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Court of Appeals  
Division I  
State of Washington

Supreme Court No. 90473-1  
(COA No. 69844-3-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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IN RE THE DETENTION OF:

MICHAEL BARGAS

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

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PETITION FOR REVIEW

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TABLE OF CONTENTS

A. INTRODUCTION ..... 1

B. IDENTITY OF PETITIONER AND DECISION BELOW ..... 1

C. ISSUES PRESENTED FOR REVIEW ..... 1

D. STATEMENT OF THE CASE ..... 2

E. ARGUMENT ..... 4

1. **The absence of available treatment at the SCC to address two of Mr. Bargas’s committed mental abnormalities violates due process** .....4

2. **Mr. Bargas’s commitment violates due process because there was insufficient evidence that he satisfied the criteria for confinement** .....11

a. The State did not establish a causal connection between Mr. Bargas’s mental abnormalities and his dangerousness.....12

b. There was insufficient evidence that Mr. Bargas would more likely than not reoffend if released.....14

F. CONCLUSION ..... 16

TABLE OF AUTHORITIES

**Washington Supreme Court Decisions**

*In re Det. of Brooks*, 145 Wn.2d 275, 36 P.3d 1034 (2001).....14

*In re Det. of McClatchey*, 133 Wn.2d 1, 940 P.2d 646 (1997).....9

*In re Det. of Post*, 170 Wn.2d 302, 241 P.3d 1234 (2010).....12

*In re Det. of Thorell*, 149 Wn.2d 724, 72 P.3d 708 (2003)...5, 11, 13, 14

*In re Det. of Turay*, 139 Wn.2d 379, 986 P.2d 646 (1997).....7-8

*In re Det. of Young*, 122 Wn.2d 1, 857 P.2d 396 (1993).....5

*In re Pers. Restraint of Duncan*, 167 Wn.2d 398,  
219 P.3d 666 (2009).....8-9

*Landmark Dev., Inc. v. City of Roy*, 138 Wn.2d 561,  
980 P.2d 1234 (1999).....11

*State v. Gatewood*, 163 Wn.2d 534, 182 P.3d 426 (2008).....12

*State v. McCuiston*, 174 Wn.2d 369, 275 P.3d 1092 (2012).....10

*Willener v. Sweeting*, 107 Wn.2d 388, 730 P.2d 45 (1986).....12

**Washington Court of Appeals Decisions**

*In re Det. of Fox*, 138 Wn. App. 374, 158 P.3d 69 (2007).....15

*State v. Madarash*, 166 Wn. App. 500, 66 P.3d 682 (2003).....11

**United States Supreme Court Decisions**

*Foucha v. Louisiana*, 504 U.S. 71, 112 S. Ct. 1780,  
118 L. Ed. 2d 437 (1992).....4, 8, 12

<i>Jackson v. Indiana</i> , 406 U.S. 715, 92 S. Ct. 1845, 32 L. Ed. 2d 435 (1972).....	4, 8
<i>Kansas v. Crane</i> , 534 U.S. 407, 122 S. Ct. 867, 151 L. Ed. 2d 856 (2002).....	12-13
<i>Kansas v. Hendricks</i> , 521 U.S. 346, 117 S. Ct. 2072, 138 L. Ed. 2d 501 (1997).....	12

**Constitutional Provisions**

U.S. Const. amend. XIV.....	passim
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**Rules and Statutes**

Laws of 1995, ch. 216, §2, 9.....	5
RAP 13.4.....	10, 16
RCW 71.09.020.....	11
RCW 71.09.080.....	5

A. INTRODUCTION

The trial court ordered Michael Bargas's indefinite confinement following his initial commitment trial pursuant to RCW 71.09. Because there was insufficient evidence that Mr. Bargas satisfied the criteria for confinement and because the nature of his commitment does not bear a reasonable relation to the purpose for which he was committed, the Court of Appeals decision affirming his indefinite confinement is contrary to the constitutional right to due process of law and this Court should accept review.

B. IDENTITY OF PETITIONER AND DECISION BELOW

Michael Bargas, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision terminating review dated June 2, 2014, a copy of which is attached as Appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. In order to confine an individual, due process requires that the nature and duration of commitment bear a reasonable relation to the purpose for which the individual is committed. The Court of Appeals held that the due process challenge to Mr. Bargas's commitment under RCW 71.09 was not properly raised in an appeal of the initial commitment proceeding. Does the Court of Appeals decision disregard

the mandates of due process where effective treatment for two of Mr. Bargas's committed mental abnormalities is unavailable at the SCC and thus the nature of his confinement is unrelated to its purpose?

