

69993-8

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Court of Appeals  
Division I  
State of Washington

69993-8

NO. 69993-8-I

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

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In re the Detention of Donald Herrick:

STATE OF WASHINGTON,

Respondent,

v.

DONALD HERRICK,

Appellant.

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**BRIEF OF RESPONDENT**

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## I. ISSUES PRESENTED

- A. **Whether the trial court had tenable reasons for holding Herrick in contempt, where Herrick intentionally disobeyed an order of the court.**
- B. **Whether the trial court had tenable reasons for ordering, as a remedial sanction, that the jury in Herrick's pending civil commitment trial would be given an adverse inference instruction regarding Herrick's contempt.**

## II. STATEMENT OF THE CASE

### A. Criminal Sexual History

Herrick committed his first known sexual offense on April 24, 1997, when he was 21 years old. CP at \_\_\_ (App. 1 at 1).<sup>1</sup> With an accomplice, he broke into the home of L.Y. while she was sleeping and violently raped her. CP at \_\_\_ (App. 1 at 1-2). After orally raping L.Y. and ejaculating in her mouth Herrick beat her into unconsciousness. CP at \_\_\_ (App. 1 at 2). L.Y. suffered hearing loss, nerve damage and other injuries. *Id.* Herrick was convicted of first degree rape in Island County on October 23, 1997 and released from incarceration for that offense on September 15, 2006. *Id.*

Three months after his release and while under supervision by the Department of Corrections (DOC), Herrick stalked a 16-year-old girl he

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<sup>1</sup> Appendix 1 is a true and correct copy of the State's Certification for Determination of Probable Cause, filed contemporaneously with its Petition on November 29, 2010. A supplemental designation of clerk's papers has been filed to transmit this document to this Court.

met on a city bus. CP at \_\_\_\_ (App. 1 at 2-3). After she got off the bus the victim, L.J., turned around and saw Herrick jump behind a tree, so she sought the assistance of a stranger, telling him that she thought she was being followed. CP at \_\_\_\_ (App. 1 at 3). Believing she had safely reached her home, she went inside and undressed for a shower. *Id.* A short while later her father pulled into the driveway and saw Herrick looking through his daughter's window. *Id.* Herrick appeared to be trying to remove the window screen. *Id.* He fled but was apprehended and pled guilty to one count of voyeurism on June 28, 2007. *Id.* He was released from custody on September 23, 2008. *Id.*

In 2009, while under DOC supervision, Herrick stalked a female employee of the Auburn branch of Work Source. CP at 252.

In 2010, still under DOC supervision, Herrick stalked a woman from the Auburn Public Library on several occasions. CP at \_\_\_\_ (App. 1 at 5-6). The victim, M.M., reported that Herrick followed her in a car after she encountered him at the library. CP at \_\_\_\_ (App. 1 at 6). DOC filed a violation report and after a hearing Herrick was sanctioned 120 days confinement. *Id.* While he was incarcerated for those violations the State filed the SVP petition.

**B. Sexually Violent Predator Proceedings and the PPG**

The State filed the SVP petition in Island County on November 29, 2010. CP at 1061-62. The trial court permitted the State to amend its petition with an additional recent overt act violation and an amended petition was filed on February 15, 2013. The Petition is supported by evaluations of Herrick conducted by Brian Judd, Ph.D. *See* CP at \_\_\_\_ (App. 1 at Ex. 2 (Civil Commitment Clinical Evaluation of Donald Herrick, November 19, 2010)); CP at 675-82 (Civil Commitment Evaluation Addendum, April 16, 2012).

Dr. Judd relied in part on physiological testing of Herrick conducted on March 5, 2009, by Northwest Treatment Associates (NTA). CP at \_\_\_\_ (App. 1 at Ex. 2, page 19 of evaluation). This penile plethysmograph (PPG) testing took place during Herrick's community sexual deviancy treatment. *Id.* The testing suffered from what NTA described as "signs of manipulation and suppression of responses . . . across all categories" by Herrick. *Id.* Nevertheless, Herrick demonstrated significant arousal to scenes describing the rapes of an adult female and of a female child. *Id.* The clinician concluded of Herrick: "If he is not a full-blown rapist by now, he is on his way to developing that problem." *Id.*

Concerned about the possible invalidating effect of Herrick's efforts to manipulate and suppress his PPG testing, the State moved

pretrial to compel updated PPG testing. CP at 654-711. Also supporting the State's request was Herrick's attack on the 2009 PPG results. He obtained a report from a qualified expert who opined that the PPG testing was inconclusive and that Dr. Judd improperly relied upon it. CP at 688-94. Herrick filed a response opposing updated PPG testing to which the State replied. CP at 361-565, 566-600.

The trial court heard oral argument on the Petitioner's Motion to Compel Physiological Testing on January 22, 2013. 1RP at 13-24.<sup>2</sup> The testing was permitted by RCW 71.09.050(1) "if requested by the evaluator." The evaluator, Dr. Judd, had requested the testing. CP at 684-86. The court ordered that Herrick comply with PPG testing and a specific-issue polygraph test, entering the Order Compelling Physiological Testing (PPG Order). 1RP at 28-31; CP at 353-55. The polygraph testing was necessary to address whether Herrick had again manipulated or suppressed his responses to PPG testing, a concern made greater from an August 20, 2010, recorded King County Jail phone call in which Herrick asked his girlfriend to research ways to "beat," "cheat" or "win" the PPG:

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<sup>2</sup> Consistent with Herrick's convention for identifying the VRPs: 1RP is the January 22, 2013 motions hearing; 2RP is the February 11, 2013 contempt hearing; 3RP is the February 21, 2013 remedies hearing; and 4RP is the August 25, 2014 motion hearing.

11 SHANNON: What did you want me to look up?  
12 DONNIE: For what?  
13 SHANNON: On the internet.  
14 DONNIE: Okay. Maybe the plethysmograph  
15 stuff. Google how to beat a plethysmograph.  
16 SHANNON: How to beat it?  
17 DONNIE: Yeah. Yeah.

CP at 701.

11 SHANNON: It doesn't say-- it just-- it  
12 doesn't say anything.  
13 DONNIE: How to cheat a plethysmograph.  
14 SHANNON: Yeah.  
15 DONNIE: Just keep looking, like find the  
16 correct spelling, because I don't know how to  
17 spell it. Did you find the correct spelling and  
18 stuff?  
19 SHANNON: Yeah. It's pretty--  
20 DONNIE: Because I know there's information  
21 out there somewhere about it. If you could look  
22 up -- maybe try that later or something. Just  
23 fool around to see. Can you look up a civil  
24 commitment address and phone number now? And then  
25 email that to yourself?

CP at 703

9 DONNIE: I was trying to learn like another,  
10 how to beat, how to win, how to cheat. Maybe put  
11 how to cheat a plethysmograph.  
12 SHANNON: Okay. Civil commitment center.  
13 DONNIE: Did you hear about me about how to  
14 cheat?  
15 SHANNON: Yeah.

CP at 704.

Herrick's counsel notified the State that Herrick refused to comply with the PPG Order. CP at 334. The State moved for a finding of contempt. CP at 322-34. Herrick responded. CP at 306-19. The trial court held a contempt hearing on February 11, 2013. 2RP. The court found Herrick in contempt and entered the Order on Petitioner's Motion to Hold Respondent in Contempt (Contempt Order). CP at 296-98. The court denied the State's request to jail Herrick as a coercive sanction. 2RP at 28. When the State lined out the language providing for a coercive jail remedy, it inadvertently crossed off the order's purge clause. CP at 298. That error was corrected when this Court permitted the trial court to enter an Amended Order Holding Respondent in Contempt (Amended Contempt Order). CP at 1067-69. The trial court provided as a coercive sanction that the fact of Herrick's contempt would be admissible at trial, with other possible remedies to be considered at a future date. CP at 298, 1069.

The trial court held a hearing on other possible contempt remedies on February 21, 2013. Though on January 11<sup>th</sup>, Herrick opposed the PPG testing, one month later his counsel conceded that it was necessary, admitting that to say it was "needed" was probably an "understatement:"

To say that Mr. Ross needs this PPG exam is probably an understatement that we've known since the filing of this case back in 2011. Because we knew right up front in the initial discovery that the 2009 PPG exam was an inconclusive exam that we believed was ultimately going to be invalid and not be relied upon.

I don't know why it's taken so long for the AG to come to this conclusion, but we knew this pretty much upfront. . . .

3RP at 13.

Herrick appealed the Contempt Order. He also moved for discretionary review of the PPG Order and review was denied by a ruling dated October 2, 2013 (No. 69818-4). His motion to modify that ruling was stayed by this Court, pending the filing of his opening brief in the instant appeal. *See* No. 69818-4, Order Staying Motion to Modify, January 28, 2014.

### III. ARGUMENT

#### A. **The Trial Court Did Not Abuse its Discretion by Entering an Order Finding Herrick in Contempt of the PPG Order**

Herrick argues that the trial court abused its discretion by holding him in contempt. He asserts that he has a right to determine whether the order he violated was entered in error. Herrick is incorrect because even an erroneous order must be obeyed by a party until such time as it may be reversed. The trial court here properly found Herrick in willful violation of the PPG Order.

