 274, 286, 189 P.3d 759 (2008) (Dyer II).

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 point of rejecting allegedly "scientific" evidence without proper foundation is to segregate junk science from legitimate theories accepted in the scientific community. This ostensibly prevents jurors from being misled by experts who expound theories not accepted in the scientific community. State v. Copeland, 130 Wn.2d 244, 258, 922 P.2d 1304 (1996) (discussing Frye v. United States, 293 F. 1013, 34 A.L.R. 145 (D.C.Cir.1923)).

Applied here, these principles show the state failed to prove that Hosier is "likely to engage in predatory acts of sexual violence if not confined to a secure facility." CP 264. These terms have specific meanings. The state failed to prove the risk was statistically more probable than not for at least four reasons.

*Outcome Criteria:* In Washington the state must prove a probability of “predatory acts of sexual violence.” But none of the actuarials measure that outcome.

They fall short on two key metrics. The first is “predatory.”<sup>24</sup> The second is “sexual violence.”<sup>25</sup>

As Lund and Abbott both testified, the actuarials did not measure the risk of predatory acts of sexual violence.<sup>26</sup> While the actuarial instruments might provide insight into whether an offender in Holland or Canada or Minnesota was more likely to expose himself in public after being released,<sup>27</sup> this proves nothing in Washington. In

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<sup>24</sup> Commitment in Washington is limited to those who commit “acts directed toward strangers, (2) individuals with whom the respondent has established or promoted a relationship for the primary purpose of victimization, or (3) persons of casual acquaintance with whom no substantial personal relationship exists.” CP 267; RCW 71.09.020(10).

<sup>25</sup> This is limited to serious and violent offenses. CP 268; RCW 71.09.020(17).

<sup>26</sup> 1RP 337-38, 347, 396-97, 400, 402, 406-7, 414, 426-27, 483-84; 6RP 36-37, 43-45.

<sup>27</sup> The outcome criteria in the Static-99 included non-contact offenses like public indecency and voyeurism. 1RP 399, 564.

Washington, the state must prove a greater than 50% probability that Hosier would commit a future predatory act of sexual violence.

Lund admitted all of the actuarials suffered these problems. He was unable to quantify the degree of error. Assuming arguendo Lund's risk prediction was based on a legitimate scientific foundation, it still was built on studies with broader recidivism criteria than are relevant to the narrow legal question in Washington. By definition, the actuarials could not prove the fact the state must prove.

*Age.* Second, the actuarials did not account for Hosier's advanced age, 61 years old. Although the state relied in part on the Static-99, the evidence showed it was normed on much younger offenders. More recent research recognizes the Static-99 substantially overpredicts risk for persons over 60.<sup>28</sup> As Hanson recognized several years before this trial, "offenders over 60

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<sup>28</sup> Assuming the actuarials are of any real use in 71.09 determinations, problems are magnified when they 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).

appeared substantially lower risk than expected.”<sup>29</sup> But after recognizing this fact, Hanson offered no method for “scientists” in the risk prediction business to fairly account for the lowered risk (assuming any might be inclined). “How best to consider age remains unresolved by the current study.” Id.

Consequently, evaluators using Static-99 with older offenders are left with the familiar problem of knowing that a factor external to an actuarial scheme contributes information to risk assessment, but lacking sufficient scientific evidence to formally include the factor in the actuarial measure. How evaluators proceed in the face of this dilemma depends on the confidence they place in the specific actuarial measure, the evidence supporting the external factor, and the potential contribution of other factors considered (or not) in the overall evaluation.

Id., at 13. Abbott confirmed that a dozen published studies showed dramatic reductions in base rates for offenders over 50 – in every study and every follow-up period. 5RP 64-80, 85-86; 6RP 44-47, 55-61; Ex. 143.

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<sup>29</sup> See R. Karl Hanson, The Validity of Static-99 with Older Sexual Offenders, 2005-1, at 13, available at [http://www.publicsafety.gc.ca/res/cor/rep/\\_fl/2005-01-val-stic-eng.pdf](http://www.publicsafety.gc.ca/res/cor/rep/_fl/2005-01-val-stic-eng.pdf) (last accessed 2/20/10). See also, Science on Trial, at 376-77.

While Hanson may have identified a “familiar” quandary for those in the risk prediction business,<sup>30</sup> the question for a fair legal system is not just how to identify it, but how to account for and quantify a serious gap in the scientific proof. Normally such gaps are held against the party with the burden of production and proof. The state benefits from no presumptions when it must prove facts beyond a reasonable doubt. Hosier advocates that accepted analysis. Where the state fails to meet its burden of proof, courts must recognize that failure.

Unlike Lund, Abbott quantified the downward risk adjustment necessitated by Hosier’s advanced age. By using Bayes’ theorem, he established the risk prediction from the Static -99 was well below the 50 percent threshold necessary for commitment. 5RP 46-47, 82; Ex. 143. Lund did not rebut this.

*Base Rates.* Abbott also made clear that each of the actuarials Lund used had higher base rates for recidivism than those applicable

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<sup>30</sup> “Business” is fair and accurate; the proliferation of preventive detention schemes has created lucrative business opportunities. See, e.g., <http://www.amyphenix.com/fees.htm> (listing hourly fees for evaluation, testimony, and training); 1RP 481-82; 6RP 47.

to Washington offenders.<sup>31</sup> With Washington base rates, the risk from all three actuarials was substantially below the 50 percent threshold necessary for commitment. 5RP 90-93, 96-97; Ex. 143. Lund did not rebut this.

Where different jurisdictions have different laws, different levels of post-release supervision, different populations and different law enforcement resources, the different recidivism base rates make sense. In light of Washington's aggressive use of RCW 71.09, people who might otherwise be tempted to commit a predatory offense can be deterred. After all, prevention is a key reason for such schemes. It would be curious for the state to argue otherwise.

In response, the state may cite Lund's reliance on the MnSOST-R. But the MnSOST-R not only suffered all the problems discussed above, it also failed to meet basic scientific validity standards or legal relevancy standards. It had not been validated on other populations. 5RP 22-30. Abbott testified, without rebuttal, the

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<sup>31</sup> The Static-99 did not hold its predictive validity on a variety of populations. Several studies after the Static-99 showed the 6-plus score overpredicted risk by 119 to 177percent. 5RP 37; 6RP 64-65. The 10-year prediction for the 6-plus bin was 33.5 percent, not 45 percent as expected by the Static-99. 5RP 40-41.