2. Due process requires that confinement is limited to individuals whose mental illness impairs them to a level rendering them dangerous beyond their control. The fact finder at a RCW 71.09 civil commitment trial must find this causal connection between the mental abnormality and the dangerousness required for commitment. The State must also prove a greater than 50 percent likelihood of re-offense to meet the more likely than not threshold that a person will reoffend if not confined. Does the Court of Appeals decision affirming Mr. Bargas's confinement violate his due process rights where there was insufficient evidence to establish that he satisfied the criteria for confinement?

D. STATEMENT OF THE CASE

In 2011, the State filed a petition to civilly commit Michael Bargas pursuant to RCW 71.09 and Mr. Bargas subsequently proceeded to a bench trial. CP 454. At this initial commitment trial, the State's expert, Dr. Richards, testified that Mr. Bargas had the following diagnoses: alcohol abuse in a controlled environment, polysubstance

dependence in a controlled environment, and antisocial personality disorder. RP V. 3, p. 82, 86, 92.<sup>1</sup> Dr. Richards indicated that Mr. Bargas needs intensive drug and alcohol treatment to address his history of substance abuse. RP V. 4, p. 19-20. He acknowledged that all of Mr. Bargas's sexual offenses were alcohol related. RP V. 4, p. 43. He also agreed that Mr. Bargas would not be sufficiently dangerous to merit confinement if he was able to maintain his sobriety. *Id.*

Dr. Richards was formerly the superintendent of the Special Commitment Center (SCC) and conceded that none of the programs offered at the SCC would qualify as an intensive substance abuse program. RP V. 3, p. 86-87; RP V. 4, p. 49. He explained that very few clinicians at the SCC are certified drug and alcohol counselors. RP V. 4, p. 49. The SCC is not state certified to offer a drug and alcohol program. *Id.* Dr. Richards also testified that this lack of programming is primarily due to budgeting issues. RP V. 4, p. 49-50.

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<sup>1</sup> The recorded proceedings in this matter are contained in a non-consecutively paginated six volume transcript. The first volume relates to pretrial conferences held on March 14, 2011 and July 20, 2012. The other five volumes contain the transcript of the bench trial held in Skagit County Superior Court from December 10-20, 2012. All citations herein are cited to volume and page as "RP V. \_\_, p. \_\_".

Dr. Richards concluded that Mr. Bargas met the criteria for confinement because he suffered from a mental abnormality or personality disorder which caused him to likely engage in predatory acts of sexual violence if not confined. RP V. 3, p. 152.

Dr. Fisher also testified at Mr. Bargas's initial commitment trial. RP V. 4, p. 161. Dr. Fisher agreed with Dr. Richards's diagnoses of antisocial personality disorder and polysubstance abuse. RP V. 4, p. 177-78. Dr. Fisher disagreed that these mental abnormalities made Mr. Bargas more likely than not to reoffend if released. V. 4, p. 179. The trial court subsequently entered a written decision finding that Mr. Bargas satisfied the criteria for confinement. CP 454-59. The trial court thereafter ordered that Mr. Bargas be confined to the SCC until his condition has so changed that he no longer meets the requirements for confinement. CP 459.

E. ARGUMENT

**1. The absence of available treatment at the SCC to address two of Mr. Bargas's committed mental abnormalities violates due process.**

In order to confine an individual, the courts have unequivocally found that "due process requires that the nature and duration of commitment bear some reasonable relation to the purpose



for which the individual is committed.” *Foucha v. Louisiana*, 504 U.S. 71, 79, 112 S. Ct. 1780, 118 L. Ed. 2d 437 (1992); *Jackson v. Indiana*, 406 U.S. 715, 738, 92 S. Ct. 1845, 32 L. Ed. 2d 435 (1972).

Civil commitment pursuant to RCW 71.09 is not concerned with criminal culpability of an individual’s past actions. *In re Det. of Young*, 122 Wn.2d 1, 21, 857 P.2d 396 (1993), *superseded by statute*, Laws of 1995, ch. 216, §2, 9, *as recognized in In re Det. of Thorell*, 149 Wn.2d 724, 746, 72 P.3d 708 (2003). Rather, the statute is focused on treating individuals for their committed mental abnormality. *Id.* The civil commitment goals of incapacitation and treatment are distinct from punishment. *Id.* at 21-22. The statute requires that constitutionally mandated care and treatment be provided. *Young*, 122 Wn.2d at 33. Any person committed under RCW 71.09 has the right to adequate care and individualized treatment. RCW 71.09.080(3).

Mr. Bargas’s commitment does not bear a reasonable relation to the purpose for which he was committed because there is no meaningful substance abuse treatment available at the SCC. CP 456; RP V. 3, p. 86-87; RP V. 4, p. 49-50. Included in Mr. Bargas’s committed mental abnormalities are polysubstance dependence and

alcohol abuse. CP 457. At trial, both Dr. Richards and Dr. Fisher agreed that Mr. Bargas needs intensive drug and alcohol treatment to address his history of substance abuse. RP V. 4, p. 19-20; RP V. 5, p. 10. Dr. Richards directly tied Mr. Bargas's ability to maintain his sobriety to his risk to reoffend. RP V. 4, p. 43.