**1. Standard of review**

This Court reviews a trial court's order holding a party in contempt under the abuse of discretion standard. *Detention of Broer v. State*, 93 Wn. App. 852, 863, 957 P.2d 281 (1998). Under that standard, the court's order is not disturbed absent a showing that the court's discretionary decision was manifestly unreasonable, based on untenable grounds or made for untenable reasons. *In re Detention of Young*, 163 Wn.2d 684, 694, 185 P.3d 1180 (2008).

**2. Herrick cannot intentionally disobey an order merely because he believes it is voidable**

Herrick argues that, because he believed the PPG Order was erroneous and sought its review, the trial court could not hold him in contempt for intentionally disobeying it. His argument is contrary to the long-standing rule that even erroneous orders must be obeyed, and can only be challenged where a court lacks personal or subject matter jurisdiction, or lacks inherent power to make or enter the order. The trial court here did not abuse its discretion when it concluded that Herrick's refusal to comply with the PPG order constituted contempt.

“Contempt of court” is defined by statute and includes intentional disobedience of a lawful court order. RCW 7.21.010(1)(b). An order is

“lawful” if it issues from a court with jurisdiction over the parties and the subject matter, even if the order is in error or later invalidated. *Deskins v. Waldt*, 81 Wn.2d 1, 4–5, 499 P.2d 206 (1972); *State v. Breazeale*, 99 Wn. App. 400, 413, 994 P.2d 254 (2000), *aff’d in part, rev’d in part*, 144 Wn.2d 829, 31 P.3d 1155 (2001). An erroneous order may be voidable, but this Court has always recognized the distinction between a void judgment entered by a court lacking jurisdiction, and one which is merely erroneous and voidable. *See Seattle Northwest Securities Corp. v. SDG Holding Co., Inc.*, 61 Wn. App. 725, 733-34, 812 P.2d 488 (1991) (citing *Dike v. Dike*, 75 Wn.2d 1, 8-9, 448 P.2d 490(1968)); *State v. Coe*, 101 Wn.2d 364, 370, 679 P.2d 353, 357 (1984) (citing *Bresolin v. Morris*, 86 Wn.2d 241, 245, 543 P.2d 325 (1975)).

Herrick appears to be arguing that the underlying PPG order was void, due to trial court error, and he should be able to disregard it until this appeal of the contempt order has concluded. If so, he misunderstands the difference between a void and a voidable order. While mere error can render an order voidable, it does not make it void. ““The test of the jurisdiction of a court is whether or not it had power to enter upon the inquiry, not whether its conclusion in the course of it was right or wrong.”” *Mead School Dist. No. 354 v. Mead Ed. Ass’n (MEA)*,

85 Wn.2d 278, 280, 534 P.2d 561 (1975) (citing *State v. Olsen*, 54 Wn.2d 272, 274, 340 P.2d 171 (1959), quoting 12 A.L.R.2d 1059, 1066 (1950)). “A judgment is void only where the court lacks jurisdiction of the parties or the subject matter or lacks the inherent power to enter the particular order involved.” *Coe*, 101 Wn.2d at 370 (citing *Bresolin v. Morris*, 86 Wn.2d 241, 245, 543 P.2d 325 (1975)). A subsequent contempt order is therefore only “vitiating where there is ‘an absence of jurisdiction to issue the type of order, to address the subject matter, or to bind the defendant[.]’” *Id.* at 370 (quoting *Mead*, 85 Wn.2d at 284).

Herrick’s argument has been repeatedly rejected across time and jurisdictions; a party cannot evade contempt by arguing that it should be allowed to appeal an order before complying with it. ““(W)here the court has jurisdiction of the parties and of the subject matter of the suit and the legal authority to make the order, a party refusing to obey it, however erroneously made, is liable for contempt.”” *Mead*, 85 Wn.2d at 280 (citing *Dike v. Dike*, 75 Wn.2d at 8, quoting *Robertson v. Commonwealth*, 181 Va. 520, 536, 25 S.E.2d 352 (1943)). “The orderly and expeditious administration of justice by the courts requires that ‘an order issued by a court with jurisdiction over the subject matter and person must be obeyed by the parties until it is reversed by orderly and proper proceedings.’” *Maness v. Meyers*, 419 U.S. 449, 459, 95 S. Ct. 584, 42 L. Ed. 2d 574

(1975) (quoting *United States v. United Mine Workers*, 330 U.S. 258, 293, 67 S. Ct. 677, 91 L. Ed. 2d 884 (1947)).

Nor can a party intentionally disobey a lawful order and then – as Herrick attempts to do in this appeal – attack it in a subsequent contempt proceeding. The collateral bar rule prohibits Herrick from challenging the PPG Order in this appeal:

Our “collateral bar” rule states that a court order cannot be collaterally attacked in contempt proceedings arising from its violation, since a contempt judgment will normally stand even if the order violated was erroneous or was later ruled invalid.

*Coe*, 101 Wn.2d at 369-70. “In general, a court order which is ‘merely erroneous’ must be obeyed and may not be collaterally attacked in a contempt proceeding.” *Seattle Northwest Securities*, 61 Wn. App. at 733 (citing *State v. Turner*, 98 Wn.2d 731, 738–39, 658 P.2d 658 (1983)).<sup>3</sup>

Herrick has not challenged the trial court’s jurisdiction and authority to enter an order in this proceeding. He has therefore waived any challenge to the contempt order because those are the only bases for which an order on contempt may be challenged. RAP 10.3(g). Nor does he dispute that he refused to comply with the court’s order. He merely asserts

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<sup>3</sup> Herrick moved for discretionary review of the PPG Order and review was denied by a ruling dated October 2, 2013 (No. 69818-4). His motion to modify that ruling was stayed by this Court, pending the filing of his opening brief in the instant appeal. *See* No. 69818-4, Order Staying Motion to Modify, January 28, 2014. Nevertheless, this appeal concerns only the contempt order and so the collateral bar rule applies.

that the underlying order was illegal. Thus, he has no basis to challenge the contempt order and it should be affirmed.

**3. The issue of whether the trial court order an adverse inference instruction is not ripe**

Herrick preemptively argues that the trial court cannot instruct the jury that they can draw an adverse inference from Herrick's contempt of the PPG Order. While the State intends to request that instruction, the issue is not ripe at this time.

“Ripeness addresses whether ‘the issues presented are appropriate for judicial resolution at this time.’” *Matter of Detention of McClatchey*, 133 Wn.2d 1, 12, 940 P.2d 646 (1997) (quoting *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967)). Because the trial court has not considered that issue, the matter is not ripe for adjudication.

In any event, an adverse inference instruction can be a “reasonable and just order in regard to a failure to permit discovery[.]” *Diaz v. Washington State Migrant Council*, 165 Wn. App. 59, 86-87, 265 P.3d 956 (2011). Herrick's refusal to comply with physiological testing is in effect a discovery violation. Should this Court reach the issue, it should hold that an adverse inference instruction would not be error under the facts of this case.

**IV. CONCLUSION**

For the foregoing reasons, the State requests that this Court affirm the Amended Contempt Order, holding Herrick in contempt for intentionally disobeying the PPG Order.

RESPECTFULLY SUBMITTED this 17<sup>th</sup> day of June, 2015.

ROBERT W. FERGUSON  
Attorney General



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Senior Counsel  
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# Appendix 1

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3 ISLAND COUNTY CLERK

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8 STATE OF WASHINGTON  
ISLAND COUNTY SUPERIOR COURT

9 In re the Detention :

10 DONALD R. HERRICK,

11 Respondent.

NO. 10 2 00981 1

CERTIFICATION FOR  
DETERMINATION OF PROBABLE  
CAUSE

12 I, Malcolm Ross, am an Assistant Attorney General for the State of Washington, and am  
13 familiar with the investigation conducted by the Washington State Department of Corrections and  
14 various law enforcement agencies relating to Respondent, Donald R. Herrick.

15 Pursuant to RCW 71.09.030, the Attorney General for the State of Washington is filing  
16 this Petition at the request of the Island County Prosecuting Attorney, Gregory M. Banks.  
17 Petitioner, State of Washington, sets forth the following in support of its Motion for  
18 Determination of Probable Cause that Respondent, Donald R. Herrick, is a sexually violent  
19 predator pursuant to chapter 71.09 RCW et seq.

20 I. SEXUALLY VIOLENT OFFENSE

21 Respondent, Donald R. Herrick (Herrick), was born on May 15, 1975, and is now 35 years  
22 old. He has been convicted of a sexually violent offense as that term is defined in  
23 RCW 71.09.020(17).

24 On April 24, 1997, the Respondent committed rape in the first degree against victim  
25 L.Y. L.Y. was asleep early that morning in her Clinton home when she was awakened by a  
26

1 stranger in her room. The stranger was Herrick, who had broken into her home with an  
2 accomplice. The accomplice was in a different area of the home.

