

No. 61053-8-I

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COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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IN RE THE DETENTION OF

RICARDO CAPELLO

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COURT OF APPEALS DIVISION I  
STATE OF WASHINGTON  
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**STATE'S RESPONSE BRIEF**

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**I. INTRODUCTION**

Although lacking support in the record, appellant Capello claims that his civil commitment should be reversed because portions of his SVP trial were closed to the public. The record does not support his claim of closure, nor do the constitutional provisions and case law applicable to civil cases support reversal. Capello also challenges two evidentiary rulings, which even if error, had no discernable prejudice to Capello's case. Because Capello fails to show that the trial court committed any error, his civil commitment should be affirmed.

**II. STATEMENT OF THE CASE**

Capello, also known as Richard Rogers, presents the rare instance - - even for sexually violent predator litigation -- where the underlying diagnosis is Paraphilia Sexual Sadism. In addition, Capello exceeded the diagnostic threshold on the Hare PCL-R for a diagnosis of psychopathy -- making him a Sexually Sadistic Psychopath. The risk for sexual violence flowing from this diagnosis is palpable.

Consistent with his diagnosis, Capello has two separate convictions for sexually violent offenses.<sup>1</sup> In 1984, he was convicted of Sexual Abuse in the First Degree and Sodomy in the First Degree in Hawaii in 1984, for the rape of G.B. He also has a 1991 conviction for

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<sup>1</sup> As noted in appellant's brief, the facts are drawn from the certification at

Kidnapping in the First Degree, with Sexual Motivation, for the rape and abduction of L.W. in King County.

G.B. was working as a dancer at a night club in Honolulu, Hawaii, on the evening of March 6, 1982. When she finished work, Capello invited G.B. to go out for breakfast with him and his father-in-law. Capello took his father-in-law home, and drove G.B. down a deserted dirt road, surrounded by sugar cane fields. G.B. got nervous and asked Capello to take her home. He parked the car and told her they were going to "make out." He demanded that she give him "head" before he would take her home. Capello un-zipped his pants and tried to force G.B.'s head into his lap.

G.B. grabbed the car keys, and jumped out of the car. Capello chased her, grabbed hold of her, and threatened to kill her if she didn't let him have intercourse with her. G.B. began to struggle and scream. Capello choked her, and began tearing her clothing off. VRP 12/13/2007 at 40. He tore G.B.'s jeans off, breaking the zipper. He ripped open her blouse and broke the snap off her bra. He ultimately forced his penis into her mouth, penetrated her vagina and anus with his fingers and had vaginal intercourse with G.B. *Id.* During the attack G.B. attempted to reason with Capello, asking him about his family. He told her he regularly had sex

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CP 4 as well as extensive testimony presented to the second jury.

with his mother and his sisters. G.B. was finally able to break away and she ran from Capello and hid in the sugar cane field. He got in his car and drove away.

G.B. found her way to a nearby house and knocked on the door. An elderly man called the police at her request. When a police officer responded, he stopped Capello's car as he was driving away. The officer saw a woman's hair comb on the front seat and questioned Capello. He stated that he was on his way home and had gotten lost. He claimed that he had been alone that evening and knew nothing about a woman screaming. G.B. was located about 100 yards away. She was crying and upset, and her clothes were half torn from her body. She told the police that Capello had raped her. She was transported to the Sexual Abuse Treatment Center where she was treated for bruises and scratches to her back, neck, arms, leg, finger (where her ring had been ripped off her finger by Capello) and her lip.

When discussing this crime with the pre-sentence investigator after his 1991 offense, he at first stated the G.B. was a prostitute and that he was attractive enough that he didn't have to rape women to find sexual satisfaction. He later stated that it was "not rape or sodomy, just two people on the hood of a car stealing a moment of the night." Capello was

unable to explain why G.B.'s ring and hair clip were found in his car, nor could he explain her injuries and torn clothes.

At trial, Capello was found guilty of Sodomy in the First Degree and Sexual Assault in the First Degree. He was sentenced to 20 years, and served approximately five years. He was released on parole, and sought release to the State of Washington, where he was to be supervised under the interstate agreement.

Capello moved into the home of S.C., a woman with whom he had corresponded while he was in prison. VRP 12/6/2007 at 45. His residency with Ms. C was short-lived, and he moved out less than two months after he moved in. The two began a sexual relationship almost as soon as Capello arrived from Hawaii. *Id.* at 51. Capello was abusive, threatening and controlling from the beginning. *Id.* at 54-56. He was aroused sexually to "tormenting somebody or to see someone unhappy or in pain or being humiliated." *Id.* at 58.

On one occasion, Capello tied S.C.'s hands to a rocking chair while she was naked. *Id.* at 62. Capello took his foot off the runner that was balancing the chair and laughed as the chair and S.C. fell over. *Id.* On another occasion, he "hog-tied" her to an ottoman. *Id.* at 65-67. Frequently, Capello would come up behind S.C. while she was doing something and place a knife or scissors to her throat to scare her. *Id.* at 60.

He tried to get her to play sexual games with him where she would play the role of "surprised housewife" and he would play the rapist who broke into her house. VRP 12/6/2007 at 58-59. S.C. stated that he was not able to get or maintain an erection unless he was controlling, torturing or humiliating her. She said he would get verbally abusive with her if he wasn't able to achieve his sexual goals.

The relationship permanently ended when Capello poured hot soup on S.C. while she was in bed, and then raped her. *Id.* at 68-72. S.C. was asleep in her bed and Capello came in with a bowl of hot soup. *Id.* When S.C. refused to sit up, he pulled the sheets back and poured the soup on her stomach, burning her to the point of blistering. *Id.* Capello then proceeded to rape S.C. while she was screaming in pain from the burn. *Id.* S.C. went to a friend's house and stayed there until Capello had moved out. *Id.* at 72.

Capello was arrested on a parole violation around this same time, and he spent some time in jail in the Ellensburg area. When he was released he moved to Seattle, where it appears the Department of Corrections lost contact with him for several years. During this time he has admitted he would frequently hook up with women he met in bars and stay with them over night.