The record below clearly establishes that the treatment that Mr. Bargas needs to address his risk of recidivism caused by these mental abnormalities (i.e., polysubstance abuse and alcohol dependence) is not available to him at the SCC. CP 456. Thus, this paucity of programming within the SCC renders Mr. Bargas's confinement there unconstitutional because the nature of his commitment fails to bear a reasonable relation to its purpose (i.e., treatment for the mental abnormalities that make him dangerous).

The Court of Appeals concluded that Mr. Bargas's contention that the unavailability of intensive substance abuse treatment constitutes a due process violation is not properly raised in an appeal from an initial commitment trial. Slip. Op. at 10. The court cited prior case law that establishes that the trier of fact's role in a RCW 71.09 commitment is not to evaluate the potential conditions of confinement, but to determine whether the individual meets the criteria for

confinement. *Id.* However, the court's reliance on this line of cases was misplaced.

In its decision, the Court of Appeals quotes *In re Det. of Turay*, 139 Wn.2d 379, 986 P.2d 646 (1997). Slip op. at 10-11. Turay argued that the trial court erred by granting the State's motion to exclude evidence of the confinement conditions at the SCC. *Id.* at 403. Turay asserted that the trial court should have permitted him to present these conditions to the fact finder. *Id.* This Court held that the trial court properly excluded this evidence because the conditions at the SCC were not relevant to whether Turay had a mental abnormality that made him currently dangerous. *Id.*

The Court of Appeals failed to distinguish the challenge to an evidentiary ruling in *Turay* from Mr. Bargas's due process challenge to his civil commitment. Mr. Bargas does not assert that the fact finder should have considered evidence regarding whether appropriate treatment was available at the SCC when determining whether Mr. Bargas met the criteria for confinement. Rather, Mr. Bargas's commitment violates due process because the nature of his confinement does not bear a relation to the purposes for which he was committed. Mr. Bargas disputes the constitutional validity of the order

of commitment because of the absence of intensive substance abuse treatment at the SCC, as opposed to the evidentiary ruling that was at issue in *Turay*.

Similarly, the Court of Appeals also cited *In re Pers. Restraint of Duncan*, 167 Wn.2d 398, 219 P.3d 666 (2009), when summarily dismissing Mr. Bargas's due process arguments regarding the unavailability of treatment at the SCC for his committed mental abnormalities. Slip op. at 11. Duncan argued on appeal that the trial court erred when it determined that expert testimony addressing the effectiveness of treatment at the SCC was irrelevant and thus inadmissible. *Duncan*, 167 Wn.2d at 408. This Court upheld the trial court, reasoning that the success rate of the SCC treatment program was beyond the scope of the issue before the fact finder, which was whether Duncan was likely to reoffend. *Id.* at 409-10.

Again, Mr. Bargas does not contend that the fact finder should have heard evidence regarding the unavailability of substance abuse treatment at the SCC, but that his commitment violates due process under *Foucha v. Louisiana*, 504 U.S. 71, 112 S. Ct. 1780, 118 L. Ed. 2d 437 (1992), and *Jackson v. Indiana*, 406 U.S. 715, 92 S. Ct. 1845, 32 L. Ed. 2d 435 (1972). Therefore, Mr. Bargas's challenge is

distinct from that raised to the evidentiary rulings made by the trial court in *Duncan*.

The Court of Appeals also referenced *In re Det. of McClatchey*, 133 Wn.2d 1, 940 P.2d 646 (1997), for the proposition that “a person committed under RCW 71.09 may not challenge the actual conditions of their confinement, or the quality of the treatment at the DSHS facility until they have been found to be an SVP and committed under the provisions of RCW 71.09.” Slip op. at 10-11. McClatchey was granted discretionary review to challenge the conditions of his confinement at the SCC *prior to* his initial commitment trial. *McClatchey*, 133 Wn.2d at 2. This Court held that unless he is found to meet the criteria of confinement and committed under the provisions of RCW 71.09, the constitutionality of the statute as applied to the facts of his case cannot be determined. *Id.* at 5.

Mr. Bargas is distinguishable from *McClatchey* because he has been found to meet the criteria for confinement. Mr. Bargas’s due process rights are violated because the deficiencies in the administrative implementation of the statute cause his commitment to be unrelated in nature to the purpose for which he was committed (i.e., treatment for the mental abnormalities that make him dangerous).

Thus, the Court of Appeals failed to properly distinguish between the issues raised by Mr. Bargas and those in the cases to which it cited in its decision.