3 L.Y. asked Herrick what he was doing and to get out of her room. Herrick put a pillow  
4 over her head and began beating her. He demanded money and marijuana, and threatened to  
5 kill her if she did not tell him where it was. L.Y. told Herrick she had no money but that there  
6 was marijuana in an upstairs room. Herrick continued to beat her and then ripped off her  
7 underwear. He attempted to vaginally rape her but was unsuccessful. Herrick then told L.Y.  
8 that he was holding a knife and would slash her throat if she "didn't suck him off." L.Y. could  
9 feel something sharp against her. Herrick forced his penis into her mouth and ejaculated. He  
10 used a pillow case to wipe her vaginal area, then forced it into her mouth. L.Y. bit his fingers  
11 and Herrick beat her again. He put the pillow over her head again and began to leave.

12 As Herrick walked away, L.Y. pulled the pillow off her head. Herrick came back and  
13 beat her again. He grabbed the back of her neck and her chin and said he was going to kill her.  
14 L.Y. thought he was going to snap her neck. She was able to get her feet underneath him and  
15 kicked him off. As she fought with him, Herrick called for help from his accomplice. He then  
16 elbowed her in the ribs, got on top of her, and beat her until she lost consciousness. When she  
17 regained consciousness Herrick was gone. L.Y. lost significant hearing in her left ear, nerve  
18 damage in her left cheek and suffered other injuries.

19 On October 23, 1997, the Respondent was convicted of rape in the first degree, in  
20 Island County, Washington. He was released back into the community from that conviction on  
21 or about September 15, 2006.

## 22 II. VOYEURISM OFFENSE

23 On December 5, 2006, 16-year-old victim L.J. was returning to her Shoreline home  
24 from downtown Seattle, on the bus. She had a conversation with a man, later identified as  
25 Herrick, who was also on her bus. When she got off at her stop, Herrick got off too. He asked  
26

1 for her phone number. She said she did not want to give him her number but would take his.  
2 Herrick gave her his number and she left to walk home.

3 As she walked, L.J. felt she was being followed. When she looked behind her she saw  
4 Herrick following her, then saw him jump behind a tree. L.J. walked past her house for a block  
5 or so and then doubled back, in the company of an older man she happened upon. She told the  
6 older man she thought someone was following her. Once she got to her house she ran inside.  
7 She went into her bedroom and began undressing to take a shower.

8 Shortly thereafter L.J.'s father pulled into the driveway and saw Herrick looking  
9 through a window into his daughter's room. Herrick had his hands down near the bottom of  
10 the window and it appeared to L.J.'s father as though he was trying to remove the window  
11 screen. L.J.'s father got out of his car. Herrick appeared startled to see him and ran around to  
12 the back of the house. L.J.'s father followed but could not find him. He called the police, who  
13 traced Herrick through the phone number he had given to L.J.

14 On June 28, 2007, the Respondent pleaded guilty to one count of Voyeurism, in King  
15 County Superior Court. He was sentenced to 22 months of confinement and was released to  
16 the community on or about September 23, 2008.

### 17 III SEXUAL DEVIANCY TREATMENT

18 The Respondent did not participate in sex offender treatment during incarceration.  
19 However, he did begin participating in such treatment with Northwest Treatment Associates in  
20 September 2008. Treatment was interrupted because the Respondent was jailed for 120 days  
21 for a series of supervision violations. A letter to the Respondent's Community Corrections  
22 Officer (CCO) dated August 16, 2009, reports that:

23 Mr. Herrick demonstrates the same kind of behavior in treatment that he does  
24 with his Community Corrections Officer. He manipulates and lies when it  
25 seems to him to serve his best interests. It appears to be in his character to be an  
26 argumentative individual who questions cooperation before he decides whether  
to get involved or not. He argues frequently and often questions authority.

1 After another interruption due to supervision violations, the Respondent returned to  
2 treatment. He was terminated after being taken into custody for his current violations,  
3 described in section IV below.

### 4 III CIVIL COMMITMENT CLINICAL EVALUATION

5 Brian W. Judd, Ph.D., conducted a civil commitment clinical evaluation of the  
6 Respondent at the request of Washington's End of Sentence Review Committee. Dr. Judd  
7 concludes that the Respondent suffers from at least one mental abnormality, as that term in  
8 defined in RCW 71.09.020(8), as well as a personality disorder, as that term is defined in RCW  
9 71.09.020(9). Dr. Judd further concludes that the Respondent's mental disorders make him  
10 likely to commit a predatory, sexually violent offense if he is not confined in a secure facility.  
11 True and correct copies of Dr. Judd's curriculum vitae and his evaluation are attached hereto as  
12 Exhibits 1 and 2, respectively.

13 Dr. Judd's diagnoses of the Respondent include: Paraphilia Not Otherwise Specified  
14 (Nonconsent); Alcohol Abuse (By History); Cannabis Abuse; a provisional diagnosis of  
15 Voyeurism; and Antisocial Personality Disorder. Exhibit 2 at 23. Dr. Judd supports his mental  
16 abnormality diagnosis of the Respondent as follows:

17 Mr. Donald Herrick is a 35 year-old male with a history of broad-spectrum  
18 antisocial conduct beginning in childhood. Records indicate that he has been on  
19 continuous community supervision or incarcerated since 1994 when he was 19  
20 years of age. Despite repetitive sanctioning, Mr. Herrick has not demonstrated  
21 the ability to be compliant with supervision or manage his behavior in the  
22 community. Pursuant to his release into the community [after his rape  
23 conviction] on 9/15/06, Mr. Herrick has been sanctioned to 522 days of  
24 confinement, independent of his incarceration on [voyeurism charges]. Mr.  
25 Herrick's paraphilic interests have been chronic and persistent and manifested  
26 both in his conduct as well as on physiological testing. Behaviorally, Mr.  
Herrick's paraphilic arousal manifested in a home-invasion rape on 4/24/97, a  
pattern of voyeuristic activity resulting in sanctioning while in custody [for  
rape] and subsequent incarceration [for voyeurism]. Mr. Herrick's pattern of  
apparent predatory behavior continued following his release on 9/23/08  
resulting in sanctioning for Stalking on 7/15/10. Physiological testing

1 conducted on 3/5/09 detected clear arousal to humiliation rape of an adult  
2 female and rape of a female minor, despite apparent efforts to suppress arousal.  
3 Mr. Herrick's arousal to these scenarios were absolutely higher than to scenarios  
4 depicting consensual sexual activity.

5 Exhibit 2 at 27.

6 Dr. Judd also completed a risk assessment of the Respondent, utilizing a variety of data,  
7 including but not limited to: Actuarial risk assessment instruments; measurement of the  
8 Respondent's psychopathic traits; physiological assessment with the penile plethysmograph  
9 (PPG); and consideration of the Respondent's sex offense history. Dr. Judd concludes that  
10 actuarial assessment shows the Respondent to be at a high risk to reoffend. Exhibit 2 at 23-25.  
11 Additionally, evaluation of the Respondent using the Hare Psychopathy Checklist – Revised  
12 (PCL-R) indicates that the Respondent is a psychopath, which is associated with “a  
13 significantly higher risk for violent and antisocial recidivism.” Exhibit 2 at 24. The  
14 Respondent's psychopathy, in combination with the deviant arousal pattern shown by PPG  
15 testing, is of particular importance:

16 A recent meta-analysis of 82 recidivism studies entailing 29,450 offenders  
17 identified two broad factors associated with sexual recidivism: deviant sexual  
18 interests and antisocial orientation/lifestyle instability. Moreover, within the  
19 domain of sexual offenders, those offenders who demonstrated both high levels  
20 of psychopathy and deviant arousal on plethysmography constituted a  
21 particularly high risk population for both violent and sexually violent  
22 recidivism. In light of Mr. Herrick's assessed level of psychopathy, level of  
23 deviant arousal and an absence of risk mitigation factors, I regard him as being  
24 at a high risk to sexually recidivate.

25 Exhibit 2 at 27-28 (footnotes omitted).

#### 26 **IV RECENT OVERT ACT**

27 The State must prove that the Respondent has committed a “recent overt act” since  
28 being released from total confinement for his sexually violent offense – rape in the first degree  
29 – on September 15, 2006. The Respondent committed a recent overt act by stalking an adult  
30 female in February, 2010 and on June 17, 2010.

1 On June 17, 2010, Auburn Police responded to a report of stalking and harassment.  
2 Victim M.M. reported that on several occasions a man, later identified as the Respondent, had  
3 watched her in the Auburn Public Library and then followed her through the city after she left.  
4 M.M. reported that she first noticed the man in February, 2010, because he had followed her  
5 around the library. He stood in book aisles parallel to where she was, and peeked at her  
6 through the stacks. When he did this his hands were down the front of his pants and he moved  
7 his hands as though massaging his genitals. When she left the library and drove away, the man  
8 followed her in a car. This had occurred on two different occasions. Each time she went to  
9 businesses such as Safeway and Burger King in the hopes he would lose interest and leave, but  
10 he didn't. M.M. made eye contact with the man and gestured at him to leave her alone. He  
11 eventually left when she made it appear that she was calling for help on her cell phone.

