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NO. 63879-3

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

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COURT OF APPEALS
DIVISION I
M.B.C.

In re the Detention of:

JEFFREY LIPTRAP

Appellant,

v.

STATE OF WASHINGTON,

Respondent.

RESPONDENT'S OPENING BRIEF

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ORIGINAL

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I. ISSUES PRESENTED

Whether the trial court abused its discretion in denying a committed sexually violent predator's motion for a new trial pursuant to CR 60(b)(3) brought more than one year after trial and based on developments in the field of risk assessment occurring since the trial where the "new evidence" is substantially similar to what was presented at trial and is unlikely to change the result of trial.

II. STATEMENT OF THE CASE

A. Liptrap's Criminal Sexual History

Jeffrey Liptrap was born on June 24, 1965. CP at 16. Liptrap has a history molesting minor children. He was convicted of Attempted Indecent Liberties Against a Child Under Age 14 in 1986; the victim was a four-year-old female child. CP at 37-38. In 1993, he pled guilty to Rape of a Child 1st Degree and Communication With A Minor For Immoral purposes, both involving the 11-year-old son of a live-in female friend, and Child Molestation 1st Degree involving that same friend's 8-year-old daughter. CP at 38. A sex offender treatment provider described Liptrap's disclosures to him regarding these incidents as follows:

[Liptrap] admits to constant sexual contact with victims, girl 9, boy 11 over a period of months. Sexual contact with boy: he performed anal on boy and engaged in mutual oral sex. Girl; he performed oral on her and engaged in penile

vaginal intercourse. They did threesomes: the kids would have sex with each other and he would have sex with one of the kids or they would take turns with him. He reports he and the kids would get together and "plan" when they would be able to have sex again. He also showed pornography to both the girl and the boy and they "learned" sexual behaviors from the pornography. He said he did enjoy sex with the girl more than the boy...He said he found his fiancée sexually repulsive and they did not have sex even though they were living together. Reports he is "turned off" by adult female genitals and has been getting his emotional and sexual needs met through children for "years."

CP at 42. The children's mother, Liptrap's fiancée, at one point found sexually oriented materials belonging to Liptrap. These materials included the following:

- A chapter from a book containing the following passage: "He looked at Lilli, she was sleeping peacefully, curled up in a ball. She was a good, sweet kid, and the world's best cocksucker."
- A book entitled *Hot Mouth Daughters: Pete and Lilli Assembled a Crew of Oral Experts for a Floating Orgy!*
- A book entitled *Good Head, Uncle!*
- A book which reads in part as follows: "How does one tell one's daughter, a child of 12, that she would have to give her little pussy to the man who would become her new daddy? I accepted a cockthrust from my stepfather, getting really turned on by a sense of double action..."

CP at 40. In addition to the offenses for which he has been convicted, Liptrap has admitted to an additional four unadjudicated sexual offenses against children between roughly six and eleven. CP at 41.

B. Procedural History

The State filed a petition alleging that Respondent is a Sexually Violent Predator (SVP) on June 13, 2005. CP at 60. A jury trial was held beginning on June 11, 2007. *Id.* That trial resulted in a hung jury. *Id.* A second jury trial was held on beginning on December 3, 2007, and Liptrap was found to be an SVP. *Id.* An Order committing Respondent was entered on December 11, 2007. *Id.*

Roughly 16 months later, Liptrap filed a motion for a new trial pursuant to CR 60(b)(3) and CR 60(c). CP 69-267. The trial court denied his motion. CP at 10; 6/22/09 RP at 8-10. Liptrap appeals.

C. Trial Testimony Regarding Risk Assessment

At trial, the State offered the expert opinion testimony of clinical and forensic psychologist Dr. Christopher North, Ph.D. Dr. North, a licensed psychologist, has considerable experience in the evaluation, diagnosis, treatment and risk assessment of sex offenders. CP at 83-91.¹

As part of his evaluation, Dr. North reviewed court documents, police reports, presentence investigation reports, criminal history information, DOC records, Special Commitment Center (SCC) records

¹ A portion of Dr. North's trial testimony was appended to Appellant's Motion for New Trial, and for that reason is referenced as a clerk's paper.

that document Liptrap's progress there, and Liptrap's deposition testimony. *Id.* at 94-98. Dr. North testified that, in his professional opinion, Liptrap suffers from a mental abnormality, namely Pedophilia, and a personality disorder, namely Personality Disorder, Not Otherwise Specified (NOS) with Antisocial, Narcissistic and Histrionic features. *Id.* at 107, 117.