He was brought to DOC's attention when he was arrested for Assault in the Second Degree in September 1989, for threatening several

people with a gun. Capello had been in a relationship with T.H. who was in a band. Capello had briefly worked for the band, but was fired due to his erratic behavior. On the night of the incident, Capello confronted T.H. and several of her band members. He threatened them with a pistol, pointing it directly in the face of William James, one of the band members. In interviews with the police, the band members described how frighteningly fast Capello's temper flared during the altercation. T.R. called 911 and Capello ran to the phone and disconnected it. The 911 operator called back and T.H. was able to report the incident as Capello fled in his car. He was chased by the police until he crashed his car into an embankment and then ran from the police. He was later arrested, and convicted of one count of Assault in the Second Degree. He received an exceptional sentence (down) of 12 months, so that he could obtain drug and alcohol treatment

On January 22, 1991, L.W. was walking to her car in a Kent, Washington, parking lot after work. As she opened the door to her car, Capello approached her from behind, grabbed her arm and held a knife to her throat. He ordered her not to make any noise. Capello got into the car and pulled L.W. in after him. He ordered her to drive to an abandoned house, where he made her stop the car. He pushed her against the driver's door and tried to remove her pantyhose, when he couldn't get them off, he cut them off her with the knife. Capello unzipped his pants and put the

knife in her mouth and told her if she did not cooperate, he would "shove it down her throat." He then told her to "relax and enjoy" as he forced his penis into her vagina.

While Capello was raping her, the knife that Capello had placed in LW's mouth slipped and cut her. At one point the horn on the car accidentally sounded, and Capello slapped L.W. across the face. After he ejaculated, Capello forced his penis into L.W.'s mouth, and he urinated in her mouth. He told her if she reported the crime to the police, he would find her and kill her.

L.W. went to the hospital and had a full medical examination. Because she was so severely traumatized by the rape, it took her several months to report it to the police. She did go to the Kent Police Department in April 1991, where she was able to pick Capello's photograph from a 6-person photo montage. She also worked with a Detective to construct a composite drawing of Capello.

Capello was charged with Rape in the First Degree and Kidnapping in the first degree, with a sexual motivation. The police went to Capello's apartment and served a search warrant. They found a telephone bill for over \$1300, most of which was due to calls to a phone sex number. When the police questioned Capello's live in girl friend, who was employed as a top-less dancer, she said that Capello was often on the phone when she

came home and he would quickly end the call upon her arrival. After his arrest, Capello called her from the jail and threatened to kill her if she left him. VRP 12/13/2007 at 52-53.

At the time of his arrest, Capello told the police that he had hit women in the past, but only in conjunction with their own fantasies of wanting to be raped or wanting to be forcefully made to have sex. VRP 12/6/2007 at 19; 31. He said this had been a fantasy of his ex-wife's and also a fantasy of his present girlfriend, to be domineered, pushed around, hurt and manipulated. *Id.* He did admit that he had "forced women to do things against their will." VRP 12/6/2007 at 18. He also told the police that he used different social security numbers and dates of birth on various forms and applications so that he would not be tracked down. *Id.* at 16-19. While he was in prison he changed his name from Richard Rogers to Ricardo Capello, and he admitted he did this in an effort to thwart his parole supervision. *Id.* at 17.

Capello told the pre-sentence investigator that he agreed with the official version of the offense and stated that "it just happened." He admitted that he had thought about committing similar crimes in the past, but had "held himself in check." He was sentenced to 144 months of confinement, the high end of his standard range. When the sentence was

imposed, Capello exploded and swore at the judge. He had to be forcibly removed from the court room in hand cuffs.

Capello has also been convicted of Public Indecency in 1974 in Corvallis, Oregon. Capello has insisted that this incident involved nothing more than "skinny dipping" with the Sheriff's daughter, however the charging documents make clear that Capello has caught having sex with a minor in a public place. According to the prosecutor who handled the case, Capello was able to plead to Public Indecency only because the victim's family did not want to cooperate in the prosecution.

Between 1971 and 1990, Capello was convicted of multiple offenses, including forgery, theft, DUI, prostitution, resisting arrest, drug promotion, disorderly conduct and conspiracy to commit theft by extortion. Capello has a long history of coercing women into committing crimes with him. He has also moved around the country when he gets caught. He has convictions in Hawaii, Oregon, and Washington and other law enforcement contacts in Illinois and Canada.

Capello has been evaluated by several forensic psychologists during his confinement. Dr. Dennis Doren, a member of the Joint Forensics Unit, diagnosed Capello as suffering from sexual sadism, a mental disorder that predisposes him to commit acts of sexual violence. Additionally, Dr. Doren has assigned a diagnosis of anti-social personality

disorder, polysubstance dependence and alcohol abuse. Dr. Doren also assessed Capello has having extremely high levels of psychopathy as measured by the Hare Psychopathy Checklist-revised (PCL-R). Dr. Doren's professional opinion is that the combination of these disorders, as well as numerous other clinical factors renders Capello more likely than not to re-offend in a sexually violent manner if he is not confined in a secure facility.

Capello refused to meet with Dr. Doren during the course of his evaluation, and thus he State sought a court order for a forensic psychologist from the Special Commitment Center to meet with him. Dr. Paul Spizman, conducted the evaluation which included a lengthy interview. Dr. Spizman gave Capello a copy of his draft report and allowed Capello to address any of his concerns. Dr. Spizman initially did not believe there was sufficient evidence to support a diagnosis of sexual sadism, and assessed Capello as suffering from paraphilia, N.O.S, non-consent., and assigned sexual sadism as a "rule-out" diagnosis. After reviewing the statement and deposition of S.C., Dr. Spizman updated his opinion and confirmed that in his opinion Capello does suffer from full blown sexual sadism. Dr. Spizman also believes Capello suffers from anti-social personality disorder with high psychopathy. Dr. Spizman also

conducted several risk assessments, and concluded that Capello is at high risk to re-offend.

While in the Department of Corrections, Capello started to participate in the Sex Offender Treatment Program at Twin Rivers. He was terminated from the program after a few weeks because he denied he had any sexual deviancy. Since he has been detained at the Special Commitment Center he has refused to participate in any treatment. If he is released on this petition, he will be re-entering the community as an untreated sex offender.