12 On June 16, 2010, the man again followed M.M. from the library to a Napa Auto Parts  
13 store. This time, she contacted the police, who arrived and warned the Respondent to  
14 discontinue his behavior. They also wrote him a ticket for driving with a suspended license.

15 Global Positioning Satellite (GPS) data confirmed the Respondent's whereabouts on  
16 the date in question. A violation report was filed by the Respondent's CCO alleging stalking  
17 and a number of other violations, including accessing Facebook. The Respondent was found  
18 guilty of all violations by following a hearing which concluded on July 22, 2010, and was  
19 ordered to serve 120 days of confinement.

20 Dr. Judd reviewed the Respondent's violations and opines that his stalking behaviors  
21 constitute a recent overt act, as that term is defined in RCW 71.09.020(12). He reports:

22 Cumulatively, in light of Mr. Herrick's history of adjudicated offending in  
23 reference to [his rape and voyeurism convictions] and evidence of paraphilic  
24 arousal to rape . . . Mr. Herrick's behavior on or around 2/8, 2/25 and 6/16/10  
25 causes reasonable apprehension of harm of a sexually violent nature. As such, I  
26 regard this series of acts as constituting a "recent overt act" as defined by RCW  
71.09.020 (12).

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Exhibit 2 at 27.

The Respondent is due to be released to the community on November 30, 2010.

Under penalty of perjury under the laws of the State of Washington, I certify that the foregoing is true and correct to the best of my knowledge.

RESPECTFULLY SUBMITTED this 24<sup>th</sup> day of November, 2010.

ROBERT M. MCKENNA  
Attorney General

  
MALCOLM ROSS, WSBA #22883  
Assistant Attorney General  
Attorneys for Petitioner

# EXHIBIT 1

BRIAN W. JUDD, PH.D., P.C.  
203 Fourth Avenue East, Suite 320  
Olympia, WA 98501  
360.352.5351  
Fax 360.352.5357

**CURRICULUM VITAE**

2/10

**EDUCATION:**

Kansas State University	BS	Psychology/Anthropology	1980
University of Chicago	MS	Social Science	1983
University of Houston	MA	Psychology	1987
University of Houston	Ph.D.	Psychology	1989

**MASTER'S THESIS:**

Topography of the 40 Hertz Evoked  
Potential in the Auditory and Visual  
Modalities

**DOCTORAL DISSERTATION:**

Lateralization of Language in  
Traumatically Brain Injured Children

Jan. 1986 - July 1988

Clinical Internship in the Department of  
of Psychiatry, University of Texas  
Medical School, Houston, Texas, and The  
Mental Health Section, Department of  
Pediatrics, The University of Texas M.D.  
Anderson Hospital and Tumor Institute,  
Houston, Texas. Internship program  
coordinated through the Clinical  
Neuropsychology Program at the  
University of Houston, by Jack Fletcher,  
Ph.D.

**EXPERIENCE:**

Sept. 1983 - Jan. 1984

Clinical Practicum, Division of  
Neuropsychology, Medical Center Del Oro  
Hospital, Houston, TX

*A Professional Corporation  
Licensed Psychologist  
Certified Sex Offender Treatment Provider  
Clinical & Forensic Consultation & Assessment*

JUDD CURRICULUM VITAE

2

2/10

Jan. 1984 - Sept. 1984	Clinical and Research Practicum, Transitional Learning Community, Galveston, TX
Sept. 1984 - May 1985	Clinical Practicum, Department of Psychology, Veterans Administration Medical Center, Houston, TX
Sept. 1984 - Sept. 1986	Research Associate, Regional Cerebral Blood Flow Laboratory, Department of Neurology, Baylor College of Medicine, Houston, TX
July 1988 - May 1989	Consultation & Assessment, Larry Pollock, Ph.D. and Associates, and HCA Medical Center Hospital, Houston, TX
May 1989 - March 1991	Coordinator of Outpatient Neuropsychology, Larry Pollock, Ph.D. and Associates, and HCA Medical Center Hospital, Houston, TX
March 1991- Oct. 1992	Staff Neuropsychologist New Medico Community Re-Entry Services of WA, Mountlake Terrace, WA
Oct. 1992 – January 2001	Psychological Consultant, Office of Disability Insurance, Renton, WA
January 1993 - Present	Private Practice, Seattle, Silverdale, Tacoma, and Olympia, WA
April 1993 - January 1998	Contract Neuropsychologist, Rehab w/o Walls Inc., Seattle, WA
March 1994 – 2000	Court Psychologist, West Seattle Psychiatric Hospital, Seattle, WA
May 1994 – November 2002	Affiliate Sex Offender Treatment Provider, State of Washington
June 1994 – January 2001	Contract Neuropsychologist, Green Mountain Rehabilitation Medicine, Bremerton, WA
January 1996 – January 2001	Court Psychologist, Harborview Hospital, Seattle, WA

January 1996 – May 2002	Court Psychologist, Snohomish County Evaluation and Treatment Facility and Steven's Hospital, Snohomish County, WA
January 1999 – Present	Contract Psychologist, Special Commitment Center, Steilacoom, WA
November 2002 – Present	Certified Sex Offender Treatment Provider, State of Washington
April 2004 – May 2005	Contract Psychologist, Office of Disability Insurance, Olympia, WA.

**PROFESSIONAL AFFILIATIONS:**

**Member:**

**American Psychological Association  
American Psychology/Law Society  
Association for the Treatment of Sexual Abusers (ATSA)**

**BIBLIOGRAPHY:**

**Published Articles in Peer Reviewed Journals:**

Sinnott, E.R., Judd, B.W., Rissman, K., & Harvey, W.M. (1980). Temporal patterns of drug abuse by heroin addicts, International Journal of Addictions, 15, 1241-1248

Sinnott, E.R., Judd, B.W., & Olson M.A. (1983). Food, drugs and alcohol: A common temporal pattern of use. Perceptual and Motor Skills, 57 37-39.

Rogers, R.D., Meyer, J.S., Judd, B.W., & Mortel, K.F. (1985). Abstinence from cigarette smoking improves cerebral perfusion among elderly chronic smokers. Journal of the American Medical Association, 253, 2970-2974. French Edition JAMA, 10, 947-950.

Rogers, R.L., Meyer, J.S., Mortel, K.F. Mahurin, R.K., Judd, B.W. (1986). Decreased cerebral blood flow precedes multiinfarct dementia, but follows senile dementia of Alzheimer's type. Neurology, 36, 1-6.

Meyer, J.S., Rogers, R.L., Mortel, K.F. & Judd, B.W. (1987). Hyperlipidemia is a risk factor for decreased cerebral perfusion and stroke. Archives of Neurology, 44, 418-422.

Meyer, J.S., Judd, B.W., Tawaklna, T., Rogers, R.L., & Mortel, K.F. (1986). Improved cognition after control of risk factors for multi-infarct dementia. Journal of the American Medical Association, 265, 2203-2209. French edition JAMA, Supplement Neuro-Psychiatrie, 11, 27-34.

Judd, B.W., Meyer, J.S., Rogers, R.L., Gandhi, S., Tanahashi, N., Mortel, K.F., and Tawaklna, T. (1986). Cognitive performance correlates with cerebrovascular impairments in multi-infarct dementia. Journal of the American Geriatric Society, 34, 355-360.

Meyer, J.S., Rogers, R.L., Judd, B.W., Mortel, K.F., & Simms, P. (1988). Cognition and blood-flow fluctuate together in multi-infarct dementia. Stroke, *19*, 163-169.

Copeland, D.R., Dowell, R.E., Fletcher, J.M., Sullivan, M.P., Jaffe, N., Cangir, A., Frankel, L.S. & Judd, B.W. (1988). Neuropsychological test performance of pediatric cancer patients at diagnosis and one year later. Journal of Pediatric Psychology, *13*(2), 183-186.

Dowell, R.E., Jr., Copeland, D.R., & Judd, B.W. (1989). Neuropsychological effects of chemotherapeutic agents. Journal of Developmental Neuropsychology, *5*, (1), 17-24.

**Abstracts in Peer Reviewed Journals:**

Rogers, R.L., Meyer, J.S., Judd, B.W., & Mortel, K.F. (1985). Abstinence from cigarette smoking improves cerebral perfusion among elderly chronic smokers. Modern Medicine of Canada.

Judd, B.W., Meyer, J.S., Rogers, R.L., Gandhi, S., Tanahashi, N., Mortel, K.F., & Takwala, T. (1986). Cognitive performance correlates with cerebrovascular impairments in multi-infarct dementia. Geriatric Digest, *7*, 19-20.

Meyer, J.S., Judd, B.W., & Rogers, R.L., (1986). Cognitive performance fluctuates in multi-infarct dementia. Neurology (supplement) *1*, 36.

Meyer, J.S., Judd, B.W., & Rogers, R.L., & Mortel, K.F. (1986). Improved condition after control of risk factors in multi-infarct dementia. Annals of Neurology, *20*, 158.