Mr. Bargas's commitment following his initial commitment trial violates his due process rights because its nature does not bear a reasonable relation to the purposes for which he was committed.<sup>2</sup> This violation constitutes a significant question of law under the Constitution of the United States under RAP 13.4(b)(3) as well as an issue of substantial public interest that should be determined by this Court under RAP 13.4(b)(4).

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<sup>2</sup> Moreover, given the unavailability of effective treatment to address Mr. Bargas's polysubstance dependence and alcohol abuse diagnoses, the duration of his confinement will correspondingly be unrelated to the purposes of his confinement in violation of due process. In order for a civilly committed individual to be subsequently released, he must establish that he has "so changed" through participation in treatment that he no longer merits confinement. *State v. McCuiston*, 174 Wn.2d 369, 394, 275 P.3d 1092 (2012). "By making treatment the only viable avenue to a release trial... the State creates an incentive for participation in treatment." *Id.* Thus, not only does Mr. Bargas's initial commitment violate his due process rights by being unrelated in nature to its purpose, but the duration of his commitment is similarly unconstitutional.

**2. Mr. Bargas's commitment violates due process because there was insufficient evidence that he satisfied the criteria for confinement.**

A person does not meet the criteria for commitment under RCW 71.09 unless he has a mental abnormality or personality disorder that makes him more likely than not to commit predatory acts of sexual violence. RCW 71.09.020(7), (18).

Courts apply criminal standards of review to appeals from RCW 71.09 proceedings. *Thorell*, 149 Wn.2d at 744. When viewed in the light most favorable to the State, "there must be sufficient evidence in the finding of mental illness to allow a rational trier of fact to conclude the person facing commitment has serious difficulty controlling behavior." *Id.* at 744-45.

A challenge to the sufficiency of evidence presented at a bench trial requires an appellate court to review the trial court's findings of fact and conclusions of law. *State v. Madarash*, 166 Wn. App. 500, 509, 66 P.3d 682 (2003). The standard of review for a trial court's findings of fact and conclusions of law is a two-step process. *Landmark Dev., Inc. v. City of Roy*, 138 Wn.2d 561, 573, 980 P.2d 1234 (1999). First, the trial court's findings of fact must be supported by substantial evidence in the record. *Id.* If the findings are supported

by substantial evidence, then the appellate court must decide whether those findings of fact support the trial court's conclusions of law.

*Willener v. Sweeting*, 107 Wn.2d 388, 393, 730 P.2d 45 (1986). A trial court's conclusions of law are reviewed de novo. *State v. Gatewood*, 163 Wn.2d 534, 539, 182 P.3d 426 (2008).

a. The State did not establish a causal connection between Mr. Bargas's mental abnormalities and his dangerousness.

As previously discussed, commitment for any reason constitutes a significant deprivation of liberty triggering due process protection.

*Foucha*, 504 U.S. at 80. Due process requires that confinement is limited to individuals whose mental illness impairs them to a level rendering them dangerous beyond their control. *Kansas v. Hendricks*, 521 U.S. 346, 358, 117 S. Ct. 2072, 138 L. Ed. 2d 501 (1997). The fact finder at a RCW 71.09 civil commitment trial must find this causal connection between the mental abnormality and the dangerousness required for commitment. *In re Det. of Post*, 170 Wn.2d 302, 310, 241 P.3d 1234 (2010).

Although total and complete lack of control over sexually violent behaviors is not required to sustain a commitment, the "critical distinguishing feature" for individuals properly subject to commitment



is “a special and serious lack of ability to control behavior.” *Kansas v. Crane*, 534 U.S. 407, 412-13, 122 S. Ct. 867, 151 L. Ed. 2d 856 (2002). Proof of a serious difficulty controlling behavior is necessary to distinguish a dangerous sex offender subject to civil commitment from the “dangerous but typical recidivist convicted in an ordinary criminal case.” *Id.* at 413. Due process requires more than mere proof of a risk to reoffend, but rather proof of a risk to reoffend which is linked to the individual’s mental abnormality. *Thorell*, 149 Wn.2d at 736.

The Court of Appeals concluded that Dr. Richards sufficiently linked Mr. Bargas’s dangerousness to his antisocial personality diagnosis.<sup>3</sup> Slip op. at 7. However, during trial Dr. Richards pontificated that a diagnosis of antisocial personality disorder alone is insufficient to justify confinement. *See* RP V. 4, p. 59. Dr. Richards’s testimony demonstrates that Mr. Bargas’s diagnoses of antisocial personality disorder, polysubstance dependence, and alcohol abuse do not compel him to sexually offend. Rather, this testimony illustrates that Mr. Bargas is more likely to *choose* to commit sexual offenses while intoxicated.