Static-99 was a more reliable predictive instrument than the MnSOST-R. 6RP 11-12; see also Vrieze and Grove, Predicting Sex Offender Recidivism, 32 Law and Human Behavior 266, 276-77 (June 2008) (summarizing the serious statistical flaws in the MnSOST-R, and concluding the use of the MnSOST-R in jurisdictions with low base rates does not meet basic standards of relevancy; “the tests are not useful in deciding any issue of fact; *they possess at most paltry probative value at that point in the fact-finding process.*” . . . The danger of unfair prejudice also outweighs any minimal probative value; “[the test] errs systematically against the respondent, constituting a prejudiced outcome”) (emphasis in original).

*Clinical judgment.* Recognizing the weakness of the state’s actuarial proof, the trial prosecutors also presented Lund’s personal opinion founded in clinical judgment. That effort fails in light of the undeniable trend toward the rejection of clinical assessment. Thorell, 149 Wn.2d at 753-58. Clinical judgment has been recognized as no

more reliable than flipping a coin. In re Coffel, 117 S.W.3d 116, 129 (Mo. App. 2003).<sup>32</sup>

More than a decade ago the risk prediction business was abandoning clinical judgment for actuarial prediction.<sup>33</sup> That trend clearly continues.<sup>34</sup> Abbott confirmed it, and showed how Lund's reliance on 15 "factors" to aid his judgment either repeated factors already accounted for in the actuarials, or created factors not shown

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<sup>32</sup> Abbott stated, without rebuttal, that clinical judgment is not accurate and correlates lowest with predicting sexual recidivism. 5RP 13-14; 6RP 8, 75-76.

<sup>33</sup> In re Detention of Campbell, 139 Wn.2d 341, 376, 986 P.2d 771 (1999) (Sanders, J., dissenting) (quoting Grant T. Harris et al., Appraisal and Management of Risk in Sexual Aggressors: Implications for Criminal Justice Policy, 4 Psychol., Pub. Pol'y, & L. 73, 88 (1998)).

<sup>34</sup> Browne, M. Neil and Ronda R. Harrison-Spoerl, Putting Expert Testimony in its Epistemological Place: What Predictions of Dangerousness in Court Can Teach Us, 91 Marq. L. Rev. 1119, 1192-1205 (2008); E. Janus & R. Prentky, Forensic Use of Actuarial Risk Assessment with Sex Offenders: Accuracy, Admissibility and Accountability, 40 Am.Crim. L.Rev. 1443, 1485 (2003) ("[r]espected researchers urge the 'complete replacement of existing practice with actuarial methods,' and suggest that the use of clinical methods, where actuarial ones are available, would be 'unethical.'"). The state appears to oppose this trend only when the actuarial predictions undermine the state's preferred result.

to be predictively valid through legitimate research. 1RP 529, 534-48; 5RP 99-104; 6RP 4-10.

The state may also argue that jurors, not appellate courts, determine credibility.<sup>35</sup> But that response would fundamentally misunderstand and misrepresent Hosier's argument. The state's proof failed to pass the foundational point where a jury could legitimately determine whether Lund was more credible than Abbott.

Even if Lund was right, it should not be forgotten that the state's methodology does not predict individual outcomes. Instead, a 51 percent risk prediction assumes that 51 similarly scored people will reoffend within a period of X years.<sup>36</sup> This also means, of course, that 49 people will not reoffend within that period. The current system cares little about false positives, however, and allows all 100 to be locked up. The constitution, and a respect for even minimal fairness, requires us to constantly strive to do better than this.

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<sup>35</sup> See generally, State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

<sup>36</sup> Reoffense is not necessarily within a "foreseeable future." See argument 4, infra.

Because the state failed to prove element 3, the commitment order should be reversed and the petition dismissed with prejudice.<sup>37</sup>

2. THE COURT VIOLATED HOSIER'S RIGHT TO A FAIR TRIAL WHEN IT BARRED THE JURY FROM CONSIDERING RELEVANT EVIDENCE ON THE QUESTION WHETHER HOSIER WAS LIKELY TO COMMIT FUTURE ACTS OF SEXUAL VIOLENCE, AND WHEN IT REFUSED TO INFORM THE JURY THAT "MORE PROBABLY THAN NOT" MEANS A STATISTICAL PROBABILITY GREATER THAN 50 PERCENT

The state bore the burden to prove Hosier was likely to commit acts of sexual violence if not confined to a secure facility. CP 264, instruction 6; RCW 71.09.020(16), 71.09.060(1). Outdated instruction 8, however, misled the jury by directing it to ignore key facts bearing on the issue and thereby prevented Hosier from presenting a complete defense to the allegations against him. CP 266. The instruction also denied due process and commented on the evidence by preventing the jury from considering evidence that Hosier would be subject to six years of court-ordered conditions of supervision if released. The court also erred by refusing the proposed paragraph

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<sup>37</sup> If this Court agrees, it need not address Hosier's remaining claims.

defining "more probably than not" as "a statistical probability greater than 50%." CP 94, 134; 1RP 597-99.

Involuntary commitment under RCW 71.09 is a significant deprivation of liberty triggering due process protection under the Fourteenth Amendment of the United States Constitution. Thorell, 149 Wn.2d at 731 (citing Foucha v. Louisiana, 504 U.S. at 80). "A fair trial in a fair tribunal is a basic requirement of due process." In re Murchison, 349 U.S. 133, 136, 75 S. Ct. 623, 99 L. Ed. 942 (1955).

Notions of fundamental fairness require an accused be given "a meaningful opportunity to present a complete defense." State v. Wittenbarger, 124 Wn.2d 467, 474, 880 P.2d 517 (1994); see also In re Welfare of Hansen, 24 Wn. App. 27, 36, 599 P.2d 1304 (1979) (due process principles require party be given a full and meaningful opportunity to present evidence). "The right to offer the testimony of witnesses . . . is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies." Washington v. Texas, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967) (characterizing this right as a fundamental element of due process as protected by the Fourteenth Amendment).