Meyer, J.S., Judd, B.W., Rogers, R.L., & Mortel, K.F. (1987). Cognition fluctuates in multi-infarct dementia. Stroke, *18*, 297.

Meyer, J.S., Rogers, R.L., Judd, B.W., & Mortel, K.F. (1987). Cognitive performance and cerebral blood flow fluctuate in multi-infarct dementia. American Neurological Association, 112th Meeting, 37.

Judd, B.W., Dowell, R.E., Jr., & Copeland, D.R. (1987). Neuropsychological performance in an untreated brain tumor population: Implications for a taxonomy. Journal of Clinical and Experimental Neuropsychology, *10*, (1) 45.

Dowell, R., Copeland, D. & Judd, B.W. (1987). Anterograde amnesia following diencephalic tumors in children. Journal of Clinical and Experimental Neuropsychology, *10*, (1), 1718.

Ewing-Cobbs, L., Judd, B.W., & Miner, M.E. (1990). Lexical retrieval and intellectual function following traumatic brain injury in children. Journal of Clinical and Experimental Neuropsychology, *12*, (1), 104.

Judd, B.W., Ewing-Cobbs, L., Papanicolaou, A.C., Fletcher, J.M., & Miner, M.D. (1990). Lateralization of language following traumatic brain injury in children. Journal of Clinical and Experimental Neuropsychology, 12, (1), 104.

**Book Chapters:**

Meyer, J.S., Judd, B.W., Rogers, R.L. & Mortel, K.F. (1988). Control of hypertension, abstinence from smoking, and surgical revascularization procedures improve cognition in different categories of multi-infarct dementia. In *Cerebral Vascular Diseases*, 6, World Federation of Neurology 13th Salzburg Conference, International Conference Series, Excerpta Medica, Amsterdam.

**PRESENTATIONS:**

Schrock, B., Thompson, N., & Judd, B.W. Changes in cognitive functioning in head injury following non-acute rehabilitation. Poster presentation at the International Neuropsychological Society, San Diego, CA, February, 1985.

Spydell, J.D., & Judd, B.W. Topography of 40 Hz evoked potential in the auditory modality. Poster presentation at the American EEG Society, Orlando, FL, October, 1985.

Meyer, J.W., & Judd, B.W. Cognitive performance correlates with cerebrovascular impairment in multi-infarct dementia. Platform presentation at the Congress of Neurology, New Orleans, LA, May, 1986.

Meyer, J.S., Judd, B.W., Rogers, R.L., & Mortel, K.F. Improved cognition after control of risk factors in multi-infarct dementia. Poster presentation at the American Neurological Association, Boston, MA, October, 1986.

Judd, B.W., Dowell, R.E., Jr., & Copeland, D.R. Neuropsychological performance in an untreated brain tumor population: Implications for a taxonomy. Poster presentation at the International Neuropsychological Society, New Orleans, LA, January 1988.

Dowell, R., Copeland, D., & Judd, B.W. Anterograde amnesia following diencephalic tumors in children. Poster presentation at the International Neuropsychological Society, New Orleans, LA, January 1988.

Ewing-Cobbs, L., Judd, B.W., & Miner, M.E. Lexical retrieval and intellectual function following traumatic brain injury in children. Platform presentation at the International Neuropsychological Society, Kissimmee, FL, February, 1990.

Judd, B.W., Ewing-Cobbs, L., Papanicolaou, A.C., Fletcher, J.M., & Miner, M.E. Lateralization of language following traumatic brain injury in children. Poster presentation at the International Neuropsychological Society, Kissimmee, FL, February, 1990.

2/10

Hart, S.D., Judd, B.W., & Boer, D.P. Actuarial risk assessment of sexually violent recidivism. Platform presentation to the Association for the Treatment of Sexual Abusers, Chicago, IL, November, 1996.

Judd, B.W. Use of structured clinical techniques in evaluating risk of violent recidivism. Presentation to the Region III Parole Clinic, Los Angeles County, Los Angeles, CA, March, 1997.

Judd, B.W. Actuarial assessment of sexually violent recidivism. Presentation to the Los Angeles Roundtable On Sexual Offending, Los Angeles, CA, March, 1997.

Judd, B.W., What's New in Neuropsychology? Invited presentation to the Washington State Trial Lawyers Association, Seattle, WA, May, 1997.

Judd, B.W., & Hart, S.D. Actuarial and Clinical Risk Assessment of Violent Recidivism. Platform Presentation to the American Academy of Forensic Sciences, San Francisco, CA, February, 1998.

Judd, B.W. Neuropsychological Indices Associated with Domestic Abuse: Description of Preliminary Relationship. Invited presentation to the Kitsap County Bar Association, Port Orchard, WA, April, 1998.

Judd, B.W. Assessment of Domestic Abuse Recidivism. Presentation to the Region III Parole Clinic, Los Angeles County, Los Angeles, CA, September, 1998.

Judd, B.W. Actuarial and Clinical Risk Assessment of Violent Recidivism. Invited Presentation to Seattle Forensic Institute, Seattle, WA, October, 1998.

Judd, B.W. Efficacy of Treatment with Sex Offenders. Invited Presentation to Seattle Forensic Institute, Seattle, WA November, 2000.

Judd, B.W. Assessment of Child and Adolescent Psychopathy. Presentation to Jefferson County Department of Juvenile Services, Pt. Townsend, WA, March, 2001.

**SELECTED CONTINUING EDUCATION SEMINARS:**

The Battered Spouse Syndrome as a Criminal Defense	03/93
Battered Woman and Rape Trauma Syndrome as Forensic Issues	03/94
Forensic Evaluations and the MMPI-2	03/94
Forensic Evaluations and Forensic Applications of the MMPI and MMPI-2	05/94
Conference on Understanding the Anti-Social Personality	06/94
Detection of Distortion, Deception, and Malingering in the Witness, Victim, Defendant and Patient	11/94

**JUDD CURRICULUM VITAE**  
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The Ethics of Forensic Practice: Law, Ethics, and Professional Practice	11/94
Criminal Forensic Assessment: Exculpatory and Mitigating Defenses	01/95
Risk Assessment: Implications for Evaluation, Intervention and Decision-Making	01/95
Diagnostic and Structured Interviewing: Applications to Forensic Evaluations	01/95
Ethical Issues in Medicolegal Consultations	02/95
Neuropsychology in a Psychiatric Setting	02/95
Working Memory: An Interface Between Brain Organization and Cognition	02/95
Personal Injury Evaluation: Ethics, Practice and Case Law	02/95
The Role of the Psychologist in Death Penalty Litigation	02/95
Sexual Violence: Perpetrators & Victims	03/95
Practical Legal Research Techniques for Forensic Psychologists	03/95
Forensic Assessment of Juveniles	03/95
Forensic Neuropsychological Assessment	03/95
WSOSA Conference on Risk Assessment and Risk Management	05/96
Advanced Workshop on Application of the PCL-R	05/96
Criminal Responsibility Assessment: A Practical Guide	04/97
Mental Health Law Update	04/97
The Psychopathic Personality	04/97
Assessment of Violence Potential	04/97
Sexual Offender Profiling	12/98
Risk Assessment of Sexual Offenders	12/98
Assessment of Violent Juvenile Offenders	01/99
Childhood Trauma: Forensic Psychological Issues and Applications	01/99

**JUDD CURRICULUM VITAE**  
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8

Ethical Issues for the Forensic Practitioner	01/00
Assessment of Workplace Violence	01/00
Role of the Forensic Psychologist in Death Penalty Litigation	01/00
Sex Offender Re-Offense Risk Assessment	09/00
Assessing Psychopathy with the Hare Psychopathy Checklist – Revised	02/02
Assessing Violence Risk	02/02
Sexually Abusive Youth	02/02
Washington Association For The Treatment of Sexual Abusers – Spring Evaluation and Research Conference	02/04
Washington Association For The Treatment of Sexual Abusers – Spring Evaluation and Research Conference	02/05
Association For The Treatment of Sexual Abusers – Annual Conference, Salt Lake City, Utah. Adult Risk Assessment Track	11/05
Washington Association For The Treatment of Sexual Abusers – Spring Evaluation and Research Conference	02/06
Association For the Treatment of Sexual Abusers – Annual Conference, Chicago, Illinois.	09/06
Washington Association For The Treatment of Sexual Abusers – Spring Evaluation and Research Conference	02/08
Washington Association For the Treatment of Sexual Abusers – Spring Evaluation and Research Conference	02/09
Association for the Treatment of Sexual Abusers - Annual Conference, Dallas Texas	10/09

**TESTIMONY:**

Qualified as an expert in: Superior Court, State of Washington  
Federal District Court

Areas of Established Competency:

- 1) Neuropsychological and Emotional Sequelae of Traumatic Head Injury
- 2) Civil Commitment - RCW 71.05
- 3) Assessment of Violence Risk and Risk of Recidivism
- 4) Juvenile Declines
- 5) Sexual Deviancy
- 6) Diminished Capacity
- 7) Competency To Stand Trial
- 8) Not Guilty By Reason of Insanity
- 9) Civil Commitment of Sexually Violent Predators – RCW 71.09