The defense called Stephen Hart, Ph.D. Although Dr. Hart is a well-published academic with a high opinion of his abilities, he has no experience practicing psychology and lacks a license to practice psychology in any jurisdiction, including his native Canada. VRP 12/13/2007 at 5-7; 40. The State was forced to grant Dr. Hart qualified immunity in order to prevent a mistrial because he had violated Washington law by engaging in the practice of psychology outside the courtroom and holding himself out as a psychologist. VRP 12/6/2007 at 5. Dr. Hart's practice in the sexually violent predator arena is limited to testifying for the defense. VRP 12/13/2007 at 7-8.; 44

Even though the State has the burden of proof beyond a reasonable doubt, the trial court prevented the State from presenting additional expert

testimony from Dr. Henry Richards and Dr. Paul Spizman in support of its case. VRP 12/14/2007 at 4-5. After a lengthy trial, the jury returned a unanimous verdict finding that Capello was a sexually violent predator. VRP 10/14/2007 at 6.

### **III. ISSUES PRESENTED FOR REVIEW**

A. In a civil case, may a trial court hold an informal chambers conference when all substantive matters are repeated on the record when court re-convenes?

B. Did the trial court abuse its discretion by admitting certain evidence?

### **IV. CAPELLO RECEIVED A PUBLIC TRIAL**

Capello argues that he was denied a right to public trial. Apart from drawing extreme inferences from the record, he fails to demonstrate that any part of the trial was closed. Even if portions of the trial were closed, a civil litigant like Capello lacks standing to raise the public right to a open trial. Unlike a criminal defendant, Capello cannot claim a personal right to a public trial, particularly when he fully participated in any allegedly closed proceedings.

**A. The Record Does Not Support Capello's Claim**

Capello claims that proceedings must have been closed to the public at some point because he cites a portion of the record where the prosecutor says that the parties had "talked in chambers . . . . quite a bit" about an issue. VRP 11/14/2007 at 203-04. From this single reference, Capello draws the grand conclusion that "[t]he record clearly shows significant rulings being made off-the-record in closed chambers hearings." Opening Br. at 29. There is no support in the record for this claim

First, the cited passage from the 11/14/2007 transcript comes from the first Capello trial, which ended in a mistrial. Although there is no evidence that the court made off the record rulings in the first trial from the cited transcript, it would not matter to the second trial. Error in the first trial is not relevant because a mistrial was declared and the proceeding was repeated in a second trial. Capello can have no argument that an alleged closure of the first trial means that the second trial was closed. There was no open trial violation.

Second, the trial court entered its legal rulings on the record in the very documents that Capello cites for the claim that rulings occurred off the record. Opening Br. at 28-29. It is true that the trial court reserved ruling on certain issues, but this is not error. By there nature, pre-trial

rulings are subject to revision depending on the actual evidence and testimony. By reserving a question, the trial court is waiting to rule until the evidence develops. It is also possible that the trial court will never need to visit a reserved issue because the evidence is not offered or it is admitted with no objection. Capello's effort to spin a closed trial conspiracy out of reserved rulings simply makes no sense.

With no record of a closed proceeding, Capello cannot claim error. This court should refuse to review the issue.

**B. Capello Has No Valid Claim for Violation of Open Trial Requirements**

Even if certain conversations between the judge and attorneys for both sides were held in chambers, Capello does not have standing to bring such a claim in a civil case. Even if he did have standing, he waived his right to raise such a claim by waiving his presence during the proceedings. Any informal conference with counsel is merely designed to increase the efficiency of limited court room time. Any topics addressed informally in chambers are generally later discussed, as required, on the public record. Because no public trial proceeding was hidden from Capello or the public, Capello fails to provide a basis to overturn his civil commitment..

1. **Capello Lacks Standing To Claim That The Public's Right To Open Administration Of Justice Was Violated**

Both civil and criminal judicial proceedings are constitutionally open to the public. *Dreiling v. Jain*, 151 Wn.2d 900, 93 P.2d 861 (2004). Article I, section 22 of the Washington Constitution and the sixth amendment to the United States Constitution each guarantees a *criminal defendant* a right to a public trial. *State v. Easterling*, 157 Wn.2d 167, 174, 137 P.3d 825 (2006). Additionally, article 1, section 10 of the Washington Constitution that provides "justice in all cases shall be administered openly, and without unnecessary delay," gives the public and the press a right to open and accessible court proceedings. *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 36, 640 P.2d 716 (1982).

The public's right to an open trial exists separately from a criminal defendant's right. *State v. Easterling*, 157 Wn.2d 167, 174, 137 P.3d 825 (2006). Only a criminal defendant has the right to an open and accessible court through both article 1, §22 and article 1, § 10 of the Washington State Constitution. The Washington Supreme Court has held that where a courtroom is ordered closed during significant portions of trial a defendant's constitutional rights have been violated.<sup>2</sup> *Id.*

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<sup>2</sup> The Washington Supreme Court has held that where a courtroom is closed during significant portions of criminal trial, a defendant's constitutional rights are violated. *State v. Marsh*, 126 Wash. 142, 145, 217 P. 705 (1923) (closing

In civil proceedings, the right to open and accessible court proceedings under article 1, § 10 is held by the public and the press, not a party to the proceedings. *Dreiling v. Jain*, 151 Wn.2d 900, 93 P.2d 861 (2004). Certain pretrial discovery procedures, such as depositions and interrogatories, are not public components of a civil trial. *King v. Olympic Pipeline Co.*, 104 Wn. App. 338, 369, 16 P.3d 45 (2001). They were not open to the public at common law, and in general, are conducted in private as a matter of modern practice. *Id* at 370. Information disclosed as a result of the depositions and/or interrogatories is not open to the public unless it is later used in a court proceeding. *Id*. Any restraints placed on discovered information that has not been admitted into evidence is not considered a restriction on a traditionally public source of information. *Id* at 370.

A sexually violent predator trial is a civil proceeding, not criminal. *In re Young*, 122 Wn.2d 1, 15-52 (1993). The Washington State Supreme

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court to try an adult as a juvenile); *State v. Bone-Club*, 128 Wn.2d 254, 256-57, 906 P.2d 325 (1995) (closing court at State's request for the pretrial testimony of an undercover detective); *State v. Brightman*, 155 Wn.2d 506, 511, 122 P.3d 150 (2005) (closing court for the entire 2 ½ days of voir dire, excluding the defendant's family and friends); *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 100 P.3d 291 (2004) (excluding the defendant's family and friends excluded from all voir dire proceedings); *State v. Easterling*, 157 Wn.2d 167, 172-73, 137 P.3d 825 (2006) (excluding the defendant and his attorney excluded from pretrial motions regarding the co-defendant); *State v. Strobe*, 167 Wn.2d 222, 217 P.3d 310 (2009) (private questioning of a subset of jurors violated the right to a public trial where the court failed to balance the Bone-Club factors before holding voir dire in chambers. *State v. Momah*, 167 Wn.2d 140, 217 P.3d 321 (2009) (invited error does not entitle a defendant to a new trial.