"Instructions satisfy the requirement of a fair trial when, taken as a whole, they properly inform the jury of the applicable law, are not misleading, and permit the defendant to argue his theory of the case." State v. Tili, 139 Wn.2d 107, 126, 985 P.2d 365 (1999).<sup>38</sup> An instruction that prejudicially deprives the defendant of the benefit of having the jury pass upon a significant and disputed issue of fact invades the right to a fair trial. State v. Byrd, 72 Wn. App. 774, 782, 868 P.2d 158 (1994), aff'd., 125 Wn.2d 707 (1995); State v. Van Pilon, 32 Wn. App. 944, 948, 651 P.2d 234 (1982), rev. denied, 99 Wash.2d 1023 (1983). Overall, an accused has the constitutional right "to have the jury base its decision on an accurate statement of the law applied to the facts in the case." State v. Miller, 131 Wn.2d 78, 90-91, 929 P.2d 372 (1997).

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<sup>38</sup> Whether an instruction allows a party to argue its theory of the case is an additional safeguard to be applied only where the instruction itself accurately states the law. State v. Wanrow, 88 Wn.2d 221, 237, 559 P.2d 548 (1977). "[I]t would be illogical to apply such a test to erroneous instructions – of what significance is it that counsel may or may not be able to argue his theory to the jury when the jury has been misinformed about the law to be applied?" Wanrow, 88 Wn.2d at 237.

- a. The Outdated Instruction Improperly Barred the Jury From Considering Defense Evidence. **Error! Bookmark not defined.**

Instruction 8 erroneously precluded the jury from considering expert opinion and other relevant testimony on the question whether Hosier was likely to commit acts of sexual violence if not confined to a secure facility. The instruction thereby violated Hosier's right to present a complete defense.

Instructions 6, 7, and 8 dealt with the key questions before this jury. Instruction 6, the "to commit" instruction, listed the three elements necessary for commitment: (1) a prior conviction for a crime of sexual violence; (2) a mental abnormality and/or a personality disorder which causes serious difficulty in controlling sexually violent behavior, and (3) the mental abnormality and/or personality disorder makes Hosier "likely to engage in predatory acts of sexual violence if not confined to a secure facility." CP 264; In re Detention of Audett, 158 Wn.2d at 727.

Instruction 7 defined "mental abnormality" and "volitional capacity." CP 265. Instruction 8 then told the jury what it could and could not consider in determining the third element:

"Likely to engage in predatory acts of sexual violence if not confined in a secure facility" means that the person more probably than not will engage in such acts if released unconditionally from detention in this proceeding.

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

CP 264 (emphasis added). This instruction incorrectly stated the law.

Instruction 8 used the language of former WPI 365.14, which was revised in 2006, two years before this trial. As revised, it reads:

"Likely to engage in predatory acts of sexual violence if not confined in a secure facility" means that the person more probably than not will engage in such acts if released unconditionally from detention in this proceeding.

[In determining whether the respondent is likely to engage in predatory acts of sexual violence if not confined to a secure facility, you may consider all evidence that bears on the issue. In considering [placement conditions or] voluntary treatment options, however, you may consider only [placement conditions or] voluntary treatment options that would exist if the respondent is unconditionally released from detention in this proceeding.]

WPI 365.14.<sup>39</sup> The Comment to the revised version explains the reasons for this change:

[The previous] version of this instruction . . . could have been interpreted as permitting the jury to consider only

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<sup>39</sup> The instruction proposed by defense counsel included this revised language. CP 134.

placement conditions and voluntary treatment options when determining whether the respondent is likely to engage in predatory acts of sexual violence if not confined to a secure facility, even if other evidence relevant to the question has been admitted. The current instruction makes clear that the jury is not prohibited from considering such evidence when it has been admitted by the trial court.

Comment to WPI 365.14.<sup>40</sup>

A jury is presumed to follow the court's instructions. State v. Johnson, 124 Wn.2d 57, 77, 873 P.2d 514 (1994). The plain language of instruction 8 unambiguously prohibited the jury, in determining Hosier's risk of future offense, from considering any evidence other than placement conditions and voluntary treatment options that would exist if Hosier were released. To Hosier's

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<sup>40</sup> The language of former WPI 365.14, upon which Instruction 7 was based, tracked an isolated section of RCW 71.09.060(1) addressing the "likely to engage" element in relation to "placement conditions and treatment options." As reflected in the revised version of WPI 365.14, the limiting language used in RCW 71.09.060(1) was meant to exclude only evidence related to conditions of a less restrictive alternative. The history of this provision and accompanying findings of legislative intent, as set forth in the Comment to former WPI 365.14, make this point abundantly clear. See RCW 71.09.015 (explaining the amendment responded to In re the Detention of Casper Ross, 102 Wn. App. 108 (2000), to ensure juries would not consider evidence of LRA conditions a court could not lawfully order).

detriment, the instruction barred the jury from taking into account crucial evidence relevant to future risk.

A criminal defendant has the constitutional right to present a defense consisting of relevant evidence not otherwise inadmissible. State v. Kim, 134 Wn. App. 27, 41, 139 P.3d 354 (2006), review denied, 159 Wn.2d 1022 (2007). This right stems from the basic requirement of due process that a defendant be afforded a fair trial and the opportunity to set forth a complete defense. Murchison, 349 U.S. at 136; Wittenbarger, 124 Wn.2d at 474.

It cannot seriously be disputed that the right to present a complete defense consisting of all relevant, admissible evidence also applies when the state targets a person with RCW 71.09. The Supreme Court has recognized due process protections are triggered by the potential significant deprivation of liberty such proceedings entail. Thorell, 149 Wn.2d at 731. Whether Hosier was likely to re-offend was a contested issue at trial. Instruction 8 violated his right to present a full and meaningful defense to this charge and deprived him of the benefit of having the jury pass upon a significant and disputed issue. Van Pilon, 32 Wn. App. at 948.