Dr. North also conducted a risk assessment to determine whether Liptrap was likely, as a result of his mental abnormality or personality disorder, to commit another sexually violent offense. CP at 120. He used actuarial instruments,² then considered other risk factors outside these instruments that research has identified as associated with sexual offending. *Id.* Dr. North used three actuarial instruments: the Static-99, the Minnesota Sex Offender Screening Tool – Revised (MnSOST-R) and the Sex Offender Risk Appraisal Guide (SORAG). *Id.* at 120. On the Static-99, Liptrap's score of 5 correlated to a 33 percent risk of reconviction for a new sex offense within 5 years of release, 38 percent within 10 years, and 40 percent within 15 years. *Id.* at 130. Liptrap's score on the MnSOST-R test was statistically related to a 25 to 57 percent risk of re-arrest for a "hands on" sex offense within 6 years of release. *Id.* at 159. Finally, Dr. North testified that Liptrap's score on the SORAG

² An actuarial instrument is a list of factors associated with a certain outcome, which are then weighted statistically. CP at 121.

(Sex Offender Risk Assessment Guide) indicated a 76 percent likelihood of reconviction for a new violent offense, including sex offenses, within 10 years of release. *Id.* at 165.

Liptrap presented the testimony Dr. Richard Wollert, Ph.D. Dr. Wollert testified extensively regarding the effects of age on risk, and the validity and reliability of the various actuarial tools that Dr. North used in his risk assessment. CP at 62.³

III. ARGUMENT

Liptrap seeks review of the trial court order denying his motion to vacate his commitment and order a new trial, arguing that various developments in the field of risk prediction occurring since the time of trial constitute "newly discovered evidence" within the meaning of CR 60(b)(3).

This claim fails. First, his claim is time-barred, having been brought more than one year after his commitment. Nor has Liptrap demonstrated that the trial court abused its discretion in denying his motion for a new trial where the arguments presented simply recycled a slightly modified version of arguments that were presented to—and

³ Citations to the record are to the State's response to Liptrap's motion. Unfortunately, although specific citations to the trial record were made in the brief, they were not attached to the State's response.

rejected by—the jury at his trial. If all that were needed in order to justify a new trial were a new methodology or opinion, a committed SVP would be entitled to a new trial with every newly published article or theory. His effort to vacate his commitment should be denied.

A. Legal Standard Under CR 60(b)(3)

Pursuant to CR 60(b)(3), the court may relieve a party or his legal representative from a final judgment, order, or proceeding based on "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under [CR]59(b)." A new trial on the ground of newly discovered evidence will only be granted if the moving party demonstrates that the evidence (1) will probably change the result of the trial, (2) was discovered after trial, (3) could not have been discovered before trial even with the exercise of due diligence, (4) is material, and (5) is not merely cumulative or impeaching. *Go2Net, Inc. v. CI Host, Inc.*, 115 Wn. App. 73, 88, 60 P.3d 1245 (2003).⁴ Failure to satisfy any one of these five factors justifies denial of the motion. *Id.* In addition, for evidence to be "newly discovered" under CR 60(b)(3), the evidence must have existed when the order was entered,

⁴ Although *Go2Net* addresses these criteria in the context of a CR 59 motion, the test for newly discovered evidence under CR 59 and CR 60(b)(3) is the same. 5 Karl B. Tegland, *Washington Practice: Rules Practice* CR 60 at 553 (2006).

not later. *In the Matter of the Marriage of Knutson*, 114 Wn. App. 866, 872, 60 P.3d 681 (2003) (emphasis added).