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<sup>3</sup> The court also alternatively concluded that Mr. Bargas’s substance abuse and dependence are a mental abnormality warranting commitment. Slip op. at 8.

This evidence establishes nothing more than perhaps that Mr. Bargas may be a typical recidivist convicted in an ordinary criminal case who deservedly was confined for his prior offenses. This evidence is insufficient, however, to establish the causal connection between Mr. Bargas's mental abnormalities and his volitional control that is required for his commitment to be constitutional.

b. There was insufficient evidence that Mr. Bargas would more likely than not reoffend if released.

The State must show a greater than 50 percent likelihood of reoffense to meet the more likely than not threshold that a person will reoffend if not confined. *In re Det. of Brooks*, 145 Wn.2d 275, 295-96, 36 P.3d 1034 (2001), *overruled on other grounds, Thorell*, 149 Wn.2d at 753. The fact to be proved with respect to RCW 71.09 is expressed in terms of statistical probability. *Brooks*, 145 Wn.2d at 296. The question "is not whether the defendant will reoffend, but whether the probability of the defendant's reoffending exceeds 50 percent." *Id.*

In making this determination, actuarial models are more reliable than clinical judgment. *Thorell*, 149 Wn.2d at 753, 757. The probative value of actuarial assessments is high and directly relevant to whether an individual satisfies the criteria for confinement. *Id.* at 758; *see also*

*In re Det. of Fox*, 138 Wn. App. 374, 395 n.14, 158 P.3d 69 (2007)

(research suggests that actuarial risk assessments are more reliable than clinical analyses).

Three separate doctors gave Mr. Bargas a score of four on the Static 99-R, an actuarial risk assessment tool. RP V. 3, p. 157. This resulted in an estimated risk of re-offense of 17 to 23 percent within five years and 26 to 33 percent within ten years. RP V. 3, p. 158. Dr. Richards acknowledged, however, that most recidivism occurs within two years of release. RP V. 4, p. 23. The Static-99R results place Mr. Bargas at less than 50 percent likely to reoffend and thus, alone, are insufficient to establish the required dangerousness.

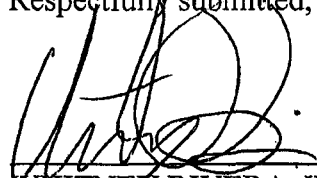
Mr. Bargas's most recent offense occurred in 1996. CP 455; RP V. 3, p. 53. While the State may have established that Mr. Bargas was historically a risk to reoffend by discussing his dynamic risk factors, this evidence was insufficient to establish that he currently would more likely than not reoffend if release. As such, there is insufficient evidence justifying his commitment in violation of his due process rights.

F. CONCLUSION

Based on the foregoing, Petitioner Michael Bargas respectfully requests that review be granted pursuant to RAP 13.4(b).

DATED this 2nd day of July, 2014.

Respectfully submitted,



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# APPENDIX A

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COURT OF APPEALS DIVISION I  
STATE OF WASHINGTON

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

In the Matter of the Detention of	)	NO. 69844-3-1
	)	
MICHAEL BARGAS	)	DIVISION ONE
	)	UNPUBLISHED OPINION
	)	
	)	FILED: June 2, 2014

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LAU, J. — Following a bench trial, the superior court found that Michael Bargas has a personality disorder and mental abnormalities that make him likely to engage in sexual violence and that require his commitment as a sexually violent predator. Because the court's findings are supported by substantial evidence, the findings support the court's conclusions of law, and Bargas's claim regarding the conditions of his confinement is not properly before us, we affirm.

**FACTS**

In 1987, a jury convicted Bargas of forcibly raping a 38-year-old female acquaintance during a burglary. In 1990, four months after his release on the prior offense, the State charged Bargas with second degree rape. He pleaded guilty to an amended charge of third degree assault with sexual motivation. In 1997, Bargas

pleaded guilty to first degree child molestation involving a nine-year old girl. In 2011, the State of Washington filed a petition alleging that Bargas is a sexually violent predator (SVP).

At trial, the State's principal witness was Dr. Henry Richards, a psychologist with extensive experience in the evaluation, diagnosis, and treatment of sex offenders. He reviewed several thousand pages of records, including police reports, legal documents, health information, previous psychological evaluations, and records from the Department of Corrections. He also interviewed Bargas.

Dr. Richards concluded that Bargas suffers from antisocial personality disorder (ASPD), alcohol abuse, polysubstance dependence, severe psychopathy, and deviant sexual arousal. In his opinion, Bargas's personality disorder constitutes both a mental abnormality and a personality disorder under RCW 71.09.020(18).<sup>1</sup> His alcohol abuse and polysubstance dependence also constitute a mental abnormality. Dr. Richards testified that these disorders cause Bargas serious difficulty in controlling his sexually violent behavior.

