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COURT OF APPEALS  
DIVISION ONE

NOV 13 2013

NO. 69844-3

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**COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON**

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In re the Detention of Michael Bargas,

MICHAEL BARGAS,

Appellant,

v.

STATE OF WASHINGTON,

Respondent.

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**BRIEF OF RESPONDENT**

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## SUMMARY OF ARGUMENT

Following a bench trial, the court found Bargas to have Antisocial Personality Disorder, Severe Psychopathy, Alcohol Abuse, Polysubstance Dependence, and deviant sexual arousal. The court found Bargas to meet the criteria as a Sexually Violent Predator.

Bargas now argues that he only commits sex offenses when he is intoxicated. From that premise, he argues that his substance abuse is not a legally sufficient legal basis for his commitment, and he argues that the sex offender treatment at the Special Commitment Center is inadequate to meet his treatment needs.

Although he has not challenged any of the Findings of Fact, the evidence amply supports the trial court's Findings of Fact. The Findings of Fact support the Conclusions of Law. Finally, the existing treatment at the SCC, designed to address sexual deviancy, sex offending and substance abuse, is constitutionally adequate to address Bargas' treatment needs.

### I. ISSUES

- A. **Does the Evidence Support the Trial Court's Findings That Bargas' Antisocial Personality Disorder, Alcohol Abuse, Polysubstance Dependence, Severe Psychopathy and Deviant Sexual Arousal Cause Him Serious Difficulty Controlling His Sexually Violent behavior?**

- B. Does the Evidence Support the Trial Court's Finding, and Does the Court's Finding Support the Conclusion That Bargas is Likely to Commit a Predatory Act of Sexual Violence if Not Confined to a Secure Facility?**
- C. Does Confinement of Bargas at the Special Commitment Center, Where Sex Offender Treatment is Provided to Residents, Violate Bargas' Right to Due Process When He Has Been Found to Be a Sexually Violent Predator?**

## II. FACTS

On February 17, 2011, the State of Washington filed a Petition alleging that Michael Bargas was a Sexually Violent Predator. CP 1-2. Bench trial commenced on December 12, 2012, in Skagit County Superior Court, the Honorable John Meyer presiding. RP V. 2.<sup>1</sup>

Bargas has two prior convictions for sexually violent offenses. He was convicted by a jury in Spokane County Superior Court on May 1, 1987 of Rape in the First Degree. Exhibit 11. According to the records, the case involved the burglary and forcible rape of a 38-year-old female, who was not known to Bargas. RP V. 3 p. 56-7. On June 16, 1987, the court sentenced Bargas to 51 months incarceration. Exhibit 11. Bargas was released in May of 1990. RP V.5 p. 94-5.

Four months after his release from prison, Bargas raped another woman. RP V. 3 p. 59; V. 5 p. 95. Bargas was charged with Rape in the

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<sup>1</sup> State of Washington will adopt the Appellant's manner of citing to the record, referring to the report of proceedings by volume number and page number.



Second Degree and he plead guilty to an amended charge of Assault in the Third Degree with Sexual Motivation. Exhibit 18; RP V. 5 p. 95. The court sentenced Bargas to 12 months of confinement and community supervision. Exhibit 18.

After his release from jail in early 1991, Bargas moved to Las Vegas. CP 122. He returned to Skagit County and shortly thereafter he sexually assaulted a nine-year-old female. On January 23, 1997, Bargas plead guilty to Child Molestation in the First Degree in Skagit County Superior Court. Exhibit 24. On March 27, 1997, the court sentenced Bargas to 171 months of incarceration. *Id.*

Dr. Henry Richards, a forensic psychologist with extensive experience in the evaluation, diagnosis, and treatment of sex offenders, conducted an evaluation of Bargas to determine whether, in his opinion, Bargas met the criteria of a sexually violent predator. RP V. 3 p. 36-43; 46. Dr. Richards reviewed several thousand pages of records including police reports, legal documents, health information, previous psychological evaluations, and materials from the Department of Corrections (DOC) relevant to Bargas' incarceration, as well as conducting an in-person interview of Bargas. *Id.* at 46; 48-9. The records he reviewed are typically relied upon by professionals in SVP cases. *Id.* at 47.

Dr. Richards testified that in his opinion, Bargas suffers Antisocial Personality Disorder, Alcohol Abuse (perhaps dependence), Polysubstance Dependence, Severe Psychopathy, and Bargas has deviant sexual arousal. RP V. 3 p. 80; 86; 92; 94; 112; V. 4 p. 97. In his opinion, Bargas' Antisocial Personality Disorder constitutes both a mental abnormality and a personality disorder under RCW 71.09. RP V. 3 p 80; 93. Dr. Richards also testified that he determined Bargas' Alcohol Abuse and Polysubstance Dependence constitute a mental abnormality. *Id.* at 80. Dr. Richards testified Bargas' diagnoses, which constitute mental abnormalities and personality disorders, cause him serious difficulty controlling his sexually violent behavior. *Id.* at 79-80; 93; 142-3.

Dr. Richards explained that he evaluated Bargas' ability to control his sexually violent behavior by looking at his disorders, the context of his life and personality, and how the disorders fit into his offending behaviors. RP. V 3 p. 142. That evaluation led Dr. Richards to determine that Bargas' personality disorders or mental abnormalities causes him serious difficulty controlling his behavior. *Id.* at 142. Dr. Richards described "the most basic contextual problem is [Bargas'] personality disorder, Antisocial Personality Disorder with severe psychopathy." *Id.* at 142-43. Dr. Richards testified that Bargas' antisocial personality disorder and severe psychopathy drives his sexual

opportunism. *Id.* at 143. Dr. Richards testified that Bargas was the type of rapist who was motivated by antisociality. He said, for Bargas, “antisociality is enough, just enough without substance abuse, to motivate a whole group of rapist type.” *Id.* at 151. Dr. Richards testified that severe psychopathy further described Bargas’ antisocial personality disorder. *Id.* at 95. Dr. Richards described that there are significant brain differences, psychophysiological reaction differences for psychopaths. *Id.* at 96. He went on to testify that psychopathy is “more defined as biological neurological entity that has a social psychological expression.” *Id.* at 96-97.