In response the state may claim the jury was instructed to read the instructions as a whole, not just instruction 8. But jurors also read

instructions as they are written. Instruction 6 provided the three elements. Instructions 7 and 8 then immediately defined those elements and constrained the jury's consideration. CP 264-66. The court erred.

b. The Court Erred in Refusing the Proposed Paragraph Defining the Risk Determination as a Statistical Probability.

A court errs when it refuses a timely proposed instruction that is supported by the evidence and correctly states the law. In re Detention of Pouncy, \_\_ Wn.2d \_\_, \_\_ P.3d \_\_, 2010 WL 817369 (No. 81769-3, 3/11/10), slip op. at 6-8. Defense counsel timely proposed the revised version of WPI 365.14.<sup>41</sup> For the reasons argued in section 2.a., the court erred in refusing that instruction.

The instruction also included the following paragraph:

"More probably than not" represents a statistical probability greater than 50%. If the state does not prove beyond a reasonable doubt that Mr. Hosier is more than 50% likely to engage in predatory acts of sexual violence if not confined in a secure facility, then Mr. Hosier does not qualify for this civil commitment as a sexually violent predator.

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<sup>41</sup> CP 94, 134, attached in appendix A.

CP 94, 134. The trial court erred when it declined to include this paragraph. 1RP 597-98.

The state should concede the paragraph is factually supported. Where the experts targeted their testimony to the 50 percent threshold, that factual question was at issue in this trial. 1RP 384; 5RP 46-47, 82, 90-93, 96-97; Ex. 143. Both experts also admitted they could not individualize Hosier's risk of reoffense; the actuarials instead predicted whether a person who shares similar characteristics with a group of others would be likely to reoffend. 1RP 403-05. This is necessarily a statistical inquiry.

The state also should concede the paragraph is legally correct. The Brooks court stated the proof necessary to establish "more likely than not" is a "statistical probability" of "more than 50%." Brooks, 145 Wn.2d at 296. "The fact to be proved with respect to the SVP statute is expressed in terms of a statistical probability." Brooks, at 296. "[T]he fact to be determined is not ~~w~~ whether the defendant will

reoffend, but whether the probability of the defendant's reoffending exceeds 50 percent." Brooks, 145 Wn.2d at 298.<sup>42</sup>

The Brooks analysis is instructive. Brooks argued the "more likely than not" standard for proving dangerousness denied equal protection because it was not as strict as the "clear, cogent, and convincing" standard required by Addington v. Texas, 441 U.S. 418, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979). Brooks, at 294-96. In rejecting Brooks' claim, the court reasoned the same fact – "probable dangerousness" – was at issue in both commitment schemes. Brooks, at 295-96. The court then expressly recognized this forward-looking fact can only be measured as a "statistical probability."

A determination of probable dangerousness in the context of commitment for mental illness requires the equivalent level of statistical probability as does a determination of the likelihood of an SVP's reoffending. Because chapter 71.09 RCW and the Texas civil commitment statute require factual determinations – likelihood of reoffense and probable dangerousness – expressed as statistical probabilities and require the same level of probability for each determination, Washington's SVP statute does not fall short of the Texas law analyzed in Addington.

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<sup>42</sup> This Court has recently reiterated the 50 percent risk threshold applies to 71.09 commitment trials. In re Detention of Bergen, 146 Wn. App. 515, 533-34, 195 P.3d 529 (2008), rev. denied, 165 Wn.2d 1041 (2009).

Brooks, 145 Wn.2d at 296 (emphasis added).

Although the trial court in Hosier's case reviewed Brooks, it nonetheless declined to instruct the jury with this correct paragraph. It reasoned that juries have long been instructed with "quantitatively imprecise" phrases like "preponderance of the evidence" and "proof beyond a reasonable doubt." 1RP 598. Citing Justice Harlan's concurrence in Winship, Judge Eadie said "[a]ll the factfinder can acquire is a belief of what probably happened, although the phrase 'preponderance of the evidence' and 'proof beyond a reasonable doubt' are quantitatively imprecise." 1RP 598 (quoting Brooks, quoting In re Winship, 397 U.S. 358, 370, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) (Harlan, J. concurring)).

The first problem with the trial court's reasoning is that Brooks did not reject a statistically measured instruction. It instead allowed the state to commit a person as long as the jury found, beyond a reasonable doubt, it was statistically probable that the person was more likely that not to commit a future act of predatory sexual violence. On multiple occasions the court made it clear that this fact is measured as a statistical probability.

The other problem is that the Winship standard is not designed to predict the risk of potential future facts. Factfinders instead use Winship to determine past facts, i.e. whether someone committed the essential elements of a previously committed crime. In contrast, a jury's determination whether a potential future act will occur must be measured as a "statistical probability." Brooks, at 294, 296, 298.

Judge Eadie also reasoned the instruction was unnecessary because lawyers argue the percentage "and nobody objects to that and everybody says that. But that's your argument to help the jury understand the law and why that's the law." 1RP 598-99. As the Supreme Court made clear in Wanrow and recently reiterated in Pouncy, however, this too was legally incorrect. "[L]awyers have a hard enough time convincing jurors of the facts without also having to convince them what the applicable law is." Pouncy, No. 81769-3, slip op. at 8 (citations omitted). The trial court therefore abused its discretion by denying the instruction without legitimate grounds. In re Detention of Anderson, 166 Wn.2d 543, 552, 211 P.3d 994 (2009) (court abuses its discretion when it acts on unreasonable grounds).

c. Instruction 8 Commented on the Evidence and Denied Hosier's Substantive Due Process Right to a Fair Determination of Risk.

In explaining the third element, instruction 8 required the jury to determine the risk of reoffense by assuming Hosier would be “released unconditionally.” CP 266.<sup>43</sup> But Hosier was not going to be released unconditionally. He instead would face strict conditions of community custody and six years of probationary supervision where he would be required to participate in sexual deviancy treatment and submit to urinalysis, breathalyzer, polygraph, and plethysmograph examinations. Ex. 64, 101.<sup>44</sup>

By requiring the jury to make this crucial risk determination based on an untrue factual assumption, the instruction unfairly skewed the determination in the state's favor. In so doing, the

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<sup>43</sup> “‘Likely to engage in predatory acts of sexual violence if not confined in a secure facility’ means that the person more probably than will not engage in such acts if released unconditionally from detention in this proceeding.” CP 266. This erroneous language remains in the revised WPI 365.14.