A motion to vacate a judgment is to be considered and decided by the trial court in the exercise of its discretion, and its decision should not be overturned on appeal unless it plainly appears that this discretion has been abused. *Martin v. Pickering*, 85 Wn.2d 241, 245, 533 P.2d 380 (1975). Because Liptrap cannot demonstrate that the trial court abused its discretion in denying his CR 60 motion, his claim fails.

B. Respondent's Motion Is Time Barred

Respondent's motions are time-barred by CR 60(b), which specifically states that "the motion shall be made within a reasonable time and for reasons (1), (2), or (3) not more than 1 year after the judgment, order, or proceeding was entered or taken." Respondent has failed to comply when he brought his motion more than 16 months after his commitment.

C. Liptrap Fails To Make The Requisite Showing Under CR 60(b)

Even if Liptrap's motion were not time-barred, it still fails. Liptrap points to new research relating to two of the three actuarial instruments used by Dr. North, arguing that, if his trial were held today, new "protocols" related to risk assessment would "manifestly change" the

result of the 2007 trial "because they predict a risk of recidivism that is incompatible with a 'likelihood' or more than 50% standard required for civil commitment under RCW 71.09." App. Br. at 26.

His argument fails for several reasons. First and most importantly, "evidence" of the sort offered by Liptrap is not of a sort contemplated by CR 60(b)(3). Secondly, the arguments he now makes are substantially similar to those made at trial only 16 months before he brought his motion for a new trial, and as such were not "new" at all. Finally, Liptrap has not demonstrated that these recent developments, part of an ongoing evolution of the science of risk assessment, would change the results of the trial. Because Liptrap fails to show that he meets all of the criteria for a new trial under CR 60(b)(3), the court below did not abuse its discretion in denying his motion.

1. The "Evidence" Offered By Liptrap Is Not Of A Type Contemplated By CR 60(b)(3)

Liptrap seeks a new trial based on materials published since his trial. Although it is correct that these materials are "new" in the sense that they did not exist in precisely their current form at the time of trial, they do not constitute "new evidence" of the sort contemplated by CR 60(b). Rather, these materials simply demonstrate something that the courts of this state have long acknowledged: that the work by experts in the field of

risk prediction to develop ever-more-accurate methods of risk prediction instruments is ongoing, and that opinions relating to how best to measure the risk of any particular offender change as this field develops.

a. The Science of Risk Prediction, Like All Scientific Fields, Evolves

Liptrap submits various materials discussing recent developments in the field of risk prediction, arguing that these materials mandate a new trial. "Evidence" of the sort proffered by Liptrap—that is, changes in scientific methodology or practice—is simply not, however, of a type contemplated by CR 60(b)(3). In all fields involving scientific research, the body of knowledge grows and evolves over time, and the field of sex offender risk assessment is no exception. The authors of the Static-99 have published an explanation of the data discussed in Liptrap's motion, and conclude their discussion with the following statement:

As noted, this research project is ongoing and the absolute recidivism rates presented here will be updated. Given changes in recidivism over time, norms for Static-99 (and likely for other actuarial risk assessment scales as well) should be continually monitored and updated as needed (i.e., when changes are large enough to be meaningful). We are currently adding more datasets and plan to do further analyses to explore other factors that may influence recidivism norms, such as age, treatment, and jurisdiction.

Hanson, Karl, et al., *Reporting Static-99 in Light of New Research on Recidivism Norms*, Newsletter for the Association for the Treatment of

Sexual Abusers, *The Forum*, 21 (1), Winter 2009 at 44 (available at http://www.static99.org/pdfdocs/forum_article_feb2009.pdf).

The materials appended to Liptrap's CR 60 motion make the evolving nature of this type of inquiry clear as well. Hanson, Helmus and Thorton, in *Reporting Static-99 in Light of New Research on Recidivism Norms* (CP at 174-83) note for example that "we have yet to finish our analyses. . ." CP at 177. While observing that the new rating scale "forces evaluators to consider factors external to the rating scale," they note that "the best method of considering these external factors is as yet unknown. . ." CP at 178. Thus, far from representing a wholesale change" (App. Br. at 2) to the methodology used by Dr. North, the recent modifications to various actuarial instruments are merely evidence of continuing evolution in the field of risk assessment.