Dr. Richards explained that Bargas’ deviant sexual arousal in combination with his severe psychopathy, actually makes the psychopathy more meaningful in terms of predicting sexual offending. RP V. 4 p. 97. Dr. Richards described Bargas as an opportunistic psychopathic rapist. RP V. 3 p. 148. Dr. Richards testified that there is a correlation between psychopathy and rape. *Id.* at 151. Dr. Richards testified that some studies show as much as six times increase for re-offending when a person has both deviant sexual arousal and high psychopathy like Bargas. RP V. 4 p. 97.

Dr. Richards testified that given the diagnoses, and in light of the way his diagnoses manifest themselves, Bargas is more likely than not to

reoffend in a sexually violent way. RP V. 3 p. 152. Dr. Richards evaluated Bargas' risk to re-offend using various actuarial tools, clinical factors, dynamic risk factors and lifestyle and personality patterns. *Id.* at 152-53. Dr. Richards opined that Bargas is likely to commit predatory acts of sexual violence if not confined to a secure facility. *Id.* at 152.

Dr. Fisher, an expert retained by Bargas, testified that he also diagnosed Bargas with a "couple of mental abnormalities and a personality disorder." RP V. 4 p. 177. Specifically, Dr. Fisher testified that Bargas had a mental abnormality of Polysubstance Dependence, in full sustained remission in a controlled environment. *Id.* Dr. Fisher also testified that Bargas had Antisocial Personality Disorder. *Id.* at 178-79. Although Dr. Fisher did not want to admit Bargas had deviant sexual arousal, he did admit that Bargas had demonstrated sexual arousal while committing deviant behaviors, including during non-consensual intercourse. RP V.5 p. 135-38. Bargas' own deposition testimony was submitted as evidence and he denied any specific memory of committing the sexual offenses. CP 91; 110-11.

At the conclusion of the trial, the court entered Findings of Fact and Conclusions of Law. CP 454-59. The trial court specifically found that "Dr. Richards' credentials and experience far exceed those of Dr. Fisher." CP 456. The trial court found that Dr. Richards was more

knowledgeable and experienced in the areas of sexual offenses, psychopathy and addiction than Dr. Fisher. *Id.* The trial court also found that Bargas' had made inconsistent statements about his sexual offending, that his testimony was not credible, that he had avoided taking responsibility for his actions, and that he has refused to acknowledge he has sexual deviancy issues. CP 455.

The trial court found that Bargas' diagnoses cause him serious difficulty controlling his sexually violent behavior. CP 457. The trial court found that Bargas was likely to engage in predatory acts of sexual violence if not confined to a secure facility. CP 458. Accordingly, the trial court concluded beyond a reasonable doubt that Bargas was a Sexually Violent Predator. CP 459.

### III. ARGUMENT

#### A. **The Evidence Supports the Trial Court's Findings That Bargas' Antisocial Personality Disorder, Severe Psychopathy, Alcohol Abuse, Polysubstance Dependence and Deviant Sexual Arousal Cause Him Serious Difficulty Controlling His Sexually Violent behavior.**

##### 1. **The Trial Court's Findings of Fact Are Verities**

Bargas has not specifically assigned error to any of the trial court's findings of fact as required by Rule of Appellate Procedure 10.3(a)(4). When findings of fact have not been challenged on appeal, the findings of fact are verities. *e.g. State v. Truong*, 168 Wn. App. 529, 277 P.3d 74, 77

*rev. denied*, 175 Wn. 2d 1020, 290 P.3d 994 (2012) *citing State v. O'Neill*, 148 Wash.2d 564, 571, 62 P.3d 489 (2003). Failure to challenge findings of fact on appeal is not a mere technical flaw in the appeal. *State v. Ross*, 141 Wn. 2d 304, 311, 4 P.3d 130, 134 (2000) *citing Olson*, 126 Wn.2d at 323, 893 P.2d 629 (1995). When a trial court's findings have not been challenged, the reviewing court is limited to determining whether the unchallenged findings of fact support the conclusions of law. *State v. Carlson*, 143 Wn. App. 507, 519, 178 P.3d 371, 376 (2008) *citing Dorsey v. King County*, 51 Wn. App. 664, 668–69, 754 P.2d 1255, *review denied*, 111 Wn.2d 1022 (1988); see also *State v. Schwab*, 141 Wn. App. 85, 91, 167 P.3d 1225, 1228 (2007) *citing State v. Levy*, 156 Wn.2d 709, 733, 132 P.3d 1076 (2006).

Because Bargas did not challenge any of the trial court's Findings of Fact, the Findings of Fact are verities. Accordingly, this court's review is limited to determining whether the Findings of Fact support the Conclusions of Law.

**2. Substantial Evidence Supports the Trial Court's Findings and Conclusions That Bargas Has a Mental Abnormality and Personality Disorder That Causes Him Serious Difficulty Controlling His Sexually Violent Behavior.**

Here, Bargas argues generally that the State failed to present substantial evidence that Mr. Bargas' diagnoses render "him so unable to

control his sexual impulses that he must be confined to a secure facility.”<sup>2</sup> Appellant’s Brief at 7; 18. Even assuming Bargas had appropriately assigned error to the court’s findings regarding his diagnoses and volitional control, substantial evidence supports the trial court’s findings and his argument fails.