## EXHIBIT 2

Brian W. Judd, Ph.D., P.C.  
203 4<sup>th</sup> Avenue East, Suite 320  
Olympia, WA 98501  
360.352.5351  
Fax 360 352.5357

JOINT FORENSIC UNIT

CIVIL COMMITMENT CLINICAL EVALUATION

**NAME:** Donald Herrick  
**DOB:** 5/15/75  
**EDUCATION:** GED  
**OCCUPATION:** Construction  
**JURISDICTION:** King County Superior Court  
**CAUSE NO.:** 06-1-10627-6 SEA  
**EVALUATOR:** Brian W. Judd, Ph.D.  
**DATE OF REPORT:** 11/19/10

REASON FOR REFERRAL:

Mr. Donald Herrick is a 35 year old male with a history of adjudicated offending against adolescent and adult females. He was referred for evaluation by the End of Sentence Review Committee pursuant to allegations that between February and June 2010 he stalked a female he observed at the Auburn Library.<sup>1</sup> For purposes of the current evaluation I attempted to interview Mr. Herrick on 10/25/10 at the King County Regional Justice Center. However, following a lengthy discussion of the nature of the evaluation, limits of confidentiality and possible dispositional outcomes, Mr. Herrick declined to proceed with the interview. Thus, the current report is based upon review of 1905 pages of discovery and collateral telephone contacts of approximately 25 minutes duration with CCO Christopher Ervin on 11/16/10 and 11/18/10.<sup>2</sup>

PROCEDURES:

The following records were relied upon in the preparation of this report:

- 1) Washington State Identification Section, undated; Bates Stamp 0030-0046.
- 2) United States Department of Justice Federal Bureau of Investigation Criminal Justice Information, Bates Stamp 0048-0053.
- 3) Defendant Case History, dated 6/29/05, Bates Stamp 0054-0058.
- 4) Washington Department of Corrections Legal Face Sheet, dated 12/12/06, Bates Stamp 0168-0176.
- 5) Department of Corrections Criminal History Summary authored by A. Hutchins, CC 2, dated 10/5/98, Bates Stamp 0184-0185.

<sup>1</sup> Auburn Police Department Case # 10-07131

<sup>2</sup> An 11/16/10 effort to contact Mr. Herrick's treatment provider at Northwest Treatment Associates was unsuccessful due to the phone being temporarily disconnected.

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Licensed Psychologist  
Clinical & Forensic Consultation & Assessment*

**D. Herrick 001910**

- 6) Offender Chrono Report from 4/26/94 through 12/11/06, various authors, Bates Stamp 0187-0216.
- 7) Omni: Chrono Quick Search Results from 9/24/08 through 7/8/10, various authors, Bates Stamp 0218-0264.
- 8) Washington State Department of Corrections Notification of Sex Offender Release, dated 9/23/08, Bates Stamp 0292-0294.
- 9) Island County Sheriff's Office Incident Report for Case # 97-00973, dated 4/24/97, Bates Stamp 0320-0362.
- 10) Transcript of an interview with LBY conducted by Detective Errol Ortego and Detective Clark of the Island County Sheriff's Office in reference to Case # 97-00973, dated 4/24/97, Bates Stamp 0363-0391.
- 11) Transcript of an interview with Deanna M. Furman conducted by Detective Bob Clark and Detective Errol Ortego of the Island County Sheriff's Office in reference to Case # 97-00973, dated 4/24/97, Bates Stamp 0411-0451.
- 12) Transcript of an interview with George Norton Erickson, III conducted by Detective Errol Ortego of the Island County Sheriff's Office in reference to Case # 97-00973, dated 4/27/97, Bates Stamp 0452-0478.
- 13) Island County Sheriff's Office Follow-Up Report for Case #97-00973 authored by Inspector E. R. Tingstad, undated, Bates Stamp 0480-0482.
- 14) Follow-Up Report for Case # 97-00973 authored by Detective R. Clark, undated, Bates Stamp 0488-0491.
- 15) Follow-Up Report for Case # 97-00973 authored by Detective R. Clark, dated 6/4/97, Bates Stamp 0496.
- 16) Victim Impact Statement authored by LY for Cause # 97-1-00069-7, dated 8/4/97, Bates Stamp 0498-0502.
- 17) *State of Washington v. Donald Ray Herrick* Amended Information for Cause # 97-1-00069-7, authored by Island County Deputy Prosecuting Attorney Linda B. Kipline, dated 8/7/97, Bates Stamp 0503-0504. Mr. Herrick was charged with Rape in the 1<sup>st</sup> Degree.
- 18) *State of Washington v. Donald Ray Herrick* Judgment and Sentence for Cause # 97-1-00069-7, dated 10/23/97, Bates Stamp 0506-0515. Mr. Herrick pled guilty to Rape in the 1st Degree on 8/8/97 and was sentenced to 125 months of incarceration, \$1027.00 in court restitution, 3 years of community supervision and given credit for 161 days served.
- 19) *State of Washington v. Donald Ray Herrick* Warrant of Commitment for Cause # 97-1-00069-7, dated 10/23/97, Bates Stamp 0519.
- 20) Amended Presentence Investigation Identification Information for Cause # 97-1-00069-7 authored by Anthony L. Dobson, CCO-2, dated, 9/22/97, Bates Stamp 0523-0535.
- 21) King County Sheriff Incident Report for Case # 06-362828 authored by King County Sheriff Officer Johan Kingsberry, dated 12/6/06, Bates Stamp 0538-0542.
- 22) King County Sheriff Follow-Up Supplemental Report for Case # 06-362828, dated 12/5/06, Bates Stamp 0544-0546.
- 23) King County Officers Witness Statement for Case # 06-362828 authored by Officer Scott Dery, dated 12/7/06, Bates Stamp 0547-0548.

- 24) *State of Washington v. Donald Ray Herrick* Judgment and Sentence for Cause # 06-1-10627-6 SEA, dated 6/28/07, Bates Stamp 0552-0557. Mr. Herrick pled guilty to 1 count of Voyeurism on 4/13/07 and was sentenced to 22 months confinement, 36 to 48 months of community supervision and given credit for 204 days of time served.
- 25) Auburn Police Department Police Report for Case # 10-07131 authored by Officer Buie Arneson, dated 6/17/10, Bates Stamp 0567-0568.
- 26) State of Washington Department of Corrections Serious Infraction Report, dated 2/5/08, Bates Stamp 0798.
- 27) Department of Corrections Administrative Segregation Referral, dated 12/27/05, Bates Stamp 0831.
- 28) Grays Harbor College Award of Completion for Stress and Anger Management, dated 10/8/03, Bates Stamp 0881.
- 29) Grays Harbor College Certificate of Completion for Human Relations, dated 6/15/04, Bates Stamp 0883.
- 30) Department of Corrections Certificate of Completion for Stress Anger Management, dated 5/19/08, Bates Stamp 0887.
- 31) Letter to Mr. Thatcher authored by Donald Herrick, undated, Bates Stamp 0896.
- 32) Letter to Robbie, dated 8/9/99, Bates Stamp 0901.
- 33) Letter dated 9/19/00, Bates Stamp 0911-0913.
- 34) Letter dated 5/7/08, Bates Stamp 0944-0946.
- 35) E-mail from Gregory F. Jones to Mark W. Kepler, dated 2/9/06, Bates Stamp 1000.
- 36) Department of Corrections LSI-R Assessment, various authors, dated 2/8/06, Bates Stamp 1090-1096.
- 37) Department of Corrections Offender Accountability Plan, dated 9/29/06, Bates Stamp 1245-1256.
- 38) King County Sheriff Incident Report for Case # 06-315597 authored by Officer Mitchell Wright, dated 10/20/06, Bates Stamp 1260-1261.
- 39) Department of Corrections Report of Alleged Violation in reference to Cause # 97-1-00069-7 authored by Iris Peterson, CCO, dated 11/1/06, Bates Stamp 1264-1268.
- 40) Department of Corrections Community Custody Hearing Report, dated 11/15/06, Bates Stamp 1273-1275.
- 41) Department of Corrections Report of Alleged Violation in reference to Cause # 97-1-00069-7, authored by Iris Peterson, CCO, dated 12/8/06, Bates Stamp 1287-1291.
- 42) Department of Corrections Community Custody Hearing Report, dated 1/2/07, Bates Stamp 1295-1299.
- 43) Department of Corrections Court Spécial in reference to Cause # 97-1-00069-7 authored by Iris Peterson, dated 1/5/07, Bates Stamp 1300-1301.
- 44) Department of Corrections Régional Appeals Panel Decision, dated 2/8/07, Bates Stamp 1303-1304.
- 45) Department of Corrections Community Custody Notice of Allegations, Hearing, Rights, and Waiver, dated 12/16/08, Bates Stamp 1308-1310.