Court has made it abundantly clear that, unlike criminal defendants, individuals subject to civil commitment under RCW 71.09 do not have a Sixth Amendment right to confront witnesses at trial and do not have a blanket Fifth Amendment right to remain silent. *Id.* Without a Sixth or Fifth Amendment right, the requirement that SVP cases be tried in a public forum flows primarily, if not exclusively, from article 1 §10 of the Washington Constitution.

Because SVP proceedings are civil in nature, there is no right to a public trial under article 1 section 22, which is limited to criminal cases by its express terms. *In re Detention of Campbell*, 139 Wn.2d 341, 986 P.2d 771 (1999). As such, the right to a public SVP trial is held by the public and/or press, not the SVP respondent.

The public has an undeniably serious interest in maintaining current and thorough information about convicted sex offenders. The specific modus operandi of sex offenders, preying on vulnerable strangers or grooming potential victims, is markedly different from the behavior of other types of persons civilly committed and such dangerous behavior creates a need for disclosure of information about convicted sex offenders to the public. Grave public safety interests are involved whenever a known sex offender's tendency to recommit predatory sexual aggressiveness in the community is being evaluated. This substantial public safety interest outweighs the truncated privacy interests of the convicted sex offender.

*Campbell*, 139 Wn.2d at 356

When the differences between the criminal and civil rights to a public trial are correctly understood, Capello's assertion that the court

violated *his* constitutional right to a trial is fundamentally flawed. Capello does not have a constitutional right to a public trial in civil sexually violent predator proceedings. Because the criminal and civil public trial rights arise from different sources, Capello's effort to reverse his trial on this point should be denied.

First, Capello lacks standing to assert that the public's right to access his trial was violated on appeal. Generally, a civil litigant does not have standing to vindicate the constitutional rights of a third party, such as a right to a public trial. *Mearns v. Scharbach*, 103 Wn. App. 498, 511, 12 P.3d 1048 (2000). The U.S. Supreme Court has held that a plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interest of third parties. *Worth v. Seldin*, 422 U.S. 490, 499, 95 S.Ct. 2197 (1975).

In order to establish standing and raise the rights of another, the litigant must show (1) the litigant has suffered an injury-in-fact, giving him a sufficiently concrete interest in the outcome of the disputed issue; (2) the litigant has a close relationship to the third party; *and* (3) there exists some hindrance to the third party's ability to protect his or her own interests. *United States v. De Gross*, 960 F.2d 1433, 1437 (9<sup>th</sup> Cir., 1992); *In re Wise*, 148 Wn. App. 425, 200 P.3d 266 (2009); *Ludwig v. Dep't of*

*Retirement Sys.*, 131 Wn. App. 379, 385, 127 P.3d 781 (2006); *Mearns*, 103 Wn. App. at 512, 12 P.3d 1048 (2000); .

Here, although the public had the right to access Capello's trial, it did not have a right to access information contained in the deposition excerpts prior to the court's ruling on admissibility. Even assuming the public/press had a right to access that information, Capello does not have standing to raise the public's constitutional right. Following the *Ludwig* analysis: Capello did not suffer an injury as a result of the informal chambers conference. Capello actually benefited from any informal chamber conference because as a result of the conference the State withdrew the Patrick deposition. Moreover, Capello makes no representation that he is asserting a violation on behalf of a particular member of the public and that that person cannot protect his/her own interest. Capello's interests on appeal are different than the interest of the public.

Second, Capello cannot forward this issue on appeal because he waived any public right that he might have by participating in any chambers proceedings. See *Momah*, 167 Wn.2d at 153 (applying invited error doctrine). Under RAP 2.5, Capello's argument should be foreclosed because it was not raised in the trial court. It is also error, if any, that Capello invited by participating, through counsel, in the conference.

Capello cannot complain now when he remained silent before the trial court. *In re the Detention of Audett*, 158 Wash.2d 712, 725, 147 P.3d 982 (2006).

Capello's claim that the court violated his right to a public trial is without merit and should be dismissed. He cannot raise the public's right and he waived any objections.

2. **Even Assuming The Criminal Cases Cited By Capello Applied, The Informal Chamber Conference In This Case Was A Preliminary Discussion Not A Substantive Proceeding That Rose To The Level That Violated The Open Administration Of Justice**

Capello cites to a number of cases where a trial court in a criminal proceeding affirmatively closed the courtroom during business hours with court staff present to record proceedings. In contrast, the informal chamber conference at issue here is not a "proceeding" that implicates the public trial right. In the cases cited in Capello's brief, all or part of an important substantive criminal proceeding was shielded from public view.<sup>3</sup> In this case, at most, informal conversations occurred in chambers between the court and the lawyers. The informal chamber conference does not qualify as "proceedings" or "hearings" that can fairly be characterized as part of Capello's trial. Such matters do not trigger analysis under *Bone-*

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<sup>3</sup> *Bone-Club* (pretrial testimony); *Orange*, (voir dire); *Brightman* (voir dire); *Easterling* (pretrial hearing); *Strode* (voir dire of selected jurors); *Momah* (voir

*Club*, nor should *Bone-Club* be extended to cover every off-the-record conversation between attorneys and judges.

In similar contexts, the Washington Supreme Court has recognized that sidebars and the like are not truly trial proceedings to which the defendant or the public must be granted access. For example, in *In re Personal Restraint of Lord*, 123 Wn.2d 296, 306, 868 P.2d 835 (1994), the supreme court considered an argument that the defendant had a right to be present at numerous conferences between the lawyers and the judge, including a pretrial hearing in which the court deferred ruling on an ER 609 motion, granted a motion for funds to get Lord a haircut and clothing for trial, settled on the wording of the jury questionnaires and the pretrial instructions, and set a time limit on the testing of certain evidence. *Lord*, 123 Wn.2d at 306. It also considered whether Lord had the right to be present during a proceeding where the court announced its rulings on evidentiary matters which had previously been argued, ruled that the jurors could take notes, and directed the State to provide the defense with summaries of its witnesses' testimony. *Id.*

The Supreme Court held that Lord had a right to be present at none of these purely legal discussions between the court and counsel.