**a. The Trial Court’s Findings of Fact are Supported by the Evidence.**

An appellate court is not entitled to weigh either the evidence or the credibility of witnesses. *Bartel v. Zuckriegel*, 112 Wn. App. 55, 47 P.3d 581, 584 (2002), quoting *In re Welfare of Sego*, 82 Wash.2d 736, 739–40, 513 P.2d 831 (1973). “It is the trial court that ‘must determine disputed facts by weighing the credibility of witnesses’ testimony.” *Id.* at 62, quoting *Johnson v. Dep’t of Licensing*, 71 Wn. App. 326, 332, 858 P.2d 1112 (1993). “Even where the evidence is conflicting, we need

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<sup>2</sup> “Unable to control sexual impulses” is a misstatement of the legal standard. An SVP commitment must be supported by proof beyond a reasonable doubt of serious difficulty in controlling behavior. *In re Detention of Thorell*, 149 Wn.2d 724, 745, 72 P.3d 708 (2003).

However, the jury’s finding that an SVP suffers from a mental illness, defined under our statute as a ‘mental abnormality’ or ‘personality disorder,’ coupled with the person’s history of sexually predatory acts, must support the conclusion that the person has serious difficulty controlling behavior, although *this evidence need not rise to the level of demonstrating the person is completely unable to control his or her behavior.*

*Id.* at 742 (emphasis added).

determine only whether the evidence most favorable to the respondent (in this case the State) supports the challenged findings.” *Id.* at 62, quoting *Miller v. Badgley*, 51 Wn. App. 285, 290, 753 P.2d 530 (1988) (citing *Thomas v. Ruddell Lease-Sales, Inc.*, 43 Wn. App. 208, 212, 716 P.2d 911 (1986)).

In Bargas’ case, the trial court entered the following unchallenged

Findings of Fact:

13. Respondent suffers from alcohol abuse (possibly dependence), poly-substance dependence, and anti-social personality disorder with an extreme level of psychopathy. Respondent has deviant sexual arousal.

14. Respondent’s mental disorders are acquired or congenital conditions that affect Respondent’s emotional and volitional capacity and predispose him to commit sexual acts to a degree constituting him a menace to the public health and safety.

15. The combination of Respondent’s alcohol abuse, poly-substance dependence, anti-social personality, severe psychopathy and deviant sexual arousal cause Respondent serious difficulty controlling his sexually violent behavior.

During the trial, Dr. Richards testified that in his opinion, Bargas suffers from Antisocial Personality Disorder (RP V. 3 p. 80; 92; 94; 141), Alcohol Abuse (perhaps dependence) (*Id.* at 80; 82; 84-5; 141) Polysubstance Dependence (*Id.* at 80; 86; 141), Severe Psychopathy (*Id.* at 80; 112), and Bargas has deviant sexual arousal. RP V. 4 p. 97. The testimony of Dr. Richards supports the trial court’s finding. This court



must give deference to the trial court that had the opportunity to observe the witness and weigh the credibility of the testimony. Even assuming Bargas had challenged this finding of fact, substantial evidence supports the finding.

Dr. Richards testified that Bargas' Antisocial Personality Disorder constitutes both a mental abnormality and a personality disorder under RCW 71.09. RP V. 3 p. 80; 93. Dr. Richards also testified that Bargas' Alcohol Abuse and Polysubstance Dependence constituted mental abnormalities. *Id.* at 80; 93. Dr. Richards described that his assessment of Bargas' mental abnormalities was based on whether Bargas had a disorder that impairs his volition. *Id.* at 79-80. Dr. Richards described that he examined Bargas' disorders and the context of his life and personality to determine whether his disorders contribute to a significant defect or deficit that leads to sexual offending. *Id.* at 142. Dr. Richards testified that Bargas' diagnoses of Antisocial Personality Disorder with Severe Psychopathy, Alcohol Abuse and Drug Dependence cause him serious difficulty controlling his sexually violent behavior. *Id.* at 80; 93; 141-2.

When questioned about the relationship between Bargas' disorder and lack of volitional control, Dr. Richards testified that, "[T]he most basic contextual problem is personality disorder, Antisocial Personality Disorder with severe psychopathy. That's really the way I understand

the—that's the context. That's the big picture." RP V. 3 p. 142-3. Dr. Richards went on to say that if Bargas did not have that disorder, we would not be seeing multiple sex offenses. *Id.* at 142.

Dr. Richards testified that Bargas' antisocial personality disorder and severe psychopathy drives his sexual opportunism. RP V. 3 p. 143. Dr. Richards testified that Bargas was the type of rapist who was motivated by antisociality. He said, for Bargas, "anti-sociality is enough, just enough without substance abuse, to motivate a whole group of rapist type." *Id.* at 151. Dr. Richards testified that psychopathy further described Bargas' antisocial personality disorder. *Id.* at 95. Dr. Richards described that there are significant brain differences, psychophysiological reaction differences for psychopaths. *Id.* at 96. He went on to testify that psychopathy is "more defined as biological neurological entity that has a social psychological expression." *Id.* at 96-97.