- 46) Department of Corrections Report of Alleged Violation in reference to Cause # 97-1-00069-7 and Cause # 06-1-10627-6 authored by Christopher Ervin, CCO-2, dated 12/16/08, Bates Stamp 1311-1323.
- 47) Department of Corrections Community Custody Hearing Report, dated 1/8/09, Bates Stamp 1324-1335.
- 48) Department of Corrections Report of Alleged Violation in reference to Cause # 97-1-00069-7 and Cause # 06-1-10627-6 authored by Christopher Ervin, CCO-2, dated 7/30/09, Bates Stamp 1339-1346.
- 49) Letter to his presumptive CCO authored by Donald Herrick, dated 7/12/06, Bates Stamp 1357-1360.
- 50) Donald Herrick Autobiography, undated, Bates Stamp 1403-1417.
- 51) Letter to Iris Peterson authored by David V. McNeill, dated 10/12/06, Bates Stamp 1419.
- 52) Report of a polygraph evaluation authored by Marty Gunderson, PDD, dated 10/26/06, Bates Stamp 1422. Mr. Herrick failed to comply with the polygraph.
- 53) Report of a polygraph evaluation authored by Marty Gunderson, PDD, dated 11/15/06, Bates Stamp 1424-1429. No deception was indicated.
- 54) Report of a polygraph evaluation authored by Marty Gunderson, PDD, dated 10/14/08, Bates Stamp 1431-1437. Deception was indicated.
- 55) Report of a polygraph evaluation authored by David V. McNeill, PPD, dated 11/6/08, Bates Stamp 1438-1446. No deception was indicated.
- 56) Report of a polygraph evaluation authored by Marty Gunderson, PDD, dated 11/13/09, Bates Stamp 1448-1454. No deception was indicated.
- 57) Report of a polygraph evaluation authored by David V. McNeill, PPD, dated 5/4/10, Bates Stamp 1455-1457. No deception was indicated.
- 58) Letter to Attorney Lisa Leone in reference to Case # 06-1-10627-6 SEA authored by Andrei Dandescu, MA, dated 4/27/07, Bates Stamp 1485-1495.
- 59) Letter to Christopher Ervin, CCO-2 authored by Florence Wolfe, MA, dated 4/8/09, Bates Stamp 1496-1510.
- 60) Letter to Christopher Ervin, CCO-2 authored by Steve N. Silver, ACSW, dated 8/4/09, Bates Stamp 1512-1515.
- 61) Letter to Christopher Ervin, CCO-2 authored by Florence Wolfe, MA, dated 8/16/09, Bates Stamp 1517-1521.
- 62) Letter to Christopher Ervin, CCO-2 authored by Steve N. Silver, ACSW, dated 6/10/10, Bates Stamp 1526-1529.
- 63) Department of Corrections Report of Alleged Violation in reference to Cause # 97-1-00069-7 and Cause # 06-1-10627-6 authored by Christopher Ervin, CCO-2, dated 7/8/10, Bates Stamp 1884-1893.
- 64) Department of Corrections Hearing and Decision Summary Report, dated 7/15/10, Bates Stamp 1904-1905.

**RISK ASSESSMENT:**

Mr. Herrick was assessed using the Hare Psychopathy Checklist-Revised 2<sup>nd</sup> Edition (PCL-R)<sup>3</sup>, the Sex Offender Risk Appraisal Guide (SORAG)<sup>4</sup> and the Static-99R.<sup>5,6</sup>

**LEGAL STANDARD:**

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

The evaluator's opinion with respect to the questions: "Does Mr. Herrick meet the statutory criteria to be committed as a sexually violent predator as defined in RCW 71.09.020?" is organized around three questions: A) Has Mr. Herrick been "convicted of or charged with a crime of sexual violence?"; B) Does Mr. Herrick suffer "from a mental abnormality or personality disorder?"; C) Is Mr. Herrick, as a result of a mental abnormality or personality disorder, "likely to engage in predatory acts of sexual violence if not confined in a secure facility?"

**FINDINGS:**

A) Has Mr. Herrick been "convicted of or charged with a crime of sexual violence?"  
YES.

Pursuant to RCW 71.09.020 (17) a "Sexually violent offense" means an act committed on, before, or after July 1, 1990, that is: (a) An act defined in Title 9A RCW as rape in the first degree, rape in the second degree by forcible compulsion, rape of a child in the first or second degree, statutory rape in the first or second degree, indecent liberties by forcible compulsion, indecent liberties against a child under age fourteen, incest against a child under age fourteen, or child molestation in the first or second degree; (b) a felony offense in effect at any time prior to July 1, 1990, that is comparable to a sexually violent offense as defined in (a) of this subsection, or any federal or out-of-state conviction for a felony offense that under the laws of this state would be a sexually violent offense as defined in this subsection; (c) an act of murder in the first or second degree, assault in the first or second degree, assault of a child in the first or second degree, kidnapping in the first or second degree, burglary in the first degree, residential

<sup>3</sup> Hare, R.D. (2003). *Manual for the Psychopathy Checklist – Revised*, 2<sup>nd</sup> Edition. Toronto: Multi-Health Systems.

<sup>4</sup> Quinsey, V.L., Harris, G.T., Rice, M.E., & Cormier, C.A. (2006). *Violent Offenders: Appraising and managing risk* (2<sup>nd</sup> Edition). Washington, DC: American Psychological Association.

<sup>5</sup> Harris, A., Phenix, A., Hanson, R.K., & Thornton, D. (2003). *Static-99 Coding Rules Revised – 2003*. Ottawa: Canada. Department of the Solicitor General of Canada.

<sup>6</sup> The revised instrument and scoring criteria were issued by Amy Phenix, Ph.D, Leslie Helmus, MA, and R. Karl Hanson, Ph.D. on 9/28/09. The revised scoring criteria and normative data are available at [www.static99.org](http://www.static99.org).

*burglary, or unlawful imprisonment, which act, either at the time of sentencing for the offense or subsequently during civil commitment proceedings pursuant to this chapter, has been determined beyond a reasonable doubt to have been sexually motivated, as that term is defined in RCW 9.94A.030; or (d) an act as described in chapter 9A.28 RCW, that is an attempt, criminal solicitation, or criminal conspiracy to commit one of the felonies designated in (a), (b), or (c) of this subsection.*

Mr. Herrick has been charged with the following offense which qualifies as a "sexually violent offense" as defined in RCW 71.09.020 (17):

Charge	Date of Conviction	Jurisdiction
Rape in the 1 <sup>st</sup> Degree	8/8/97	King County, WA

The following records were used in reconstructing Mr. Herrick's predicate offense: Island County Sheriff's Office Incident Report for Case # 97-00973, dated 4/24/97 (Bates Stamp 0320-0362); Transcript of an interview with LBY conducted by Detective Errol Ortego and Detective Clark of the Island County Sheriff's Office in reference to Case # 97-00973, dated 4/24/97 (Bates Stamp 0363-0391); Transcript of an interview with Deanna M. Furman conducted by Detective Bob Clark and Detective Errol Ortego of the Island County Sheriff's Office in reference to Case # 97-00973, dated 4/24/97 (Bates Stamp 0411-0451); Transcript of an interview with George Norton Erickson, III conducted by Detective Errol Ortego of the Island County Sheriff's Office in reference to Case # 97-00973, dated 4/27/97 (Bates Stamp 0452-0478); Island County Sheriff's Office Follow-Up Report for Case #97-00973 authored by Inspector E. R. Tingstad, undated (Bates Stamp 0480-0482); Follow-Up Report for Case # 97-00973 authored by Detective R. Clark, undated (Bates Stamp 0488-0491); Follow-Up Report for Case # 97-00973 authored by Detective R. Clark, dated 6/4/97 (Bates Stamp 0496); Victim Impact Statement authored by LY for Cause # 97-1-00069-7, dated 8/4/97 (Bates Stamp 0498-0502); *State of Washington v. Donald Ray Herrick* Amended Information for Cause # 97-1-00069-7, authored by Island County Deputy Prosecuting Attorney Linda B. Kipline, dated 8/7/97 (Bates Stamp 0503-0504); *State of Washington v. Donald Ray Herrick* Warrant of Commitment for Cause # 97-1-00069-7, dated 10/23/97 (Bates Stamp 0519), and; Amended Presentence Investigation Identification Information for Cause # 97-1-00069-7 authored by Anthony L. Dobson, CCO-2, dated, 9/22/97 (Bates Stamp 0523-0535).