The core of the constitutional right to be present is the right to be present when evidence is being presented. *United States v.*

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dire of selected jurors).

*Gagnon*, 470 U.S. 522, 526, 105 S.Ct. 1482, 84 L.Ed.2d 486 (1985) (per curiam). Beyond that, the defendant has a “right to be present at a proceeding ‘whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge....’ ” *Gagnon*, 470 U.S. at 526 (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 54 S.Ct. 330, 78 L.Ed. 674, 90 A.L.R. 575 (1934)). The defendant therefore does not have a right to be present during in-chambers or bench conferences between the court and counsel on legal matters, *United States v. Williams*, 455 F.2d 361 (9th Cir.), cert. denied, 409 U.S. 857 (1972), at least where those matters do not require a resolution of disputed facts. *People v. Dokes*, 79 N.Y.2d 656, 584 N.Y.S.2d 761, 595 N.E.2d 836 (1992) (right to be present during hearing on admissibility of prior conviction).

*Id.*

Similarly, in *In re Personal Restraint of Pirtle*, 136 Wn.2d 467, 484, 965 P.2d 593 (1998), the court held that the defendant need not be present for discussions about the wording of jury instructions, ministerial matters, and whether the jury should be sequestered. In *Pirtle* he court held that, although the defendant should have been present for a hearing where juror misconduct was discussed, his absence was immaterial where the motion was later argued and decided in his presence. *Pirtle*, 136 Wn.2d at 484.

Decisions from the Court of Appeals are similar. In a recent criminal case, the court observed:

The public trial right applies to the evidentiary phases of the trial, and to other adversary proceedings. . . . The right to public trial is linked to the defendant's constitutional right to be present during the critical phases of trial; thus, a defendant has a right to an open court whenever evidence is taken, during a suppression hearing, ...

during voir dire, and during the jury selection process. . . . A defendant does not, however, have a right to a public hearing on purely ministerial or legal issues that do not require the resolution of disputed facts.

*State v. Sadler*, 147 Wn. App. 97, 114, 193 P.3d 1108 (2008) (citations and internal quotations omitted). In *State v. Rivera*, 108 Wn. App. 645, 32 P.3d 292 (2001), the court held that the defendant had no right to be present at a chambers conference where jurors complained about the hygiene of another juror, because the matter was purely ministerial. In *State v. Bremer*, 98 Wn. App. 832, 835, 991 P.2d 118 (2000), the court held that a defendant had no right to be present at a chambers conference between the court and counsel regarding proposed jury instructions because the inquiry was legal and did not involve resolution of questions of fact. In *State v. Walker*, 13 Wn. App. 545, 536 P.2d 657 (1975), the court held that *Walker* had a right to be present at a post-trial motion to determine his competency because factual matters were determined. However, the court also noted that the defendant “need not be present during deliberations between court and counsel or during arguments on questions of law.” *Walker*, 13 Wn. App. at 557 (cited with approval in *Lord*, 123 Wn.2d at 306 n.3).

Finally, the Framers never believed that the open administration of justice required that every judicial act be performed in a public courtroom. Rather, it has always been understood that some judicial business could

occur in chambers without violating the principle that justice be administered openly. For example, when the state constitution was adopted, it was understood that judges "at chambers" had broad powers to entertain, try, hear and determine all actions, causes, motions, demurrers, and other matters not requiring a trial by jury, all of which could occur in the judge's chambers. *Peterson v. Dillon*, 27 Wash. 78, 84, 67 P. 397 (1901) (citing Section 2138, Code of 1881 -- legislature had power to authorize counties to have commissioner who exercise duties of judge at chambers). See also *Meisenheimer v. Meisenheimer*, 55 Wash. 32, 42-43, 104 P. 159 (1909) (order is valid even though judge exercised authority in chambers rather than in open courtroom).

The informal chambers discussions at issue in this case are similar to the cases discussed above. Such conferences are helpful to the administration of justice because they allow court's to streamline the issues that are necessary for a public hearing.

It should also be noted that Capello's attorneys never objected to any the informal chamber conference and were given the opportunity not to participate. When a criminal defendant, who has a fundamental right to a public trial (unlike a civil litigant), fails to object to a discretionary courtroom closure, the issue need not be reviewed on appeal. *State v. Collins*, 50 Wn.2d 740, 314 P.2d 660 (1957). In *State v. Collins*, the trial

court locked the courtroom door to prevent spectators' filing in and out of the courtroom during closing arguments from disrupting the jury. *Collins*, 50 Wn.2d at 746. People in the courtroom were permitted to remain but those outside could not enter. *Id.* Collins did not object at trial but on appeal he claimed a violation of article 1, section 10 of the state constitution. *Id.*

The Washington Supreme Court refused to consider Collins' argument for the first time on appeal. In doing so, the court distinguished between rulings that clearly violate the right to an open trial versus those rulings that involve the exercise of discretion. *Collins*, 50 Wn.2d 747-48. The court held that a discretionary ruling on courtroom closure must be objected to, whereas an order that clearly violates the right to a public trial can be reviewed absent an objection. The *Collins* decision is still binding precedent in Washington. The holding is reproduced below in its entirety:

If an order of a trial court clearly deprives a defendant of his right to a public trial, as in *People v. Jelke*, 1954, 308 N.Y. 56, 123 N.E.2d 769, 48 A.L.R.2d 1425 [where both the public and the press were excluded from the whole trial], it is unnecessary for the defendant to raise the question by objection at the time of trial. *State v. Marsh*, 1923, 126 Wn. 142, 145-146, 217 P. 705.