Dr. Richards explained that Bargas' deviant sexual arousal in combination with his psychopathy, actually makes the psychopathy more meaningful in terms of predicting sexual offending. RP V. 4 p. 97. Dr. Richards described Bargas as an opportunistic psychopathic rapist. RP V. 3 pg. 148. Dr. Richards testified that there is a correlation between psychopathy and rape. *Id.* at 151. Dr. Richards testified that some studies show as much as six times increase for re-offending when a person has

both deviant sexual arousal and high psychopathy like Bargas. RP V. 4 p. 97. Dr. Richards testified that because of Bargas' personality disorder, psychopathy, deviant sexual arousal and substance abuse/dependence, he reoffends in a sexual way. *Id.* at 143-4.

The testimony of Dr. Richards supports the trial court's Findings of Fact. Bargas has a constellation of diagnosed disorders and/or conditions, including deviant sexual arousal. The trial court found that the combination caused Bargas serious difficulty controlling his sexually violent behavior. CP 457. This court must give deference to the trial court that had the opportunity to observe the witness and weigh the credibility of the testimony. In fact, the trial court specifically found that Dr. Richards' credentials far exceed those of Dr. Fisher, and Dr. Richards was the more knowledgeable and experienced witness in the areas of addiction, sexual offenses and psychopathy.<sup>3</sup> Even assuming Bargas had challenged Findings of Fact 13, 14 and 15, substantial evidence supports the findings and his argument fails.

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<sup>3</sup> The trial court entered the following unchallenged finding of fact:

10. Henry Richards, Ph.D, testified on behalf of the State. Christopher Fisher, Psy. D., testified on behalf of Respondent. Dr. Richards' credentials and experience far exceed those of Dr. Fisher. Dr. Richards is more knowledgeable and experienced in the areas of addiction, sexual offenses, and psychopathy, including the scoring of the Hare Psychopathy Check List - Revised.

**b. The Conclusion That Bargas is an SVP is Not Based Solely on His Alcohol and Drug Dependence**

Bargas argues that because all his sex offenses were apparently committed while he was intoxicated on alcohol or drugs, that if he were to abstain from using drugs and alcohol, he would no longer be at risk of re-offending.<sup>4</sup> This argument not only mischaracterizes the evidence, but attempts to dissect the diagnoses and then reframe the issue as one of merely substance abuse rather than antisociality, psychopathy and sexual deviance.

The trial court specifically found that Bargas' "combination of alcohol abuse, poly-substance dependence, anti-social personality, severe psychopathy and deviant sexual arousal cause [him] serious difficulty controlling his sexually violent behavior." CP 457 (Finding of Fact 15 addressed above). Dr. Richards acknowledged that there were a number of risk factors for Bargas' sexually reoffending in the future, including his drug dependence and alcohol abuse (RP V. 3 p. 143-4), which is accurately reflected in the trial court's finding.

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<sup>4</sup> In Bargas' deposition, which was introduced at trial, he was asked what types of things would make it more likely that he would commit a sex offense. He answered, "If I decide to go back to drinking, if I decided to go back to drugging, that's – that would, that would probably make me act out. It's not my choice to do that." CP 135-36.

Further, the trial court rejected this very argument at trial and found that although Bargas likes to see himself as someone who offends because of substance abuse, he has refused to acknowledge his own sexual deviancy.

The court entered the following unchallenged Finding of Fact:

7. Respondent lacks credibility. He has made inconsistent statements regarding his sexual offending. Respondent sees himself as a person who commits crimes of opportunity when he is under the influence of drugs and alcohol. Respondent has avoided taking responsibility for his actions and he has refused to acknowledge that he has sexual deviancy issues, despite his history of sexually offending.

CP. at 455

Bargas now argues that if the substance dependence is subtracted from the equation, there would be a different result. Specifically he argues the experts agree that “Bargas’ risk for re-offense stems from his substance use and that if he did not use substances, he was unlikely to commit sexually violent offenses in the future.” Appellant’s Brief at 25. This assertion mischaracterizes the evidence.

Bargas relies on Dr. Richards’ pretrial deposition to support his assertion. However, when specifically asked at trial, “If you take alcohol abuse and drug dependency completely out of the consideration you said it reduces his risk. Is that going to take it below 50 percent?” Dr. Richards answered, “I have a hard time answering. It would be a different person. If

he had a different history he would be a different person. I would have a different opinion.” Dr. Richards went on to testify as follows:

If he were different it would be different. If you remove the drug and alcohol history and keep the offenses it might not change my opinion. In other words, the offenses are still there. And if I still see the antisocial personality disorder and other deficits I would still be more likely than not. But I’m assuming, you know, if everything was different, everything would be different. He wouldn’t have these offenses and we wouldn’t be sitting here.

RP V. 4. p 116-17.

Dr. Richards made it clear that there were a number of risk factors for Bargas, including alcohol abuse and drug dependency. RP V. 4 p. 116-17. He went on to describe that Bargas had a very serious and significant history of using drugs. *Id.* at 117-18. Dr. Richards testified that Bargas’ intensive drug history and his level of addiction combined with his Antisocial Personality Disorder make it extremely unlikely he would stop using drugs and alcohol without formal treatment. *Id.* at 118. Dr. Richards testified that the combination of his serious addiction coupled with his Antisocial Personality Disorder also meant that even if he did enter treatment, his treatment prognosis was not favorable. *Id.*

Finally, the trial court, which heard the evidence and was in the position to determine the credibility of witnesses and weight of the evidence, rejected the same argument Bargas is making here. During Bargas’ closing argument, the court inquired of his counsel as follows:

Court: Well, hasn't that been the theory of your case, that he never would have acted out sexually had it not been for the fact that he was under the influence of alcohol or drugs?