<sup>44</sup> Appendix B.

instruction denied Hosier's due process rights and unconstitutionally commented on the evidence.<sup>45</sup>

Substantive due process requires the state to establish both mental illness and dangerousness. There must be a link between the mental disorder and risk. A person may be held only so long as he is dangerous. U.S. Const. amend. 14; Const. art. 1, § 3; Crane, 534 U.S. at 409-10; Kansas v. Hendricks, 521 U.S. 346, 357-58, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997); Foucha v. Louisiana, 504 U.S. at 80; Thorell, 149 Wn.2d at 735-42, 761-62.

The Washington Constitution also prohibits courts from commenting on the evidence. Const. art. 4, § 16. A court violates this prohibition by "conveying to the jury his or her personal attitudes toward the merits of the case" or instructing a jury that "matters of fact have been established as a matter of law." Becker, 132 Wn.2d at 64.

Although the evidence showed Hosier would be supervised with onerous conditions for six years if released, the instruction told the jury it could not consider that evidence. The instruction removed

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<sup>45</sup> These manifest constitutional errors may be raised for the first time on appeal. RAP 2.5(a)(3); State v. Becker, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997).

the evidence from the jury's consideration more fully than would a simple disparagement. This was clearly erroneous.

In response the state may point out the instruction tracks statutory language and therefore correctly states the law. But the definition of "sexually violent predator" does not require the jury to ignore conditions of court-ordered supervision. RCW 71.09.020(18). As described in note 40, supra, the 2001 amendment to RCW 71.09.020(7),<sup>46</sup> in response to Ross, prevented jurors from considering the possibility of LRA conditions a court could not order. It was never intended to prevent a jury from considering supervision conditions a court had already ordered, nor could it constitutionally preclude the consideration of such evidence.

In response, the state may argue Hosier's counsel proposed the same erroneous language in CP 134, so any error would be

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<sup>46</sup> RCW 71.09.020(7) provides: "'Likely to engage in predatory acts of sexual violence if not confined in a secure facility' means that the person more probably than not will engage in such acts if released unconditionally from detention on the sexually violent predator petition. Such likelihood must be evidenced by a recent overt act if the person is not totally confined at the time the petition is filed under RCW 71.09.030."

invited. To the extent that response might have merit, Hosier was denied effective assistance of counsel.

The Sixth Amendment guarantees the right to effective assistance of counsel. U.S. Const. amend. 6; Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). "To prevail on a claim of ineffective assistance of counsel, counsel's representation must have been deficient, and the deficient representation must have prejudiced the defendant." State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999) (citing Strickland). Counsel has a duty to investigate the relevant law and to propose instructions correctly stating the law. State v. Jury, 19 Wn. App. 256, 263, 576 P.2d 1302 (1978); Strickland, at 690-91. Counsel's proposal of erroneous instructions may prejudice the defense and require reversal. Aho, at 745-46; State v. Bradley, 141 Wn.2d 731, 736, 10 P.3d 358 (2000); State v. Doogan, 82 Wn. App. 185, 188-89, 917 P.2d 155 (1996).

As argued above, the instruction was legally erroneous because it required the jury to assume Hosier would be "released unconditionally" and "unconditionally released." This was factually untrue. The instruction wrongly directed the jury to consider Hosier's risk of reoffense while blind to the deterrent and incapacitating effect

of conditions of community placement and probation that would govern his release for six years. While the jury may have heard the evidence, the instruction said the jury could not use it.

Hosier was prejudiced by the error. The risk determination was the key issue in this trial. The state routinely argues that someone who lacks supervision in the community is more likely to engage in predatory acts of sexual violence.<sup>47</sup> The state cannot dispute jurors are influenced by this argument. See e.g., In re Detention of Post, 145 Wn. App. 728, 748-49, 187 P.3d 803 (2008) (accepting the obvious; when faced with proof of prior sex offenses and a mental abnormality, juries are influenced by the specter of unconditional release), rev. granted, 166 Wn.2d 1033 (2009). For this reason, and the reasons discussed below, the instruction was prejudicial.

d. The Errors Were Prejudicial

A jury is presumed to follow the court's instructions absent evidence to the contrary. State v. Montgomery, 163 Wn.2d 577, 596,

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<sup>47</sup> 1RP 659 (disputing that Hosier would be “watched like a hawk” in the community).

183 P.3d 267 (2008).<sup>48</sup> Prejudice may be demonstrated where an erroneous instruction is applied to a close or disputed factual question. State v. Brown, 36 Wn. App. 549, 554, 676 P.2d 525 (1984). Instruction 8 barred the jury from taking into account defense evidence relevant to the issue of future risk. The right to present a complete defense would be an empty right where the jury is instructed to disregard key aspects of the defense pertaining to a contested issue at the heart of the State's case.

There were three errors in instruction 8. The first prevented the jury from considering Abbott's expert testimony showing the reasons why the state's proof failed to meet the commitment threshold. This was Hosier's defense. The second error prevented the jury from correctly hearing, from the court, that the state had to prove a statistical probability greater than 50 percent. This risk threshold was the key disputed fact at trial. The third error required the jury to ignore six years

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<sup>48</sup> Courts do not presume jurors ignore an instruction. State v. Grisby, 97 Wn.2d 493, 509 647 P.2d 6 (1982) ("if we assume that jurors are so quickly forgetful of the duties of citizenship as to stand continually ready to violate their oath on the slightest provocation, we must inevitably conclude that a trial by jury is a farce and our government a failure.").

of onerous supervision conditions Hosier faced in the community if released. The state cannot satisfy its burden to prove these constitutional errors were harmless beyond a reasonable doubt.

Although the state may point out in response that both counsel argued their respective theories in closing, a chance to argue does not cure erroneous instructions.<sup>49</sup> Pouncy; Wanrow, supra. This Court should reverse the commitment order.

3. INDEFINITE CIVIL COMMITMENT WITHOUT A FINDING OF CURRENT DANGEROUSNESS, AND DANGEROUSNESS IN THE NEAR FUTURE, VIOLATES DUE PROCESS.