However, if, as in the present case, a reasonable number of people are in attendance and there has been no partiality or favoritism in their admission, an order excluding the admittance of others may be entered if justification exists. The issue then becomes whether the trial court abused its discretion in so ordering, i. e., whether the order complained of was necessary to prevent interference with the orderly procedure of the trial. **Where**

**the ruling is discretionary, a defendant who does not object when the ruling is made waives his right to raise the issue thereafter.** *Keddington v. State*, 1918, 19 Ariz. 457, 462, 172 P. 273, L.R.A.1918D, 1093. A trial court is entitled to know that its exercise of discretion is being challenged; otherwise, it may well believe that both sides have acquiesced in its ruling. (We would add that this is a discretion that should be sparingly exercised; even the suspicion of an invasion of a defendant's constitutional right to a public trial should be avoided.)

There is here no claim of actual prejudice; there was no objection to the discretionary ruling. We are satisfied that the defendant did have a public trial within the purview of our constitutional provisions.

Id. at 747-48 (bold added).

So, too, any ruling "closing" the proceedings in this case -- if such a ruling had ever been made -- would have been discretionary and, thus, an objection was needed to preserve a claim of error. Even in criminal proceedings, had the issue been raised, the trial judge could have exercised discretion in balancing five factors to determine whether a chambers conference jeopardized the public trial right, and whether a closure analysis was needed. Thus, under *Collins*, a simple failure to object and /or to seek a discretionary ruling from the trial court bars the claim on appeal.

Other decisions of the Washington Supreme Court can be reconciled with *Collins*. In all other open courtroom decisions by the court in criminal proceedings, the courtroom closure reviewed on appeal clearly violated the right to public trial. In *State v. Marsh*, 126 Wash. 142, 145,

217 P. 705 (1923), the superior court tried an adult as if he were a juvenile, closing the entire proceeding and failing to provide counsel. In *State v. Bone-Club*, 128 Wn.2d 254, 256-57, 906 P.2d (1995), the trial court summarily granted the State's request to clear the courtroom for the pretrial testimony of an undercover detective. In *State v. Brightman*, 155 Wn.2d 506, 511, 122 P.3d 150 (2005) the trial court ordered -- sua sponte -- that the courtroom be closed for the entire 2 ½ days of voir dire, excluding the defendant's family and friends. Likewise, in *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 100 P.3d 291 (2004), the trial court summarily ordered the defendant's family and friends excluded from *all* voir dire proceedings. And, in *State v. Easterling*, 157 Wn.2d 167, 172-73, 137 P.3d 825 (2006), the trial court ordered the defendant and his attorney excluded from pretrial motions regarding the co-defendant.

All of these cases were criminal proceedings and not civil. Only a criminal defendant has a fundamental right to a public trial. In each of these cases, the constitutional violation was clear because there was no colorable basis upon which to close the courtroom. The errors in these cases were "manifest" and would have been reviewable under *Collins*, even absent an objection in the trial court. *Collins* has never been abrogated.<sup>4</sup> Nor has it been established that *Collins* should be overruled

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<sup>4</sup> Despite being cited and argued by the State, Collins was not cited or discussed

because it is incorrect and harmful. *In re Rights to Waters of Stranger Creek*, 77 Wn.2d 649, 653, 466 P.2d 508 (1970). For these reasons, even if Capello has standing to assert a violation, or has the right of a criminal defendant in these proceedings, this Court should hold that Capello, like Collins, failed to preserve a claim of error as to the trial court's discretionary ruling.

3. **Even If The Court Finds Capello Has A Fundamental Right To An Open Trial In SVP Cases, The Court Closure Was De Minimis And Did Not Infringe Upon His Constitutional Rights**

Even if this court finds that Capello has standing or has the rights of a criminal defendant who somehow preserved his claim of error, and that the court actually closed court to the public, the closure was for such a short period of time it was too trivial to cause a constitutional deprivation. When this occurs the error may be considered de minimis. *State v. Easterling*, 157 Wn.2d 167, 181-182, 183-185, 137 P.3d 825 (2006). Of course, it is very difficult to analyze this argument in the face of Capello's illusory court closure. Nevertheless, it is likely that any significant closure of the court would have been specifically noted somewhere in the current voluminous record.

A brief court closure whether intentional or inadvertent is deemed de minimis when weighing the closure against the values advanced by the

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in the recent Momah or Strode opinions.

right. *Easterling* at 184. The court should ask whether the closure implicates any of values advanced by the public trial guarantee: 1) to ensure a fair trial; 2) remind the prosecutor and judge of their responsibility to the accused and the importance of their functions; 3) to encourage witnesses to come forward; 4) to discourage perjury. *Carson v. Fischer*, 421 F.3d 83, 92 (2d Cir. 2005). The Supreme Court has determined that this analysis will safeguard the right at stake without requiring a new trial where these values have not been infringed by trivial closure.

Under this analysis the courts have found that an inadvertent courtroom closure of 30 to 40 minutes when the defendant took the stand was considered trivial because most of the defendant's testimony that was relevant was repeated in summation. *Peterson v. Williams*, 85 F.3d 39, 42 (2d Cir. 1996). A deputy sheriff's erroneous closure of a court room during summation to keep the courtroom quiet was only for a short portion of the trial was deemed trivial. *Snyder v. Coiner*, 365 F.Supp. 321 (N.D.W. Va. 1973).

Even deliberate closure has been found to be de minimis. A court's exclusion of a defendant's mother-in-law from the courtroom during the testimony of a confidential informant was deemed trivial. *Carson v. Fischer*, 421 F.3d 83, 92 (2d Cir. 2005). A trial court's

exclusion of spectators from courtroom during the questioning of a jury about safety concerns was considered de minimis. *State's v. Ivester*, 316 F.3d 955, 906 (9<sup>th</sup> Cir. 2003).

In this case, any informal chambers conference with both parties was trivial at best and did not touch upon Capello's alleged right to a public trial. Even if considered a "closure,"<sup>5</sup> it was for a short period of time, no testimony was taken, the discussions were likely placed on the record in open court during later sessions, and the court heard argument from both parties. Clearly, no values upon which public trial is based were infringed upon.

For these reasons, this Court should hold even if Capello has a fundamental right to an open trial in SVP cases, an informal chambers conference was de minimis and did not infringe upon Capello's constitutional rights.