Counsel: Three times he was under the influence of alcohol and drugs and he acted out sexually. I would betcha that there was thirty thousand times -- well, maybe not thirty thousand. At least three thousand times that he was under the influence of alcohol and drugs and he did not act out. I guess our point is, is based on Dr. Richards' deposition testimony, and a little weaker here, but he is still indicating that if Mr. Bargas is not using drugs and alcohol, he is more likely than not to never reoffend. And that's important because -- here's why I think that's really important, is because if we're sending him to SCC, in theory we're sending him for sex offender treatment. But his problem is drugs and alcohol of which he's not going to get any help at the SCC.

RP V. 6 p. 112-13.

Substantial evidence introduced at trial supports the trial court's Findings of Fact. The trial court was in the position to evaluate the credibility of the witnesses and weigh the evidence. Bargas' argument that his commitment as a sexually violent predator is based on his alcohol and drug addiction was rejected by the trial court, is not supported by the evidence, and is without merit.

**c. The Trial Court's Findings of Fact Support the Conclusions of Law**

Bargas argues that his diagnoses of Antisocial Personality Disorder, substance abuse and psychopathy are insufficient to find beyond a reasonable doubt that he has a mental abnormality. Appellant's Brief

at 7. Bargas also argues that the evidence at trial was insufficient to demonstrate a connection between his diagnoses and serious difficulty controlling his behavior. *Id.* The trial court entered the following Conclusions of Law:

4. Beyond a reasonable doubt, Respondent has a mental abnormality as defined by RCW 71.09.020(8).
5. Beyond a reasonable doubt, Respondent has a personality disorder as defined by RCW 71.09.020(9).
6. Beyond a reasonable doubt, Respondent's mental abnormalities and personality disorders cause him serious difficulty controlling his sexually violent behavior.
7. Beyond a reasonable doubt, Respondent is likely to engage in predatory acts of sexual violence if not confined to a secure facility.

Dr. Richards' trial testimony supports the unchallenged Finding of Fact that the constellation of Bargas' diagnoses result in Bargas' serious difficulty controlling his sexually violent behavior. The court entered the following unchallenged Finding of Fact:

15. The combination of Respondent's alcohol abuse, polysubstance dependence, anti-social personality, severe psychopathy and deviant sexual arousal cause Respondent serious difficulty controlling his sexually violent behavior.

CP at 457. Even assuming Bargas had challenged this finding, it is supported by substantial evidence as previously discussed. The Findings of Fact, including this finding, support the trial court's Conclusions of



Law that Bargas' mental abnormalities and personality disorders cause his serious difficulty controlling his sexually violent behavior.

**d. Bargas' Diagnoses Constitute a Legally Sufficient Basis for His Commitment**

Bargas seems to argue that his Antisocial Personality Disorder, substance abuse and psychopathy do not constitute a legally sufficient basis for commitment. Appellant's Brief at 17-8. For instance, Bargas argues that Antisocial Personality Disorder does not include criteria involving volitional capacity or sexual deviancy. He cites experts who have found that "antisocial personality disorder alone . . . would almost never lead to a finding that an offender would be likely to reoffend." Appellant Brief at 12. He notes that one of the editors of the DSM-IV-TR has opined that Antisocial Personality Disorder should be used to support confinement only when it can be demonstrated that it leads to a specific pattern of sex offense." Appellant's Brief at 12.

Dr. Richards acknowledged that merely having a diagnosed disorder, without more information, is not sufficient to determine that the disorder constitutes a mental abnormality. RP V. 4 p. 59-60. Dr. Richards testified that he would also need to know how the disorder manifests itself. *Id.* For instance, Bargas' Antisocial Personality Disorder, Severe Psychopathy, Alcohol Abuse, Polysubstance Dependence and deviant

sexual arousal manifests itself by causing him to commit sexual offenses.

RP V. 3 p. 143-44.

Although Bargas actually has multiple diagnoses, there is no impediment to basing a commitment on Antisocial Personality Disorder alone. The SVP statute specifically provides for commitment based on the presence of a personality disorder. An SVP is defined as:

Any person who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality *or personality disorder* which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility.

RCW 71.09.020(18)(emphasis added). The legislature thus clearly intended that offenders suffering from personality disorders, as well as other mental abnormalities, be considered for commitment as an SVP.

The Washington Supreme Court has repeatedly rejected the argument that commitment cannot be based on an antisocial personality disorder alone. *See e.g. In re Young*, 122 Wn.2d 1, 38, fn. 12, 857 P.2d 989 (1993); *In re Thorell*, 149 Wn.2d at 728 (upholding commitments of Casper Ross and Ken Gordon, both of whom suffered from antisocial personality disorders and neither of whom was diagnosed with a paraphilia); *See also In re Sease*, 149 Wn. App. 66, 201 P.3d 1078 (2009) (upholding commitment of Michael Sease, who was diagnosed with an antisocial and borderline personality disorder, but not a paraphilia).

Appellate courts of other states have reached the same conclusion.<sup>5</sup> As noted by the *Thorell* Court, “there is no talismanic significance to a particular diagnosis of mental illness. No technical diagnosis of a particular ‘mental abnormality’ definitively renders an individual either an SVP or not...[I]t is a diagnosis of a mental abnormality, coupled with a history of sexual violence, which gives rise to a serious lack of control and creates the risk a person will likely commit acts of predatory sexual violence in the future.” *Thorell*, at 762.

Bargas also argues that the diagnosis of psychopathy does not provide a basis for commitment because Bargas’ psychopathy does not result in a sexual compulsion. Appellant’s Brief at 17. Dr. Richards, however, testified that Bargas’ combination of psychopathy and deviant sexual arousal put him at risk to re-offend. RP V. 3 p. 148; 151; RP V. 4 p.