The appellate courts of this State have long been aware of the debate within the scientific community as to how best to assess risk and, more broadly, whether such assessments are sufficiently reliable to satisfy due process. While acknowledging "the inherent uncertainties of psychiatric predictions," (*In re Young*, 122 Wn.2d 1, 56, 857 P.2d 989 (1993)), our supreme court has repeatedly upheld such assessments, approving the use of both clinical judgment (*Young*, 122 Wn.2d at 56; *In re Campbell*, 139 Wn.2d 341, 355, 986 P.2d 771 (1999)) and actuarial

tools (*In re Thorell*, 149 Wn.2d 724, 752-5, 72 P.3d 708 (2005)). The debate, however, continues, as evidenced by Liptrap's submissions both in the trial court and here. Liptrap's argument against use of particular instruments as part of the process of risk assessment is simply a variation on an argument that has repeatedly been soundly rejected by our courts, that is, that predictions of future dangerousness are simply too unreliable to be presented in court. While there will inevitably be disputes relating to such testimony, such disputes are within the province of the jury to resolve. *Barefoot v. Estelle*, 463 U.S. 880, 902, 103 S.Ct. 3383, 77.L.Ed.2d 1090 (1983). The fact that the jury resolved these disputes in the State's favor in this case does not entitle Liptrap to a new trial.

b. The Court Of Appeals Has Rejected Transitory Evidence As The Basis For a CR 60(b)(3) Motion

The nature the evidence cited in support of Liptrap's CR 60(b)(3) motion does not lend itself to motions brought pursuant to CR 60(b)(3). Rather, the transitory, evolving nature of scientific thought most closely resembles the sort of "evidence" rejected as a basis for a new trial by Division III in *In re Knutson*, 114 Wn. App. 866, 60 P.3d 681(2003). There, the (divorcing) couple's assets were divided based on a valuation of those assets as of June, 2000, and the decree entered the following September. By the time certain assets were actually transferred several

months later, the value of the assets had fallen, and the former husband sought to vacate the decree pursuant to, *inter alia*, CR 60(b)(3).

Rejecting this attempt, the Court of Appeals noted that "the transitory nature of the 'evidence' does not lend itself to application of CR 60(b)(3)." *Id.*, 114 Wn. App. at 872. The value of such a plan, the court noted, "necessarily fluctuates with the ever-changing market," going on to observe that,

Following Mr. Knutson's flawed logic, "newly discovered evidence" would occur with every change in the plan's value, or any other asset previously valued, thereby justifying vacation of the decree under CR 60(b)(3). However, CR 60(b)(3) applies to evidence existing at the time the decree was entered, not later. Because Mr. Knutson has not shown the loss in value occurred before entry of the decree, his resort to CR 60(b)(3) fails.

Id. (Emphasis added). The same holds true here: Following Liptrap's (implied) logic, he is entitled to a new trial with every new development in this field.

The information presented in Liptrap's motion is not final, nor is it expected to have everlasting significance. By Liptrap's reasoning, all civilly committed SVPs who were committed prior to the development of the Static-99 and who, after commitment, were scored on that instrument and demonstrated to show a risk of re-conviction below 50 percent, are entitled to new trials. Likewise, those in whose trials the MnSOST-R was

used should have received new trials when Dr. Wollert published his paper concluding the MnSOST-R was unreliable. Of course, those individuals are not entitled to new trials on that basis, and neither is Liptrap here.

2. There Is Nothing "New" About the "Evidence" Respondent Presents

Even if the information Liptrap submits in support of his motion were of a type properly considered under CR 60(b)(3), his motion would still fail, in that this information is not "new." In fact, the "evidence" Liptrap now seeks to present is simply a recycling of evidence presented and explored at length in the course of his two-week jury trial in 2007. As such, the trial court did not abuse its discretion in denying Liptrap's motion.