To evaluate the relationship between Bargas's disorders and his lack of control, Dr. Richards looked at the disorders in the context of Bargas's life and offending behaviors. He testified that "the most basic contextual problem is [Bargas's] personality disorder, Antisocial Personality Disorder with severe psychopathy" and that these

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<sup>1</sup> RCW 71.09.020(18) provides: "Sexually violent predator" means 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.

conditions drive his sexual opportunism. 3 Verbatim Report of Proceedings (Dec. 11, 2012) (3 VRP) at 142-43. Dr. Richards testified that Bargas is a type of rapist who is motivated by antisociality. “[A]nti-sociality is enough, just enough without substance abuse, to motivate [his] rapist type.” 3 VRP at 151.

The psychopathy component of Bargas's antisocial personality disorder also plays a significant role in his lack of control. Dr. Richards testified that psychopathy indicates biological and neurological differences that have “a social psychological expression.” 3 VRP at 96. Psychopathy is a significant predictor of reoffense when, as in Bargas's case, it is found in combination with deviant sexual arousal. According to Dr. Richards, some studies show a six-fold increase for reoffense when a person has both deviant sexual arousal and high psychopathy.

Dr. Richards concluded that Bargas's disorders and/or abnormalities cause him serious difficulty controlling his behavior and that, more likely than not, he will reoffend in a sexually violent way if not confined. He based that conclusion in part on actuarial tools, clinical factors, dynamic risk factors and lifestyle and personality patterns.

Dr. Chris Fisher, an expert retained by Bargas, reviewed the discovery, depositions, and other records and interviewed Bargas. He agreed that Bargas suffers from antisocial personality disorder and polysubstance abuse. He disagreed, however, that Bargas's mental abnormalities render him unable to control his sexual impulses. He testified that antisocial personality disorder does not, by itself, cause sexual offending. Noting that all of Bargas's offenses involved the heavy use of alcohol and other drugs, he testified that Bargas's risk of reoffense would be “infinitesimal if he maintained a sober and healthy lifestyle going forward.” 5 Verbatim Report of



Proceedings (Dec. 13, 2012) (5 VRP) at 10. But even if Bargas did not remain sober, Dr. Fisher believed his risk of reoffense would be less than fifty percent.

Several additional defense witnesses testified to Bargas's religious convictions, his good character, and the support they could provide him in the community.

The trial court found Dr. Richards more qualified and credible than Dr. Fisher and concluded that the State had carried its burden. The court found that Bargas "suffers from alcohol abuse . . . , poly-substance dependence, and anti-social personality disorder with an extreme level of psychopathy. [He also] has deviant sexual arousal." Finding of Fact (FF) 13. The combination of these conditions cause Bargas "serious difficulty controlling his sexually violent behavior." FF 15. Based on Dr. Richards' testimony, the court found that Bargas'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." FF 20. The court concluded that the State proved these elements beyond a reasonable doubt and that Bargas is a sexually violent predator as defined in RCW 71.09.020(18). Bargas appeals.

#### STANDARD OF REVIEW

We apply criminal standards of review to appeals from sexually violent predator proceedings. In re Det. of Thorell, 149 Wn.2d 724, 744, 72 P.3d 708 (2003). In an appeal following a bench trial, we review challenged findings of fact to ensure that they are supported by substantial evidence. State v. Madarash, 116 Wn. App. 500, 509, 66 P.3d 682 (2003). "Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the truth of the finding." Madarash, 116 Wn. App. at 509. We consider the evidence in the light most favorable to the State and treat

unchallenged findings of fact as verities. Madarash, 116 Wn. App. at 509. The weight, credibility, and persuasiveness of the evidence are matters for the trier of fact and will not be reviewed. State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992). We review challenged conclusions of law de novo, determining whether they are supported by the findings of fact. Madarash, 116 Wn. App. at 509.

### DECISION

To commit a person as a sexually violent predator, the State must prove beyond a reasonable doubt that the person "has been convicted of or charged with a crime of sexual violence and . . . 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).

Bargas contends "the State failed to present substantial evidence that [his] ASPD, substance abuse, and psychopathy renders him so unable to control his sexual impulses that he must be confined to a secure facility." Br. of Appellant at 7. According to Bargas, "it is clear from Dr. Richards' testimony that Mr. Bargas' history of sexual offending is the result of substance abuse and a criminal lifestyle, and not the result of a mental condition that causes an ongoing and serious inability to control his sexual behaviors." Br. of Appellant at 10. He notes that Dr. Richards testified during his deposition "that all of [Bargas's] sex offenses were related to his substance abuse and that if he remained sober he would not be likely to reoffend." Br. of Appellant at 14. He claims this testimony shows that his "sexual offending is actually the result of substance abuse and a criminal lifestyle, not a mental condition" and that he does not lack

volitional control; rather, he is just "more likely to choose to commit sexual offenses while intoxicated . . . ."2 Br. of Appellant at 10, 13. We disagree for several reasons.