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<sup>5</sup> See e.g. *In re Murrell*, 215 S.W.3d 96 (2007) (Missouri case upholding SVP civil commitment with no paraphilia diagnosis, ruling antisocial personality disorder (ASPD) is not too “imprecise” to serve as the basis for commitment); *In re Barnes*, 689 N.W.2d 455 (2004) (Iowa case upholding SVP civil commitment based on ASPD, finding that statute does not require the diagnosed condition to affect the emotional or volitional capacity of every person who is afflicted with the disorder); *In re Adams*, 223 Wis.2d 60, 588 N.W.2d 336 (1998) (Diagnosis of ASPD, uncoupled with any other mental disorders, may satisfy the “mental disorder” requirement of SVP statute); *In re G.R.H.*, 711 N.W.2d 587 (2006) (North Dakota case upholding SVP civil commitment based on ASPD); and *Hubbart v. Superior Court*, 19 Cal.4th 1138, 969 P.2d 584, 81 Cal.Rptr.2d 492 (1999) (The Supreme Court’s holding in *Foucha vs. Louisiana*, 504 U.S. 71, 112 S. Ct. 1780, 118 L. Ed. 2d 437, 1992 U.S (1992) does not limit the range of mental impairments that may lead to the permissible confinement of dangerous and disturbed individuals.).

97. But, as already noted, there is no talismanic significance to a particular diagnosis.

Here, the trial court found the combination of Bargas' diagnoses significant, and the evidence supports the findings. The trial court's Findings of Fact regarding Bargas' various diagnoses support the trial court's Conclusions of Law and constitute a legally sufficient basis for his commitment as a sexually violent predator.

**B. The Court's Findings of Fact Support the Conclusion That Bargas is Likely to Commit a Sexually Violent Offense if Not Confined to a Secure Facility.**

Bargas argues that because he showed "no deviant sexual interest" on a penile plethysmograph (PPG), and because his score on an actuarial tool placed him at a "low risk of reoffending," the State failed to prove he is likely to reoffend if not confined. Appellant's Brief at 18.

**1. The Trial Court's Findings of Fact Are Verities**

Bargas did not challenge the trial court's Findings of Fact regarding his risk to reoffend. Accordingly, the unchallenged Findings of Fact are verities. *e.g. Truong*, at 77; *O'Neill*, at 571. This court's review is limited to a determination of whether the unchallenged findings support the trial court's conclusion of law. *Bartel v. Zuckriegel*, at 55.

**a. Substantial Evidence Supports the Trial Court's Findings of Fact**

Even assuming that Bargas had challenged the Findings of Fact, substantial evidence supports the trial court's findings and Bargas' argument fails. The trial court entered the following Findings of Fact regarding Bargas' risk for re-offense:

16. The parties presented conflicting evidence about Respondent's risk of reoffending if released to the community. While Dr. Fisher attempted to reduce the concept of likelihood of reoffending to a purely mathematical formula, Dr. Richards recognized the need to consider many factors in assessing Respondent's risk of reoffending, including dynamic risk factors, clinical risk factors, actuarial risk and lifestyle factors, in reaching his opinion.

17. Both Dr. Richards and Dr. Fisher scored Respondent on the Static 99 R actuarial instrument. Dr. Richards' use and application of the Static 99R supports his opinion and this court's finding that Respondent is likely to re-offend is not confined to a secure facility.

18. Both psychologists also scored Respondent on the Hare Psychopathy Checklist- Revised (PCL-R), but Dr. Richards' experience, training, and scoring of Respondent on this instrument is more reliable than Dr. Fisher's. Respondent's psychopathy, as shown by his high score on the PCL-R, and his history as a mixed rapist-child molester, supports Dr. Richards' opinion, and this court finding, that Respondent is likely to reoffend if not confined in a secure facility.

19. Dr. Richards' risk assessment is more credible and it is based on dynamic risk factors, clinical risk factors, actuarial risk and lifestyle. Respondent is likely to commit future acts of sexual violence if not confined in a secure facility.

20. Based on all the evidence presented, the Respondent's mental abnormality and/or personality disorder make him likely to engage in predatory acts of sexual violence if not confined in a secure facility.

CP 457-8.

Dr. Richards testified that his risk assessment relied on actuarial tools, clinical risk factors (RP V. 4 p. 11-12), dynamic risk factors (*Id.* at 9; 11) and lifestyle factors *Id.* at 15. He testified that he used several actuarial tools. RP. V. 3 p. 160. At least one actuarial tool placed Bargas at a risk for re-offense of over 80 percent. V. 4 p. 4. Dr. Richards testified that another actuarial tool, the Sex Offender Risk Appraisal Guide (SORAG), indicated a very high risk for Bargas, an estimate of almost certain violent recidivism. RP V. 3 p. 160; 163; V. 4 p. 4-5. Dr. Richards relied most heavily on the Static 99R because it has the most recent sample table and it is the most neutral and most studied of the actuarial tools. RP. V. 3 p. 162. Dr. Richards testified that Bargas' score on the Static 99R, resulted in a ten year recidivism risk of about 33 percent. RP V. 4 p. 4. Dr. Richards also testified at length that the actuarial risk was an underestimate because the tool measures recidivism based on new criminal conviction, (RP V 3. p. 158-59) and many sex offenses go unreported or undetected. *Id.* at 159-60. Moreover, Dr. Richards testified

he is evaluating lifetime risk, and the Static 99R data is an underestimate because it is limited to a ten year time frame. RP V. 4 p. 15.

Dr. Richards testified that the 33 percent figure from the actuarial tool anchored his judgment, but based on clinical factors, dynamic factors and lifestyle factors, Bargas' risk of reoffending if not confined was over 50 percent.<sup>6</sup> RP V. 4 p. 14-15.