At trial, Liptrap presented the expert testimony of Dr. Richard Wollert, who discussed many of the topics he now seeks to introduce as "new." Dr. Wollert testified at length about the Static-99. CP at 64. Specifically, he noted research by one of the creators of the Static-99 that showed the five year probability of reoffense for people with a score of 5 should be reduced from 33 percent to 14 percent. *Id.* Regarding the MnSOST-R, Dr. Wollert testified that he had published articles in peer reviewed professional journals criticizing the MnSOST-R. *Id.* He testified at length that the MnSOST-R was unreliable because the sample

of offenders used to create it was too small, and he described the MnSOST-R as being too unreliable to even be used at all in SVP cases. *Id.*

Dr. Wollert also described the concept of base rates to the jury, stating, "[a]s the base rate goes down, the recidivism rate for each point total go [sic] down." CP at 64. He testified that "five-year base rates now are on the order of 5 percent to 8 percent, much lower than they were 40 years ago." *Id.* Dr. Wollert also testified about a research study that concluded "those who finished treatment [like Liptrap] had a 9 percent risk of recidivating, and those who didn't had a 17 percent risk." *Id.* at 65.

At the CR 60 hearing, there was no dispute that, at the commitment trial only 18 months earlier,⁵ Liptrap had presented considerable testimony to the effect that his risk for recidivism was much lower than what had been reported by Dr. North. All parties at the CR 60 hearing had been present at that trial,⁶ and the participants' comments at the CR 60 hearing indicate that all recalled Dr. Wollert's testimony clearly. At that hearing, Liptrap's counsel pointed out that during the commitment trial, Dr. Wollert

⁵ Although the motion was filed 16 months after trial, in April of 2009, the hearing did not occur until two months later, in June of 2009.

⁶ The cover sheet to Dr. North's testimony indicates that the trial was held before The Hon. Ronald L. Castleberry, with Josh Choate appearing on behalf of the State and Martin Mooney appearing on behalf of Liptrap. CP at 80. Those same parties appeared at the CR 60 hearing. 6/22/09RP at 1.

had "criticized or pointed out some of the problem with actuarial and risk prediction, and he in fact suggested to the jury different percentages based on the actuarial instruments. . ." 6/22/09RP at 2. Likewise Judge Castleberry, in denying Liptrap's CR 60 motion, noted that "the underlying [actuarial] tests were subject to much criticism by Dr. Wollert at the initial trial. He persistently testified throughout the trial that the tests were subject to criticism and that they were not a useful tool, et cetera." 6/22/09 RP at 9. Not only had such testimony been affirmatively presented on Liptrap's behalf by Dr. Wollert, but, of course, Liptrap had an opportunity to cross-examine Dr. North at trial. Thus, as noted by Judge Castleberry, an experienced judge, Wollert's current "interpretation and analysis" was "already in one form or another put to the jury." 6/22/09 RP at 9.

3. Liptrap Has Not Demonstrated That The Proposed "New Evidence" Would Change The Result Of Trial

In order to succeed in a CR 60 motion, Liptrap must demonstrate that "the new evidence will probably change the result of trial." *Go2Net*, 115 Wn. App. at 88. Although Liptrap argues that the modified data "is accepted by the scientific community as the only acceptable standard for formulating percentage scores into understandable varying risks of reoffense," (App. Br. at 15), his own submissions do not support this

contention. Moreover, Liptrap's argument vastly overemphasizes the role actuarial instruments play in risk assessment in general and in an SVP trial in particular, and fails to take note of the fact that in any SVP trial, those actuarial instruments are only a piece of the puzzle.

a. Liptrap Has Not Demonstrated That Evolution In Risk Assessments Would Change The Result of Trial

Liptrap's assertions that the recent modifications to the Static-99 represent a "wholesale change" to earlier methodologies and a "dramatic invalidation of the prior methodology" "now accepted by the scientific community" (App. Br. at 2) are not supported by the materials he submits in support of these assertions. First, the materials he submits freely acknowledge the continuing need to look to factors outside the actuarial instruments for purposes of a risk assessment. Secondly, the numbers upon which Liptrap currently relies in support of his contention that he is entitled to a new trial are simply not that much different than those presented at trial.