Hosier argued due process required narrowly tailoring the risk prediction to the foreseeable future. The court erred by refusing to grant the defense request. CP 38-43; 1RP 42-44.

Due process requires the state to establish a person is mentally ill and dangerous before the state may commit that person. The state may hold the person only so long as he remains dangerous. U.S. Const. amend. 14; Const. art. 1, § 3; Foucha v. Louisiana, 504 U.S. at 80; In re Detention of Albrecht, 147 Wn.2d 1, 7, 51 P.3d 73

(2002). Because the jury was not required to limit the risk prediction to the foreseeable future, the state failed to prove current dangerousness and the commitment order violates due process.<sup>50</sup>

See generally, In re Detention of Moore, 167 Wn.2d 113, 127-29, 216 P.3d 1015 (2009) (Sanders, J., dissenting).<sup>51</sup>

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<sup>49</sup> The jury was instructed to disregard arguments and statements of counsel that were not supported by the law as explained by the trial court. CP 258 (Instruction 1).

<sup>50</sup> As shown in argument 1, the error is particularly egregious here, where the state's actuarial evidence failed to account for Hosier's advanced age. It took 15 years before Hosier would reach a statistical probability above 50% on the Static-99 (even with the improperly inflated base rates). At that time Hosier would be 75 years old. The state failed to establish present risk above the 50% threshold, particularly where he faced six years of intense community supervision if released.

<sup>51</sup> Hosier recognizes the Moore majority rejected the due process claim; he raises the issue to exhaust it for possible federal review.

D. CONCLUSION

For the reasons stated in argument 1, this Court should vacate the commitment order and dismiss the petition. For the reasons stated in arguments 2 and 3, this Court should vacate the order and remand for a fair trial.

DATED this 15<sup>th</sup> day of March, 2010.

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.



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ERIC BROMAN, WSBA 18487

OID No. 91051

Attorneys for Appellant

# APPENDIX A

No. 62508-0-1

INSTRUCTION NO. 6

To establish that the respondent, Richard Hosier, is a sexually violent predator, the State must prove each of the following elements beyond a reasonable doubt:

- (1) That Richard Hosier has been convicted of a crime of sexual violence; and
- (2) That Richard Hosier suffers from a mental abnormality and/or a personality disorder which causes serious difficulty in controlling his sexually violent behavior; and
- (3) That this mental abnormality and/or personality disorder makes Richard Hosier likely to engage in predatory acts of sexual violence if not confined to a secure facility.

If you find from the evidence that each of these elements has been proven beyond a reasonable doubt, then it will be your duty to return a verdict that Richard Hosier is a sexually violent predator.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one or more of these elements, then it will be your duty to return a verdict that Richard Hosier is not a sexually violent predator.

INSTRUCTION NO. 7

"Mental Abnormality" means a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit criminal sexual acts to a degree that makes the person a menace to the health and safety of others.

"Volitional capacity" means the power or capability to choose or decide.

INSTRUCTION NO. 8

“Likely to engage in predatory acts of sexual violence if not confined in a secure facility” means that the person more probably than not will engage in such acts if released unconditionally from detention in this proceeding.

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

INSTRUCTION NO. \_\_\_\_\_

“Likely to engage in predatory acts of sexual violence if not confined in a secure facility” means that the person more probably than not will engage in such acts if released unconditionally from detention in this proceeding.

“More probably than not” represents a statistical probability greater than 50%. If the State does not prove beyond a reasonable doubt that Mr. Hosier is more than 50% likely to engage in predatory acts of sexual violence if not confined in a secure facility, then Mr. Hosier does not qualify for this civil commitment as a sexually violent predator.

In determining whether the respondent is “likely to engage in predatory acts of sexual violence if not confined to a secure facility,” you may consider all evidence that bears on the issue.

In considering placement conditions and/or voluntary treatment options, however, you may consider only placement conditions and treatment options that would exist if the respondent is released from detention in this proceeding under his current circumstances.

Authority: WPIC 365.14 (revised); *In Re the Detention of Brooks*, 145 Wn.2d 275

(2001).

# APPENDIX B

No. 62508-0-1

**FILED**

02-26-03

PAM L. DANIELS  
COUNTY CLERK  
SNOHOMISH CO. WASH.

SUPERIOR COURT OF WASHINGTON  
FOR SNOHOMISH COUNTY

THE STATE OF WASHINGTON,

Plaintiff,

v.

HOSIER, RICHARD LEON

Defendant.

No. 02-1-01739-2

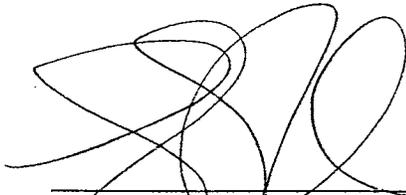
APPENDIX A  
ADDITIONAL CONDITIONS  
OF SENTENCE

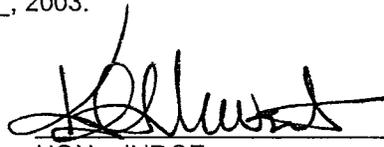
ADDITIONAL CONDITIONS OF COMMUNITY PLACEMENT:

1. Obey all laws.
2. Have no direct or indirect contact with any victim named in the discovery material.
3. Pay the costs of crime related counseling required by any victim named in the discovery material.
4. Do not initiate or prolong contact with minor children.
5. Do not seek employment or volunteer positions which place you in contact with or control over minor children.
6. Do not frequent areas where minor children are known to congregate, as defined by the supervising Community Corrections Officer.
7. Do not possess or access pornographic materials, as directed by the supervising Community Corrections Officer.
8. Do not date women or form relationships with families who have minor children, as directed by the supervising Community Corrections Officer.
9. Do not remain overnight in a residence where minor children live or are spending the night.
10. Do not possess or consume alcohol and do not frequent establishments where alcohol is the chief commodity for sale.