The foregoing testimony amply supports the trial court's Findings of Fact regarding risk. Further, it is the trial court that is in the best position to determine credibility of witnesses and weigh the evidence, and the trial court specifically found that Dr. Richards' scoring was more reliable and his risk assessment more credible than Bargas' own expert. Clearly, the trial court appropriately gave more deference and weight to the testimony of Dr. Richards.

Even assuming Bargas had challenged the trial court's Findings of Fact, the evidence supports the findings and Bargas' argument is without merit.

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<sup>6</sup> Dr. Richards described a confidence interval that is used to establish the Static 99R risk levels. He testified that he relied on the high end of the confidence interval because the practice in the health and public safety analysis is to use the confidence interval that is nearest to the danger or the benefit that we're seeking (RP V. 4 p. 101), but even if he used the low end of the confidence interval in Static 99R, it would not change his opinion that Bargas is more likely than not to re-offend in a sexually violent predatory way. *Id.* at 115.

## **2. Bargas Arguments are Not Supported by the Record**

Bargas argues that he is not at risk to reoffend because he showed no deviant sexual interest on the PPG and the actuarial score from the Static 99R placed him at low risk to reoffend. Neither argument is supported by the record.

The actual trial testimony was that the PPG results were “inconclusive.” RP V. 4 p. 98. There was insufficient data to form any conclusion. *Id.* at 98. Dr. Richards was asked about the PPG and he testified, “It indicated nothing.” *Id.* at 98. Bargas’ own retained expert, Dr. Fisher, testified as follows about the PPG results, “The conclusion was that it was inconclusive. There was no useful data to the exam here.” RP. V. 5 p. 77. Because the PPG “indicates nothing,” Bargas’ argument that the test showed no deviant sexual arousal has no merit.

Moreover, the evidence does not support Bargas’ argument that the actuarial score from the Static 99R places him at low risk to reoffend. Appellant’s brief at 18; 20. Bargas’ retained expert, Dr. Fisher, testified that he evaluated Bargas using the Static 99R and he obtained the same score as Dr. Richards. RP V. 5 p. 24. But Dr. Fisher admitted that in determining the risk associated with the score, he did not use the Static 99R as recommended by the developers of the instrument. RP V.5 p. 159-160. Accordingly the trial specifically found that Dr. Richards’ use



and application of the Static 99R supports his opinion, and the court's finding, that the Respondent is likely to re-offend if not confined in a secure facility. CP 457 (Finding of Fact 17).

As previously discussed, the trial court gave greater deference and weight to the testimony of Dr. Richards rather than Dr. Fisher. Indeed, the trial court specifically rejected Dr. Fisher's testimony by finding that Dr. Richards was more experienced, more knowledgeable and used the Static 99R as it was recommended to be used. The trial court specifically rejected Dr. Fisher's testimony regarding risk. Additionally, the court found that Dr. Richards scoring on the psychopathy instrument was more reliable. The trial court was in the best position to determine credibility and weigh evidence. The foregoing Findings of Fact are supported by the evidence. Bargas' argument that the Static99R placed him at low risk to reoffend is without merit.

**3. The Findings of Fact Support the Trial Court's Conclusion of Law That Bargas is Likely to Engage in Predatory Acts of Sexual Violence if Not Confined to a Secure Facility.**

Bargas argues, vaguely, that the State failed to prove he is likely to reoffend if not confined. Appellant's Brief at 18. The trial court entered the following conclusion of law:

7. Beyond a reasonable doubt, Respondent is likely to engage in predatory acts of sexual violence unless he is confined in a secure facility.

CP 458.

The unchallenged Findings of Fact support the trial court's conclusion. Specifically Findings of Fact 17 and 18 include specific language finding that Bargas is likely to reoffend if not confined in a secure facility. CP 457-58. Finding of Fact 19 includes language that Bargas is likely to commit future acts of sexual violence if not confined in a secure facility. CP 458. Finding of Fact 20 includes language that Bargas is likely to engage in predatory acts of sexual violence if not confined in a secure facility. CP 458. Further, there is substantial evidence supporting the foregoing Findings of Fact as previously discussed. The Findings of Fact support the Trial court's Conclusion of Law. Bargas' argument that the State failed to prove he is likely to reoffend if not confined is without merit.

**C. Bargas' Confinement at the Special Commitment Center, Where Sex Offender Treatment is Provided to Residents, Does Not Violate Bargas' Right to Due Process.**

Bargas vaguely asserts that his confinement at the SCC "violates due process" because he needs intensive drug and alcohol treatment, which is not available at the SCC. Appellant's Brief at 23.

“The Fourteenth Amendment Due Process Clause of the United States Constitution requires state officials to provide civilly-committed persons . . . with access to mental health treatment that gives them a realistic opportunity to be cured or to improve the mental condition for which they were confined.” *Turay v. Seling*, 108 F. Supp. 2d 1148, 1151 (W.D. Wash. 2000) *aff’d in part, dismissed in part sub nom. Turay v. Anderson*, 12 F. App’x 618 (9th Cir. 2001) *citing Youngberg v. Romeo*, 457 U.S. 307, 319–22, 102 S.Ct. 2452, 73 L.Ed.2d 28 (1982); *Ohlinger v. Watson*, 652 F.2d 775, 778 (9th Cir.1980). The State “enjoy[s] wide latitude in developing treatment regimens [for sex offenders]. *Id.* at 368 n. 4, *quoting Kansas v. Hendricks*, 521 U.S. 346, 368 n. 4, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997). The *Hendricks* Court rejected a facial challenge to a Kansas statute modeled on Washington’s, noting that by committing sex offenders “to an institution expressly designed to provide psychiatric care and treatment” the state “has doubtless satisfied its obligation to provide available treatment.” 521 U.S. at 368 n. 4, 117 S.Ct. 2072.