**V. THE TRIAL COURT DID NOT ERR IN ITS EVIDENTIARY RULINGS**

Capello claims that the trial court committed reversible error in making two evidentiary rulings. First, Capello claims that the trial court erred in allowing excited utterance testimony regarding statements made by victim of Capello's 1982 offense. Second, Capello challenges testimony

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<sup>5</sup> There is no indication on the record that the court would have excluded others from this conference if anyone had wished to attend.

from Dr. Doren regarding matters related to the victims state of mind in the 1991 rape case that Dr. Doren relied upon to diagnose Paraphilia Sexual Sadism. Capello's claim of error lacks merit.

**A. Standard of Review**

On a daily basis, trial judges throughout our state make thousands of discretionary decisions regarding the scope of cross-examination and the admissibility of impeachment evidence. If trial courts are to function effectively, it is important that our judges enjoy substantial latitude to make routine and timely, good-faith evidentiary decisions without unnecessary fear of reversal by appellate courts. Recognizing this important reality, our appellate courts have repeatedly emphasized that "[d]eterminations regarding the scope of cross-examination are within the trial court's discretion and will not be overturned on appeal absent an abuse of discretion." *State v. Rohrich*, 149 Wash.2d 647, 654, 71 P.3d 638 (2003) (citations omitted).

A trial court abuses only its discretion when its decision is based on untenable grounds or is manifestly unreasonable. *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995); *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 p.2d 775 (1971). Importantly, abuse of discretion occurs when no reasonable person would take the view adopted by the trial court. *State v. Castellanos*, 132 Wn.2d 94, 97 935 p.2d 1353 (1997). To

state it more positively, a trial judge does not abuse his or her discretion when the decision falls within the broad range of decisions that any reasonable trial judge might adopt. “[T]he trial court’s decision will be reversed only if no reasonable person would have decided the matter as the trial court did.” *State v. Thomas*, 150 Wash.2d 821, 856, 83 P.3d 970 (2004). Capello fails to satisfy this standard.

**B. There Was No Abuse of Discretion on the Excited Utterance Testimony**

Capello claims that the trial court erred "when it permitted hearsay testimony of a victim's opinion regarding the ultimate question at trial." Opening Br. at 30. In particular, Capello complains that that trial court erred in admitting testimony that "Basically, she said she was raped. she kept saying that he was sick and needed to be locked up." Capello has failed to preserve error, particularly on his claim that this witness testified to an "ultimate issue."

**1. Capello Failed to Preserve Error**

It is well-established that a party must timely object to the introduction of evidence in order to preserve the alleged evidentiary error for appeal. *State v. Davis*, 141 Wn.2d 798, 849-50, 10 P.3d 977 (2000); *State v. Silvers*, 70 Wn.2d 430, 432, 423 P.2d 539 (1967). One reason that parties are required to lodge objections at appropriate times below is so that parties and trial courts can operate to protect the record and correct

any error. *Smith v. Shannon*, 100 Wash.2d 26, 37, 666 P.2d 351 (1983), citing *Estate of Ryder v. Kelly-Springfield Tire, Co.*, 91 Wash.2d 111, 114, 587 P.2d 160 (1978).

In addition, a party must object on specific grounds to preserve error. A party is not only obligated to object, but to specify the correct grounds for the objection. *State v. Guloy*, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985).

Here, Capello questioned whether the victims statements met the excited utterance doctrine, but nowhere lodged an objection to claiming that the victim was testifying to an "ultimate issue." If this objection had been made below, it would have been a simple matter to redact the deposition testimony. By failing to object on these grounds, Capello has abandoned any error related to this testimony. *Guloy*, 104 Wn.2d at 422

Moreover, Capello does not effectively preserve error by only complaining of the testimony pre-trial. In *State v. Weber*, 159 Wash.2d 252, 272, 149 P.3d 646, 656 - 657 (2006), the Supreme Court noted that pretrial arguments and orders do not preserve evidentiary rulings for review on appeal absent a contemporaneous objection when the evidence is entered:

We follow the common sense approach of the Court of Appeals and consider Weber's failure to object even though he received pretrial orders that allegedly excluded the admitted evidence. Without an objection, the trial court never had an opportunity to

determine whether the evidence would even have been covered by the pretrial motions, or if it was covered by the motions, whether the court could have cured any potential prejudice through an instruction. Thus, even when the trial court has already excluded evidence through a pretrial order, the complaining party should object to the admission of the allegedly inadmissible evidence in order to preserve the issue for review, unless an unusual circumstance exists “that makes it impossible to avoid the prejudicial impact of evidence that had previously been ruled inadmissible.” *Sullivan*, 69 Wash.App. at 173, 847 P.2d 953.

Here, the testimony came in without objection both prior to reading the deposition and during the deposition. See VRP 12/6/2007 at 116 (no objection). As a result, Capello has failed to preserve his current claim of error.

**2. The Victim's Statements Were Excited Utterances**

The only objection that Capello pursues on appeal that was preserved below is to the excited utterance rule. However, the fact of a half-clothed rape victim running out of the sugar cane fields to a responding police car makes application of the excited utterance doctrine fairly routine, and certainly not an abuse of discretion.

The excited utterance is a firmly rooted exception to the hearsay rule under the rules of evidence. *State v. Woods*, 143 Wn.2d 561, 595, 23 P.3d 1046 (2001); *State v. Vincent*, 131 Wash. App. 147, 120 P.3d 120, 125 (2005); *State v. Orndorff*, 122 Wash.App. 781, 786, 95 P.3d 406 (2004).

An excited utterance is a statement made while the declarant is still under the influence of a traumatic event, such that the statement is not the product of reflection or deliberation. ER 803(a)(2); *State v. Woods*, 143 Wash.2d 561, 600, 23 P.3d 1046. *cert. denied*, 534 U.S. 964, 122 S.Ct. 374, 151 L.Ed.2d 285 (2001). Spontaneity, the passage of time, and the declarant's state of mind are factors courts consider to determine whether a statement is an excited utterance, i.e., whether it is a deliberate assertion or the product of reflex or instinct. *State v. Palomo*, 113 Wash.2d 789, 791, 783 P.2d 575 (1989). *cert. denied*, 498 U.S. 826, 111 S.Ct. 80, 112 L.Ed.2d 53 (1990). Thus, a court may admit a hearsay statement as an excited utterance if the following requirements are met: (1) a startling event or condition occurred, (2) the statement was made while the declarant was still under the stress of the startling event, and (3) the statement related to the startling event. *State v. Hardy*, 133 Wash.2d 701, 714, 946 P.2d 1175 (1997).