In the 2009 meta- analysis⁷ by Hanson and Morton-Bourgon to which Liptrap cites (App. Br. at 21), for example, the authors note that

⁷ The Oxford English Dictionary Online (OED Online) defines "meta-analysis" as "[a]nalysis of data from a number of independent studies of the same subject (published or unpublished), esp. in order to determine overall trends and significance." (OED Online (2003) <[http:// dictionary.oed.com/cgi/entry/00307098?.html](http://dictionary.oed.com/cgi/entry/00307098?.html)> [as of Jan. 1, 2004].)

actuarial tools "should be a *major consideration* in the evaluation of recidivism risk potential for sexual offenders" and that "evaluators have a *number of measures to choose from* depending on the offender, the goal of the assessments and the information and resources available." Hanson, Karl, and Morton-Bourgon, Kelly E., *The Accuracy Of Recidivism Risk Assessments For Sexual Offenders: A Meta-Analysis Of 118 Prediction Studies* at Vol. 21, No.1 *Psychological Assessment*, at 10 (2009) (emphasis added). They note that "no single measure has yet to establish itself as clearly more accurate than other, similar measures," and point to several different tools, including the Static-99 and the MnSOST-R (for the prediction of sexual recidivism) and the SORAG (for the prediction of violent (including sexual) recidivism). *Id.* Noting that "[w]hile some argue for use only of the 'best' measure," the authors indicate that "no one 'best measure' has been empirically established." *Id.* The authors conclude by noting:

The need to resolve the results of conflicting actuarial risk tools should motivate the development of new and better actuarial tools. In these new tools, variables associated with recidivism would be incorporated into psychometrically sound measures of psychologically meaningful constructs, and the tools would include a comprehensive set of factors responsible for the persistence of sexual crime. *Until such a measure has been established, evaluators will need to rely on their professional judgment when*

they consider which measures to use and how to interpret

the results for a particular case.

Id. (Emphasis added).

As noted by Hanson and Thorton in *Reporting Static-99 in Light of New Research on Recidivism Norms*, relied upon by Liptrap, "predicting behavior was likely never as simple as associating a single number with a single Static-99 score." CP at 179. This principle was reflected in Dr. North's approach to assessment of Liptrap's risk. Dr. North made clear at trial that his risk assessment was not determined by any one particular actuarial tool, nor were the various tools the sole basis of his opinion regarding Liptrap's risk. Indeed, when the State pointed out, during its examination of Dr. North, that that "we've been given a lot of different numbers" regarding risk, ranging "as low as 13.8, plus or minus 8, all the way up to 76 percent now on the SORAG," Dr. North responded by emphasizing that, for purposes of assessing risk, "more important than the numbers is how consistent are the risk assessments across all three of them? And they're fairly consistent in saying that Mr. Liptrap is a moderate high to high risk for sexual re-offense. And I think we can state that much more confidently than we can state any particular percentage risk for re-offense." CP at 165-66.

While Liptrap argues that the change in actuarial scores on two instruments would be dispositive of the trial, this appears highly unlikely.

The percentages provided to the jury by Dr. North were at best conflicting. Some indicated a greater than 50 percent recidivism rate while others indicated less than that. Indeed, at one point Dr. North testified that, adjusting for age using recent data put forth by Dr. Hanson, the risk of reoffense of those who scored similarly to Liptrap could be "somewhere between about 21 percent and 5 percent." CP at 149. In Liptrap's defense, Dr. Wollert provided the jury with recidivism statistics as low as 9 percent. CP at 65. The jury, then, was presented with a range of actuarial scores.

Moreover, the scores proposed during trial and those presented in the new Hanson studies simply are not that different: Liptrap notes that the revised recidivism rate associated with Liptrap's score now "ranges between 11.8% and 32.1%" within 10 years. App. Br. at 18. At trial, however, Dr. North testified that the 10-year risk of re-conviction was 38 percent (12/5/07 RP at 186; App. Br. at 10)—a difference of less than 8 percent from the current figure and a figure, under Liptrap's reasoning, also "substantially lower . . . than that required for civil commitment." App. Br. at 2.