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<sup>2</sup> The State correctly points out that Bargas's opening brief violates RAP 10.3(g) because it does not assign error to specific findings and conclusions. However, because it is not difficult to deduce which findings are challenged in the opening brief, we exercise our discretion to consider the merits of Bargas's arguments despite his noncompliance with the RAP. State v. Olson, 126 Wn.2d 315, 323, 893 P.2d 629 (1995) (appellate court has discretion to look past technical violations of RAPs). The following findings are expressly challenged by Bargas in his reply brief:

"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.

"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 99R 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 if 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."

Bargas also challenges conclusions of law 4, 5, 6, 7, and 8 in his reply brief. Those conclusions state in pertinent part that Bargas has a mental abnormality and

First, it is not necessary to prove that Bargas lacks all control over his actions in order to commit him as an SVP. It is sufficient to show that he has "serious difficulty" controlling his behavior. Thorell, 149 Wn.2d at 742; Kansas v. Crane, 534 U.S. 407, 413, 122 S. Ct. 867, 151 L. Ed. 2d 856 (2002).

Second, Dr. Richards did not testify that Bargas's acts are volitional or that he simply chooses when to offend. Rather, he testified that he diagnosed Bargas with a "mental abnormality," which by definition "impairs the person's ability to make a free choice . . . ." 3 VRP at 79-80. One of Bargas's mental abnormalities—antisocial personality disorder—manifests itself through impulsivity and reckless disregard for others. Although Dr. Richards believed that Bargas "doesn't want to hurt anybody," his "Antisocial Personality Disorder drives him toward certain opportunistic exploitative situations, environments." 3 VRP at 143 (emphasis added). A significant feature of Bargas's personality disorder—psychopathy—is characterized by "significant brain differences, psychophysiological reaction differences" that are "more defined as a biological neurological entity that has a social psychological expression." 3 VRP at 96. When asked if Bargas's personality disorder or mental abnormality cause him serious difficulty controlling his behavior, Dr. Richards said, "Yes." 3 VRP at 142.

Third, Bargas misrepresents the record. Dr. Richards did state in his deposition that if Bargas "were successfully to remain sober the rest of his life, perhaps there

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personality disorder that cause him serious difficulty controlling his sexually violent behavior, that he is likely to engage in predatory acts of sexual violence if not confined, and that he is a sexually violent predator.

would be no new sexual offenses. I'd say more likely than not there would not be." But at trial, he explained that without the drug and alcohol problems, Bargas

would be a different person. If he had a different history he would be a different person. I would have a different opinion.

...  
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.

4 RP (Dec. 12, 2014) at 116-17 (emphasis added). This testimony clarified

Dr. Richards' earlier statements and, together with his other testimony,<sup>3</sup> supports the court's finding that Bargas's mental disorders make him likely to engage in predatory acts of sexual violence if not confined. Any conflict between Dr. Richards' deposition and trial testimony was a matter for the trier of fact. Walton, 64 Wn.App. at 415-16.

Fourth, even if Dr. Richards had testified that Bargas commits crimes primarily because of his substance abuse and dependence, he testified that Bargas's substance abuse and dependence are a mental abnormality warranting commitment under chapter 71.09 RCW. When coupled with an individual's history of sexually predatory acts, a mental abnormality supports a conclusion that the person has serious difficulty controlling his or her behavior. Thorell, 149 Wn.2d at 742.

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<sup>3</sup> Dr. Richards also testified that "anti-sociality is enough, just enough without substance abuse, to motivate [Bargas's] rapist type," that Bargas's "most basic contextual problem is his personality disorder, Antisocial Personality Disorder with severe psychopathy," that these conditions drive his sexual opportunism, and that without them Dr. Richards would not expect to "be seeing multiple sexual offenses." 3 VRP at 151, 142-143.

Bargas next contends the State failed to prove that he currently suffers from conditions that make him likely to commit crimes of sexual violence. He claims that his plethysmograph test results, actuarial risk scores, and good behavior and sobriety in prison indicate that he is currently a low risk for reoffense. He concludes that even when viewed in the light most favorable to the State, the State's evidence was not sufficient to show that he currently suffers from conditions that render him likely to reoffend if not confined. Again, we disagree.

Both experts testified that the plethysmograph results were inconclusive and provided no useful information. Bargas's own expert, Dr. Fisher, testified that he is "not a big believer in PPGs to begin with," that "[t]hey don't really tell us anything," and that Bargas's inconclusive test didn't provide "anything meaningful." 5 VRP at 79.