Here, the victim came running out of the field toward the approaching police care with her breasts exposed, screaming "help me, help me." VRP 12/6/2007 at 112. Her pants were open and her bra was broken. *Id.* at 112. She was crying and visually upset. *Id.* at 116. The challenged statements occurred right after she made contact with the officer. *Id.*

Capello draws much from testimony that she calmed down to some extent, but the testimony actually is that the officer "tried to calm her down to find out what happened." *Id.* at 116. Although her level of emotion decreased once she was safely with the officer, there was certainly no opportunity for her to concoct a false story or calmly make up facts. The trial court did not err in allowing this testimony.

C. **There Was No Error In Allowing Testimony Regarding Capello's Act of Urinating in L.W.'s Mouth**

Capello complains that the court erred by allowing testimony that Capello urinated in L.W.'s mouth following the rape. Opening Br. at 41. Although Capello nowhere cites a ruling by the court, he claims that the urination evidence was relevant only to the question of identification. Although the court nowhere excluded or limited the urination evidence, Capello claims that urination is both not relevant and "inherently prejudicial." Opening Br. at 41. He attempts to label it "victim impact testimony," even though it goes directly to the sadistic method that Capello used to rape L.W.

A central issue in any sexually violent predator case is whether the SVP respondent suffers from a "mental abnormality." Here, the mental abnormality alleged by the State was Paraphilia Sexual Sadism. The manner that Capello chose to perpetrate his rapes and the humiliation placed on his victims was directly relevant to the diagnosis.

Dr. Doren testified that Capello suffered from Sexual Sadism. VRP 12/4/2007 at 63. A Sexual Sadist was "someone who is specifically turned on sexually by the infliction of physical or psychological pain to someone else . . . . so physical pain, including injury and/or psychological pain usually described as humiliation. *Id.* at 63. He explained the basis for the diagnosis in the DSM-IV. *Id.* at 64-65. Without objection, Dr. Doren pointed out that Capello had urinated in L.W.'s mouth following the rape. *Id.* at 72. Dr. Doren testified that the act of urination was particularly significant to his diagnosis of Sexual Sadism:

I paid attention both to the fact of the report, also to the timing of when it was relative to Mr. Capello's already reached orgasm, according to the victim, ejaculated, in that the purpose therefore of the urinating in her mouth couldn't have been because he was looking still to reach orgasm in some way, to have wanted his penis in her mouth, but to be the act of urinating her mouth was the point. And most rapists, particularly nonsadist rapists, after they've committed their rape, they just want to get the heck out of there, they don't want to get caught and there's no reason to hang around and instead he had her do this, and it is of course a very humiliating act. It's also an act that was occurring outside of the context of his trying to get an orgasm which again suggests to me that this is very much part of something that has psychological meaning for him.

VRP 12/4/2007 at 81. Dr. Doren further testified that L.W.'s feeling of actual humiliation in response to Capello further supported the diagnosis. *Id.* at 82.

Capello's current claim that urination in a victim's mouth lacks relevance to a sadism diagnosis was also refuted by his own expert, Dr.

Hart, at trial. Through the testimony, the State compiled a chart called "Evidence Consistent with Sexual Sadism." VRP 12/132007 at 24. The chart listed "urinating in mouth" among other behaviors committed by Capello. *Id.* When asked if these behaviors were consistent with a diagnosis of sexual sadism, Dr. Hart answered "yes." *Id.* at 26-27.

Although Dr. Hart disagreed with Dr. Doren's diagnosis of sexual Sadism, he did acknowledge that the offense where Capello urinated in L.W.'s mouth "is actually the one that concerns me most in terms of its potential to indicate the presence of sexual sadism." *Id.* at 28. He specifically testified that urinating in a victim's mouth is consistent with a Sexual Sadism diagnosis. VRP 12/10/2007 at 178.

Thus, while urination in the victim's mouth was powerful evidence of Sexual Sadism, it was also fair and necessary evidence. The manner of committing a rape is highly probative in determine the commitment criteria:

The evidence here was properly admitted. The manner in which the previous crimes were committed has some bearing on the motivations and mental states of the petitioners, and is pertinent to the ultimate question here. Moreover, the likelihood of continued violence on the part of petitioners is central to the determination of whether they are sexually violent predators under the terms of the Statute. Thus, we cannot say that the trial court abused its discretion in admitting the victims' testimony. Although we agree that the testimony presented by the victims was compelling, and, therefore, had a substantial effect on the jury, we do not believe that its prejudicial effect outweighed its probative value. In assessing whether an individual is a sexually violent predator, prior

sexual history is highly probative of his or her propensity for future violence.

*In re Young*, 122 Wash.2d 1, 53, 857 P.2d 989, 1015 (1993)

The trial court committed no error.

**D. Any Error Was Harmless**

An evidentiary error is reversible only if, within reasonable probabilities, the error materially affected the outcome of the trial. *State v. Cunningham*, 93 Wn.2d 823, 831, 613 P.2d 1139 (1980). In other words, "[e]rror is harmless unless the improper cross-examination was sufficient to affect the outcome of the trial." *State v. Lopez*, 95 Wash.App. 842, 856, 980 P.2d 224 (1999).

Here, the evidence against Capello -- a Sadistic Psychopath -- was overwhelming. There is no indication or argument from Capello that any error materially effected the outcome of Capello's commitment.<sup>6</sup>

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<sup>6</sup> Even if Capello properly preserved his claim that his 1982 victim erroneously testified to the ultimate issue, it does not merit reversal. First, her statements were made as of 1992, whereas the question in the 2007 was whether Capello currently suffered from a mental abnormality. Second, the victim was not opining to a mental abnormality, but simply saying that Capello was "sick" -- a natural reaction to the rape she had just experienced by him. Third, the jury heard testimony from Dr. Doren, one of the foremost experts in the field. It is highly unlikely, given the overwhelming evidence against Capello, that the short statement attributed to the victim made the difference between Dr. Doren and Dr. Hart on the diagnostic issue.

**VI. CONCLUSION**

For the foregoing reasons, the State asks that the jury verdict civilly committing Capello as a sexually violent predator be affirmed.

DATED this 27th day of April 2010.

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