4. The Evidence Presented At A Sex Predator Trial Goes Far Beyond The Scores Of Any Particular Actuarial Instrument

Liptrap's assertion that the "new" actuarial scores are "substantially lower . . . than that required for civil commitment" (App. Br. at 2) conflates the score on any particular actuarial tool with the State's overall obligation to demonstrate, beyond a reasonable doubt, that the alleged SVP is "likely" to reoffend, and reveals a fundamental misunderstanding of the SVP process. Actuarial instruments provide data regarding the rate at which persons with characteristics similar to those of Liptrap have been apprehended—whether arrested or convicted—for commission of a sexual crime within specified periods of time.⁸ Liptrap's trial, however, was not about a single score on any particular actuarial instrument, nor was it about whether Liptrap was likely to be *apprehended* for a sexual offense within a specified period of time. Rather, the inquiry was whether Liptrap was likely to "engage in" sexually violent behavior over the course of his lifetime.⁹

As such, the evidence presented at trial went far beyond the scores

⁸ The MnSOST-R measures the likelihood of re-arrest for a "hands on" sexual offense within six years. CP at 159. The Static-99 measures risk of being convicted for a sexual crime within 5, 10, and 15 years. CP at 130.

⁹ A sexually violent predator is defined as "any person who has been convicted or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility." RCW 71.09.020(18)

of one or two actuarial instruments. In addition to actuarial instruments, Dr. North testified regarding certain "dynamic" factors, such as intimacy deficits, sexual self-regulation, cooperation with supervision, and general self-regulation that effected Liptrap's risk. CP at 166-67. He noted, for example, that Liptrap is "borderline psychopathic." CP at 167. Psychopaths, he explained, "are not really capable of establishing close relationships. They manipulate and use other people." *Id.* Liptrap, he reminded the jury, "established a relationship with [the mother of his 1993 victims] so he could molest her children." *Id.* While Liptrap alienated his peers and had trouble establishing relationships with them, he felt comfortable with and sought out the company of children. CP at 167-68. He did not take sex-offender treatment seriously, and failed to make progress in that area. CP at 169 (*see also* CP 171-73: failure to succeed in treatment significantly correlated with increased risk). Liptrap had also shown poor cooperation with supervision, "basically" absconding from supervision in 1988 until 1992, during which time he failed to report to his corrections officer, failed to make restitution payments, and changed his name. CP at 169-70. Finally, Liptrap showed problems with general self-control, was impulsive and showed poor judgment. CP at 171.

The jury also heard other testimony relevant to the issue of risk. Dr. North testified that Liptrap suffered from pedophilia, a chronic,

lifelong disorder (CP at 111) characterized by recurrent, intense, sexually arousing fantasies, sexual urges or behaviors relating to children. CP at 108-09. This condition, which in Liptrap's case spanned at least 20 years, (CP at 109) caused Liptrap to have serious difficulty controlling his sexual behavior toward children. CP at 118. Likewise, his personality disorder "makes it hard for him to establish relationships with adults that could be close, meaningful and intimate that could be close, meaningful and intimate that he might be able to use as a way of meeting his needs rather than meeting them through children." CP at 119.

The jury heard almost two weeks of evidence. It heard from former victims, the mother of two of the former victims, Department of Corrections personnel, Liptrap, and Dr. North.¹⁰ It heard extensive cross-examinations regarding the conclusions of both of those experts, including Dr. Wollert's criticisms of Dr. North's methodology and Dr. Wollert's own opinion to the effect that Liptrap's likelihood to reoffend was very low.

After hearing all of this testimony, including arguments of counsel, the jury determined that Liptrap suffered from a mental abnormality or personality disorder that made him likely to engage in predatory acts of sexually violence if not confined to a secure facility. To suggest that the

¹⁰ While this is not apparent from the record in the CR 60(b)(3) motion, this evidence is referenced in the (unpublished) decision of this Court in the direct appeal. *See In re the Detention of Liptrap*, 2009 WL 667963 Wn. App. Div. I, 2009.

entire result of a two-week trial hinged on one or even two actuarial instruments, or that this verdict would change if only Liptrap had the opportunity to present more information, itself barely distinguishable from that presented at trial, is unpersuasive. As noted by Judge Castleberry at the CR 60(b) hearing,

...having been the judge on the trial I know that counsel and the experts argued a lot about the tests, but the true criteria is whether or not Mr. Liptrap met the statutory definition of a sexual [sic] violent predator and the totality of the evidence that was presented to the jury, even excluding the test, was sufficient, at least in this court's opinion, to sustain the verdict of the jury that was rendered. So I will deny the motion for a new trial.