Contrary to Bargas's assertions, the actuarial tests did not show that he is a low risk to reoffend. Bargas points out that "all three experts who administered the Static 99-R [test] scored Mr. Bargas as a four, which correlates to a group in which 17 to 23 percent of offenders are expected to recidivate within five years." Br. of Appellant at 20 (emphasis added). But Dr. Richards testified that Bargas's score resulted in a ten year recidivism risk of about 33 percent and that 33 percent is an underestimate because the Static 99R measures recidivism by new convictions, not by offenses that go unreported or undetected. Dr. Richards testified that his job is to assess the lifetime risk of an offense whether or not it is detected or charged. His testimony thus supported an inference that Bargas's risk of reoffense under the Static 99R test was not low, but rather exceeded 33 percent.

Furthermore, while Dr. Richards testified that the Static 99R result anchored his judgment, he considered other actuarial tools, clinical risk factors, dynamic risk factors, and lifestyle factors. At least one actuarial tool placed Bargas's risk of reoffense at over 80 percent. The Sex Offender Risk Appraisal Guide, which measures the risk of future violent offenses, indicated that Bargas was almost certain to engage in violent recidivism. And on the PCL-R, which measures psychopathy, Bargas's score was near the maximum and indicated severe psychopathy. While Dr. Richards said the PCL-R is "not very predictive" of reoffense among sex offenders in general, it is more predictive for rapists. Dr. Richards added that Bargas's history as a mixed rapist and child molester, as well as his combination of psychopathy and deviant sexual arousal, put him at greater risk for reoffense. With respect to Bargas's prison behavior and sobriety, Dr. Richards pointed out that this was in a controlled environment, there had been no intervening treatment other than Alcoholics Anonymous (AA), and Bargas had refused substance abuse treatment in a clinician-guided program called Clinically Assisted Self-Help (CASH).

Last, Bargas contends his commitment violates due process because "the intensive substance abuse treatment he requires is unavailable in [his] facility." Br. of Appellant at 23. This contention is not properly raised in an SVP commitment proceeding:

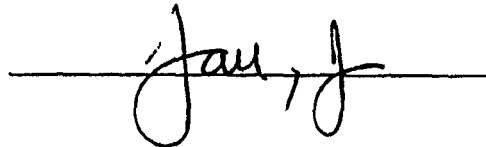
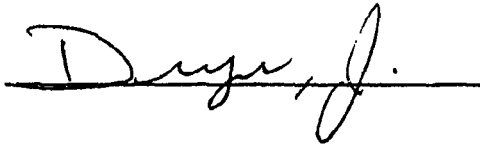
The trier of fact's role in an SVP commitment proceeding . . . is to determine whether the defendant constitutes an SVP; it is not to evaluate the potential conditions of confinement. . . . The particular DSHS facility to which a defendant will be committed should have no bearing on whether that person falls within RCW 71.090.020(1)'s definition of an SVP. Furthermore, a person committed under RCW 71.09 may not challenge the actual conditions of their confinement, or the quality of the treatment at the DSHS facility until they have been found to

be an SVP and committed under the provisions of RCW 71.09. In re Detention of McClatchey, 133 Wn.2d 1, 5, 940 P.2d 646 (1997).

In re Det. of Turay, 139 Wn.2d 379, 404, 986 P.2d 790 (1999) (second emphasis added); see also In re Pers. Restraint of Duncan, 167 Wn.2d 398, 409-410, 219 P.3d 666 (2009). Thus, this issue was outside the scope of the proceedings below and is not properly before us on appeal.<sup>4</sup>

Affirmed.

WE CONCUR:



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<sup>4</sup> We note that Bargas did not make a due process claim below and that he offers no basis for reviewing it for the first time on appeal. In any case, the argument is not persuasive. While Dr. Richards believed AA was not sufficient treatment given the severity of Bargas's substance abuse, he did not say that other available treatment, such as the CASH program that Bargas refused to participate in, was inadequate. Rather, he testified that substance abuse treatment is "a very large focus for offenders who have drug and alcohol problems" and that "[t]here are specified modules where they address sobriety and addiction . . . and the basic principles of relapse prevention . . ." 4 VRP at 48-49. Similarly, the trial court did not find that available substance abuse treatments were inadequate. The court simply found that the available treatment "does not focus on intensive substance abuse treatment, rather it is sex offender treatment that will address deviancy, sexual offending and substance abuse." The court did not assess the adequacy of the treatment.



### DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 69844-3-1**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office / residence / e-mail address as listed on ACORDS / WSBA website:

- respondent Mary Robnett, AAG  
Office of the Attorney General – Criminal Justice Division
- petitioner
- Attorney for other party

  
MARIA ANA ARRANZA RILEY, Legal Assistant  
Washington Appellate Project

Date: July 2, 2014