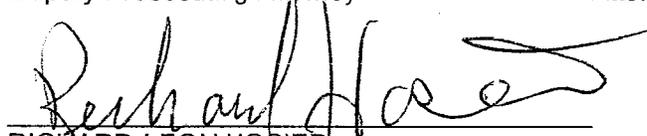
11. Do not possess or consume controlled substances unless you have a legally issued prescription.
12. Do not associate with known users or sellers of illegal drugs.
13. Do not possess drug paraphernalia.
14. Stay out of drug areas, as defined in writing by the supervising Community Corrections Officer.
15. Participate in offense related counseling programs, to include sexual deviancy treatment, substance abuse treatment and Department of Corrections sponsored offender groups, as directed by the supervising Community Corrections Officer.
16. Participate in urinalysis, breathalyzer, plethysmograph and polygraph examinations as directed by the supervising Community Corrections Officer, to ensure conditions of community custody.
17. Your residence, living arrangements and employment must be approved by the supervising Community Corrections Officer.

Dated this 25<sup>th</sup> day of February, 2003.

  
\_\_\_\_\_  
LISA D. PAUL, #16064  
Deputy Prosecuting Attorney

  
\_\_\_\_\_  
HON., JUDGE

  
\_\_\_\_\_  
NEAL S. FRIEDMAN, #16768  
Attorney for Defendant

  
\_\_\_\_\_  
RICHARD LEON HOSIER  
Defendant

file

Respondents Exhibit

101

SUPERIOR COURT OF WASHINGTON  
FOR SNOHOMISH COUNTY

THE STATE OF WASHINGTON,

Plaintiff,

No. 02-1-01739-2

v.

JUDGMENT & SENTENCE  
(Gross Misdemeanor)

HOSIER, RICHARD LEON

Defendant.

Aliases: RICHARD T HOSSIER, RICHARD LEON LARQUE,

The above-named defendant was found guilty on 2-4-03 by jury verdict of:

Count No. 3	Crime: Attempted Communication With A Minor For Immoral Purposes	Count 4 Harassment, Count 5 Harassment,	RCW 9.68A.090	Date of Crime: 07/15/02
Count No. 4	Crime: Harrassment	RCW 9A.46.020	Date of Crime: 07/29/02	
Count No. 5	Crime: Harrassment	RCW 9A.46.020	Date of Crime: 07/31/01	

IT IS ADJUDGED that the defendant is guilty of the above crime(s) and that the defendant be sentenced to imprisonment in the Snohomish County Jail for a maximum term of 365 days on Count No. 3; 365 days on Count No. 4; 365 days on Count No. 5.

IT IS ORDERED that the execution of 365 days of this sentence <sup>on each count</sup> is ( ) deferred pursuant to RCW 9.95.210 ( ) suspended pursuant to RCW 9.92.060 upon the following conditions:

- ( ) The defendant shall commence serving the portion of the sentence not suspended or deferred ( ) immediately ( ) no later than the \_\_\_\_\_ day of \_\_\_\_\_, 2003, at \_\_\_\_\_ .m.

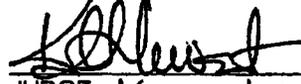
- (a) ( ) The defendant shall receive credit for \_\_\_\_\_ days served.
  - (b) ( ) If eligible, and subject to the rules and regulations of the program, the defendant may participate in the ( ) work release program ( ) home detention program.
2.  The defendant shall report to the Department of Corrections and shall be under the charge of a community corrections officer designated by that department and follow implicitly the instructions of that department and rules and regulations promulgated by the department during the term of probation.
3.  The termination of probation shall be set at 24 months from the date of this order <sup>on each count, to</sup> however, the court shall have the authority at any time prior to the entry of an order terminating probation to revoke, modify, or change the terms and conditions of this sentence and to extend the period of probation. <sup>you</sup> <sub>(total of 6 years probation).</sub> <sup>consecutive</sup>
4.  The defendant shall not commit any law violations.
5. ( ) The defendant shall enter and successfully complete any ( ) inpatient ( ) outpatient treatment and therapy programs as directed by the defendant's community corrections officer.
6. ( ) The defendant shall pay to the clerk of this court:
- (a) ( ) \$ \_\_\_\_\_ court costs, plus any costs determined after this date as established by separate order of this court;
  - (b) ( ) Victim assessment, \$100.00 Prior to June 6, 1996. \$500.00 on or after June 6, 1996. *imposed under felony counts.*
  - (c) ( ) \$ \_\_\_\_\_ total amount restitution (with credit for amounts paid by co-defendants). The amount and recipient(s) of the restitution are as established by separate order of this court. *Kee*
  - (d) ( ) \$667/727 recoupment for attorney's fees;
  - (e) ( ) \$ \_\_\_\_\_ fine;
  - (f) ( ) \$ \_\_\_\_\_ Dept. Drug enforcement fund;
  - (g) ( ) \$125.00 Washington State Toxicology Laboratory Fee. [ ] All or part suspended due to inability to pay. RCW 46.61.5054(1).
7. The above payments shall be made in the manner established by Local Rule 7.2(f) and according to the following terms:
- ( ) not less than \$ \_\_\_\_\_ per month,
  - ( ) on a schedule established by the defendant's community corrections officer, to be paid within \_\_\_\_\_ months of ( ) this date ( ) release from confinement.
8.  The defendant shall be prohibited from having any contact, directly or indirectly, with M.S. (11-10-83) for a period of 6 years.

9. (X) The defendant, having been convicted of a sexual offense, a drug offense associated with the use of hypodermic needles, or a prostitution related offense, shall cooperate with the Snohomish County Health District in conducting a test for the presence of human immunodeficiency virus. The defendant, if out of custody, shall report to the HIV/AIDS Program Office at 2722 Colby, Suite 333, Everett, Washington, within one hour of this order to arrange for the test.

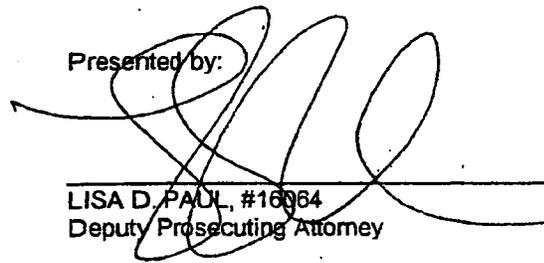
10. ( ) If this is a crime enumerated in RCW 9.41.040 which makes you ineligible to possess a firearm, you must surrender any concealed pistol license at this time, if you have not already done so. (Pursuant to RCW 9.41.047(1), the Judge shall read this section to the defendant in open court).