Bargas’ argument has no merit. First, the argument is yet another attempt to re-frame his diagnosis as merely substance abuse, which is an unsupported premise. Appellant’s Brief at 24. Second, his argument assumes there is no appropriate treatment available for him at the SCC,

which is also unsupported by the unchallenged Findings of Fact and the record.<sup>7</sup>

Although Bargas continues to try and frame his diagnosis as one of merely substance abuse or dependence, the unchallenged Findings of Fact, and the evidence, indicate that he has a constellation of other diagnoses and issues including antisocial personality disorder, severe psychopathy, and deviant sexual arousal. Bargas has not challenged the trial court's findings and the court specifically found that Bargas "sees himself as a person who commits crimes of opportunity while he is under the influence of drugs and alcohol." CP 455. But Bargas "lacks credibility" (CP 455) and he "has avoided taking responsibility for his actions and has refused to acknowledge that he has sexual deviancy issues, despite his history of sexually offending." CP 455. The court also found that Bargas "wants to be in control, even with staff," and he has "refused to participate in the Counselor Assisted Self Help (CASH) substance abuse treatment at the SCC." CP 456.

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<sup>7</sup> Bargas does not specify the basis for his due process argument. The United States Supreme Court has held that the SVP statute (Community Protection Act of 1990) is civil in nature. *Seling v. Young*, 531 U.S. 250, 259-61, 121 S. Ct. 727, 148 L. Ed. 2d 734 (2001). Earlier due process challenges to the constitutionality of confinement for SVPs are based on the claim that the act was punitive in nature. *Id.*; see also *Turay v. Seling*, 108 F. Supp. 2d 1148, 1151 (W.D. Wash. 2000) *aff'd in part, dismissed in part sub nom. Turay v. Anderson*, 12 F. App'x 618 (9th Cir. 2001).

Bargas takes testimony out of context to argue that if confined to the SCC he has two options “attend farcical AA group” or CASH in which “untrained therapists come and go,” where “program goals are shifted” and where “participants never graduate.” Appellant’s Brief at 27-8. An actual review of the testimony shows plainly that during Dr. Richards’ testimony, Dr. Richards was relating Bargas’ stated reasons for not participating in CASH. RP V. 3 p 87-88. Bargas did not want to get into the CASH program because the CASH program involved sex offender treatment. *Id.* at 88. Dr. Richards related, “And because it [sex offender treatment] was part of that, he didn’t want to do it.” *Id.* at 88. Bargas told Richards that he had reviewed some of the treatment manuals and “it wasn’t a process he wanted to go through.” *Id.* at 88. Bargas complained that the treatment program was unstable, changing, and he knew residents who had been there for 15 years, meeting setbacks. *Id.* at 88.

Dr. Richards acknowledged that sex offender treatment does force people to face up to very painful things, deal with dysfunction, including sexual dysfunction. RP V 3 p. 89. Dr. Richards testified that, contrary to Bargas’ view, the program was more stable, with a “very accomplished staff” and a “more stable environment.” *Id.* at 89.

Bargas asserts that the only substance abuse treatment offered at the SCC is AA and CASH. Appellant’s Brief at 25. This assertion

ignores the court's Findings of Fact and misstates the evidence. Significantly, the court found that the sex offender treatment at the SCC "will address deviancy, sexual offending and substance abuse." CP 456. Even assuming Bargas had challenged this finding, there is substantial evidence supporting this finding.

Dr. Richards, former superintendent of the SCC, testified that drug and alcohol treatment at the SCC is a very large focus for offenders who have drug and alcohol problems. RP V 4 p. 48-9. He went on to describe that there are special modules in the treatment at the SCC to address sobriety and addiction to drugs and alcohol and the basic principles of relapse prevention. *Id.* at 49. This testimony supports the trial courts Findings of Fact. Bargas' argument that the SCC does not offer appropriate drug and alcohol treatment is without merit.

Bargas has not raised any meritorious issue on appeal. He continues to argue that his primary disorder is alcohol and drug addiction, a premise that was argued at trial and rejected by the trier of fact. Bargas contends he needs very specific substance abuse treatment, the kind that is NOT available at the SCC, another premise that was argued at trial and rejected. On these bases, previously rejected by the trier of fact, Bargas now argues that his continued confinement is not constitutional. His argument ignores the fact that he has mental abnormalities, a personality


disorder, and sexual deviance that also need to be treated. His argument also ignores the fact that there is drug and alcohol treatment available at the SCC, apparently not the specific program that he professes to prefer. Bargas' arguments are without merit.

#### IV. CONCLUSION

For the reasons set forth above, this Court should affirm Bargas' commitment as a sexually violent predator.

RESPECTFULLY SUBMITTED this 13<sup>th</sup> day of November, 2013,

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\_\_\_\_\_  
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NOV 13 2013

NO. 69844-3-I

**WASHINGTON STATE COURT OF APPEALS, DIVISION I**

In re the Detention of:

Michael Bargas,

Appellant.

DECLARATION OF  
SERVICE

I, Elizabeth Jackson, declare as follows:

On November 13, 2013, I deposited in the United States mail true and correct copies of Brief of Respondent, and Declaration of Service, postage affixed, addressed as follows:

Rachael SeEVERS  
Washington Appellate Project  
1511 Third Avenue, Suite 701  
Seattle, WA 98101

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

DATED this 13<sup>th</sup> day of November, 2013, at Seattle, Washington.

  
ELIZABETH JACKSON

**ORIGINAL**