6/22/09RP at 10.

D. 71.09 Annual Review Process Accounts For Changes In Methodology

While Liptrap is not entitled to relief pursuant to CR 60(b)(3), this is not to say that there is no way he can obtain a new trial. Pursuant to the express terms of the SVP statute, Liptrap is entitled to an annual evaluation of his mental condition, and a hearing on the question of whether he is entitled to a new trial regarding whether he continues to meet commitment criteria. *See* RCW 71.09.070-.090. If, at a hearing conducted pursuant to RCW 71.09.090, the trial court finds that probable cause exists to believe that his condition has "so changed" that he no

longer meets the definition of a sexually violent predator, the court is required to set a hearing that issue. RCW 71.09.090(2)(c).¹¹ Should Liptrap obtain a trial through the annual review process, he will be free to present the information contained in his motion even though that information, standing alone, does not satisfy the requirements of CR 60(b)(3).

It is also important to note that, should there in fact be a true "wholesale change" in the methodology associated with risk prediction such that theories such as those presented in Liptrap's motion gain genuine broad acceptance within the scientific community, it is to be expected that these changes will be apparently in the annual reviews performed by the Department of Social and Health Services (DSHS) pursuant to RCW 71.09.070. If DSHS were to determine, based on both changing actuarial instruments and all other relevant information, that Liptrap no longer meets commitment criteria, the State would be unable to make its prima facie case for continued commitment and a new trial would be required pursuant to RCW 71.09.090(2)(c) (*see* FN 10). As such, Liptrap is not without remedy in the event of a genuine change in risk

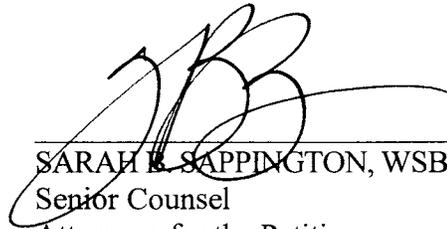
¹¹ RCW 71.09.090(2)(c) provides in pertinent part as follows: "If the court at the show cause hearing determines that either: (i) The state has failed to present prima facie evidence that the committed person continues to meet the definition of a sexually violent predator ... or (ii) probable cause exists to believe that the person's condition has so changed that...the person no longer meets the definition of a sexually violent predator... then the court shall set a hearing ..."

assessment methodologies.

IV. CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court affirm the decision of the trial court below.

RESPECTFULLY SUBMITTED this 11th day of March, 2010.



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NO. 63879-3

WASHINGTON STATE COURT OF APPEALS, DIVISION I

In re the Detention of:

JEFFREY L. LIPTRAP,

Appellant.

DECLARATION OF
SERVICE

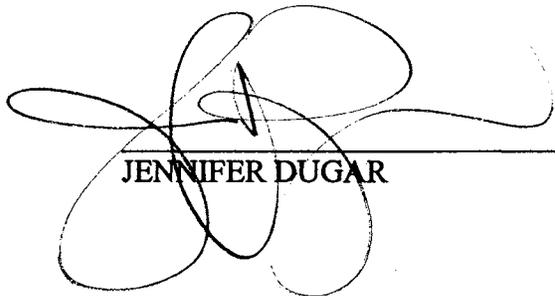
I, Jennifer Dugar, declare as follows:

On this 11th day of March, 2010, I sent via email and deposited in the United States mail true and correct cop(ies) of Respondent's Opening Brief and Declaration of Service, postage affixed, addressed as follows:

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Seattle, WA 98101-3647
oliver@washapp.org

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

DATED this 11th day of March, 2010, at Seattle, Washington.



JENNIFER DUGAR

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STATE OF WASHINGTON
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