11. (X) Conditions as set forth in  
attached Appendix A.  
Sentence is consecutive to felony  
sentence in this case.

DONE IN OPEN COURT this 25<sup>th</sup> day of February, 2003.

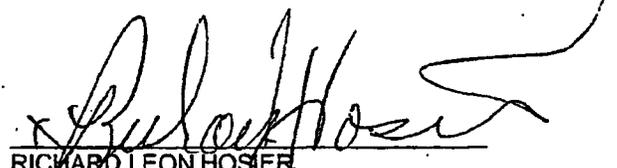
  
JUDGE Kenneth L. Cowser

Presented by:

  
LISA D. PAUL, #16064  
Deputy Prosecuting Attorney

Approved as to form:

  
NEAL S. FRIEDMAN, #16768  
Attorney for Defendant

  
RICHARD LEON HOSIER  
Defendant

DOC  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
Defendant's current address  
Telephone # \_\_\_\_\_

\*\*\*\*\*  
Defendant Information  
Address: 10915 SMOKEY POINT, MARYSVILLE, WA 98290  
HT: 6' DOB: 07/03/1947 SID: WA12295224  
WT: 180 SEX: M FBI: 41939G  
EYES: Blue RACE: White DOC: 272909  
HAIR: Gray or Partially Gray DOL: HOSIE-RL-539MC, WA  
\*\*\*\*\*

ORDER OF COMMITMENT

THE STATE OF WASHINGTON to the Department of Corrections of the County of Snohomish, State of Washington:

WHEREAS, RICHARD LEON HOSIER, has been convicted of the crime(s) of Count 3 Attempted Communication With A Minor For Immoral Purposes, Count 4 Harassment, Count 5 Harassment, and judgment has been pronounced against the defendant that punishment be by imprisonment in the Snohomish County Department of Corrections for a period of time as specified in the attached certified copy of Judgment and Sentence, Now, Therefore,

THIS IS TO COMMAND YOU, the Snohomish County Department of Corrections, to detain the defendant pursuant to the terms of the Judgment and Sentence.

FURTHER, this is to command you that should the Judgment and Sentence authorize the release of the defendant to a Work/ Training Release Facility or Program, or to any other program or for some specific purpose, this Order of Commitment shall constitute authority for you to release the defendant for that program or purpose, subject to any additional requirements of that program or purpose.

WITNESS, the Honorable Kenneth L. Cowser, Judge of Snohomish County Superior Court and the seal thereof, this 25<sup>th</sup> day of February, 2003.

Pam L. Daniels  
Clerk of the Superior Court

By: *Nevean Prole*  
Deputy Clerk

SUPERIOR COURT OF WASHINGTON  
FOR SNOHOMISH COUNTY

THE STATE OF WASHINGTON,

Plaintiff,

v.

HOSIER, RICHARD LEON

Defendant.

No. 02-1-01739-2

APPENDIX A  
ADDITIONAL CONDITIONS  
OF SENTENCE

ADDITIONAL CONDITIONS OF COMMUNITY PLACEMENT:

1. Obey all laws.
2. Have no direct or indirect contact with any victim named in the discovery material.
3. Pay the costs of crime related counseling required by any victim named in the discovery material.
4. Do not initiate or prolong contact with minor children.
5. Do not seek employment or volunteer positions which place you in contact with or control over minor children.
6. Do not frequent areas where minor children are known to congregate, as defined by the supervising Community Corrections Officer.
7. Do not possess or access pornographic materials, as directed by the supervising Community Corrections Officer.
8. Do not date women or form relationships with families who have minor children, as directed by the supervising Community Corrections Officer.
9. Do not remain overnight in a residence where minor children live or are spending the night.
10. Do not possess or consume alcohol and do not frequent establishments where alcohol is the chief commodity for sale.

Additional Conditions of Sentence Page 1 of 2  
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PA#02F03160

Snohomish County Prosecuting Attorney  
S:\forms\felony\sau\sent\addcon.sen  
SAU/LDP/sah

11. Do not possess or consume controlled substances unless you have a legally issued prescription.
12. Do not associate with known users or sellers of illegal drugs.
13. Do not possess drug paraphernalia.
14. Stay out of drug areas, as defined in writing by the supervising Community Corrections Officer.
15. Participate in offense related counseling programs, to include sexual deviancy treatment, substance abuse treatment and Department of Corrections sponsored offender groups, as directed by the supervising Community Corrections Officer.
16. Participate in urinalysis, breathalyzer, plethysmograph and polygraph examinations as directed by the supervising Community Corrections Officer, to ensure conditions of community custody.
17. Your residence, living arrangements and employment must be approved by the supervising Community Corrections Officer.

Dated this 25<sup>th</sup> day of February, 2003.



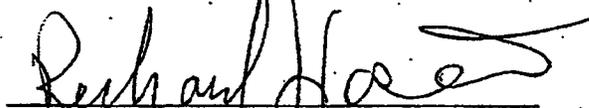
LISA D. PAUL, #16064  
Deputy Prosecuting Attorney



HON., JUDGE



NEAL S. FRIEDMAN, #16788  
Attorney for Defendant



RICHARD LEON HOSIER  
Defendant

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

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In re Detention of Richard Hosier,     )  
  )  
STATE OF WASHINGTON,                    )  
  )  
      Respondent,                            )  
  )  
                                  v.                )  
  )  
RICHARD HOSIER,                            )  
  )  
      Appellant.                             )

COA NO. 62508-0-1

2010 MAR 15 PM 4:04  
RECORDED & INDEXED  
FILED

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 15<sup>TH</sup> DAY OF MARCH, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X]     RICHARD HOSIER  
       SPECIAL COMMITMENT CENTER  
       P.O. BOX 88600  
       STEILACOOM, WA 98388

**SIGNED** IN SEATTLE WASHINGTON, THIS 15<sup>TH</sup> DAY OF MARCH, 2010.

x Patrick Mayovsky