The official version of events is taken from the 9/22/97 Amended Presentence Investigation Identification Information for Cause # 97-1-00069-7 authored by Anthony L. Dobson, CCO-2 (Bates Stamp 0523-0535). In recounting the sexual assault and beating of LY, Mr. Dobson wrote, "On 4/24/97 at about 7:30 AM, the Island County Sheriff's Department responded to a reported assault and rape in Clinton, Washington. The complaint was received at 6:11 AM. The victim of the rape was LBY, DOB: 12/12/64. Island County Sheriff's Detectives contacted the victim Y at Whidbey General Hospital and obtained a description of her attacker. Y described the attacker as being a tall,

*muscular, white male with long hair and wearing a dark colored sports-type jersey with lighter colored stripes around the sleeves. Y provided the following description of the assault and rape. She was awakened by noise in her bedroom and saw a male subject with long hair standing near her bed. The subject jumped on the bed and began to physically attack her. Y stated that she sleeps in the nude and the subject attempted to enter her vaginally but was unable to penetrate her vaginally with his penis. The subject restrained her on the bed and got to his feet on the floor next to the bed, grasped her by the back of her head and neck, and forced her to perform oral sex on him. The subject ejaculated in her mouth. The subject then restrained her by the back of the neck and attempted to wipe the ejaculate from her mouth with a flannel pillow case from her bed. Y stated that she bit down in [sic] his hand as he was attempting to wipe her mouth out and the subject began to violently beat her in the face with his fist. Y stated at this point she was fearful that he might kill her and she began to fight very hard against him. She stated that another person had entered the room at some point when she was fighting with the attacker, because her attacker had called for help and she thought she may have glimpsed at the second person. Y stated that she did not get a closer look at the second person because the original attacker was beating her in the face. Y states that during the assault, she had pulled the attacker's hair and bit down on his hand or finger. A pillow case with blood and possible seminal fluid from the attacker was recovered" (Bates Stamp 0524).*

In an 8/21/97 interview with Mr. Dobson, Ms. Y provided some additional information. Summarizing his interview, Mr. Dobson wrote, "Ms. Y said she awakened and became aware that somebody was in her room. She saw a man standing there and asked what he was doing there, and for him to get out of her room. She said her roommate frequently had men over to the house and she thought perhaps he had inadvertently entered her room. She said the man then came over to her bed, put a pillow over head [sic], and began beating her. He then asked for cash and pot. He said if she didn't tell him where it was, he would kill her. Ms. Y said she had no money but "leaf" was upstairs. Ms. Y said they struggled some more and he beat her some more, eventually ripping off her underwear. She said he tried to penetrate her vaginally with his penis but he was not hard enough to do so. Ms. Y then said that he said he had a knife on her throat and would slash her throat if she "didn't suck him off." She said she did feel something sharp against her. At that point, he put his penis in her mouth and ejaculated in about a minute. She said that he then used a pillow case to wiper her crotch, then stuck the pillow case in her mouth to try to clean her. She remembers biting him when he put his fingers in her mouth. She said after she bit him, he beat her some more. She then relaxed somewhat and he put a pillow over her head and walked away. After he walked away, she pulled the pillow off her head and then he came back and beat her some more. She said he grabbed the back of her neck and her chin and he said he was going to kill her. She thought he was going to snap her neck. She then said that somehow she was able to get her feet underneath him and kick him off, and then jumped on top of him, grabbed his hair and beat his head against a small refrigerator that was in the room. At that point he called for help from his friend. She said that at some point he elbowed her in the ribs and then he was able to get on top of her and he proceeded to beat her more until she passed out. When she regained consciousness, she saw she was alone, dialed 911 from

*the phone in her room, left the phone prior to answering and jumped out the window. She ran to her neighbors for help. While she was going to her neighbors, she said she heard a vehicle going away at what appeared to be at a high rate of speed" (Bates Stamp 0526).<sup>7</sup>*

As part of his presentence investigation report, Mr. Dobson also interviewed Mr. Herrick on 8/28/97 in the Island County Jail. Mr. Dobson wrote, "*During the interview, Herrick related to me his version of the offense. The following is what he related to me as his recollection of the events that happened during the offense: Herrick stated that he and his friend, Skip<sup>8</sup>, had been planning on stealing marijuana plants from the residence occupied by Ms. Y and her roommate.....When he arrived at Skip's house, a lot of people were there having a party so they didn't think they could steal the plants without getting caught. During all this time, he had been drinking. He said he had drank about a six-pack of beer, but ran out at about 2:00 AM. He then started drinking hard liquor and smoking pot...After they left Skip's house, they decided to go to Ms. Ys' house. Herrick said he did not remember getting to the house, but remembered being in the house. Herrick said he was going to look for the marijuana, but Skip said he would [sic] because Ms. Y would recognize him. Herrick went into Ms. Ys' bedroom with Skip, she awoke and they told her to put a pillow over her head. Herrick said that Skip then left to look for the marijuana. Herrick was looking through some stuff and then remembered her having him by the hair while she was on top of him. He called Skip for help, Skip came down and hit her to get her off. He said they both kicked her and then left for Skip's house. Herrick says he feels disgusted about what happened although he doesn't remember much of the incident. However, he said he accepts what the statements say. He doesn't disagree with the police reports, but disagrees with some things in Skip's statement" (Bates Stamp 0527).<sup>9</sup>*

Mr. Herrick was charged with Rape in the 1<sup>st</sup> Degree in violation of RCW 9A.44.040 on 8/7/97 (Bates Stamp 0503-0504) and pled guilty on 8/8/97 (Bates Stamp 0506). He was sentenced on 10/23/97 to 125 months of incarceration, \$1027.00 in court restitution, 3 years of community supervision and given credit for 161 days served (Bates Stamp 0506-0515). He was released into the community on or around 9/15/06 (Bates Stamp 0201).

**B. Does Mr. Herrick "suffer from a mental abnormality or personality disorder?"**  
**YES.**

RCW 71.09.020 (8) defines "mental abnormality" as "*...a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to the commission of criminal sexual acts in a degree constituting such person a menace to*

<sup>7</sup> When interviewed by Mr. Dobson on 8/21/97, Ms. Y stated that in addition to the mental and emotional trauma she had suffered permanent damage including 40% hearing loss in her left ear and nerve damage to her left cheek.

<sup>8</sup> Skip refers to Mr. Herrick's codefendant, George Norton Erickson III.

<sup>9</sup> Unlike the initial 8/28/97 interview with Mr. Dobson, when interviewed by Andrei Dandescu, MA on 4/5 and 4/6/07, Mr. Herrick did acknowledge attempting to vaginally rape LY but discontinued the attempt due to being flacid. However subsequently stated that he forced Ms. Y to fellate him and ejaculated into her mouth.

*the health and safety of others." RCW 71.09.020 (9) defines "personality disorder" as "...an enduring pattern of inner experience and behavior that deviates markedly from the expectations of the individual's culture, is pervasive and inflexible, has onset in adolescence or early adulthood, is stable over time and leads to distress or impairment."*

**NON-PREDICATE OFFENDING:**

Mr. Herrick pled guilty to 1 count of Voyeurism on 4/13/07 and was sentenced on 6/28/07 (Bates Stamp 0552-0557). Records utilized in reconstructing this offense include: King County Sheriff Incident Report for Case # 06-362828 authored by King County Sheriff Officer Johan Kingsberry, dated 12/6/06 (Bates Stamp 0538-0542); King County Sheriff Follow-Up Supplemental Report for Case # 06-362828, dated 12/5/06 (Bates Stamp 0544-0546); King County Officers Witness Statement for Case # 06-362828 authored by Officer Scott Dery, dated 12/7/06 (Bates Stamp 0547-0548); *State of Washington v. Donald Ray Herrick* Judgment and Sentence for Cause # 06-1-10627-6 SEA, dated 6/28/07 (Bates Stamp 0552-0557), and; Letter to Attorney Lisa Leone in reference to Case # 06-1-10627-6 SEA authored by Andrei Dandescu, MA, dated 4/27/07 (Bates Stamp 1485-1495).

The official version of events is taken from the 12/6/06 Incident Report authored by Officer Johan Kingsberry. On 12/5/06 victim LJ (DOB: 7/29/90), *"...was on the bus coming home from Seattle. She was returning from work on bus # 41. She then transferred to the # 347 which would take her home to Shoreline. She got onto the #347 and a man she describes as [sic] white male with blonde hair was wearing a gray sweat shirt with jeans and tennis shoes. The tennis shoes were black and white in color. The man and her were talking about classic literature together. When she got to her stop at NE 170 St and 5 Ave NE they both got off the bus together. The two began talking again at the bus stop. The man identified himself as "Donny" and asked for her phone number. She said she did not want to give Donny her number but she would take his. Donny gave her his number and she said she began walking home. As she was walking home she felt she was being followed. When she looked back she saw Donny walking behind her. Donny jumped behind a tree when he saw her turn around. She recognized the man as Donny because of his hair and she recognized his sweatshirt. L walked past her house for a block or so and doubled back towards her house. As she was walking back she started walking with an older man. She told the man she thought someone was following her. Once she got to her house again she ran towards the house and unlocked the door and entered her home. Once inside she went into her bedroom and began undressing to take a shower. L said someone began knocking on her bedroom window shortly after she undressed to take a shower. She looked out the window and saw her father in the front yard. Her father Pierre was telling her someone had been looking through her window.*

*I spoke with the father Pierre. Pierre told me he came home about 2118 hrs on 12/5/06. He pulled into the driveway and saw a man looking into his daughters [sic] room which faces east towards 5 Ave NE. The man was standing between the roses and the house facing the window. Pierre describes the man as a white male with long blond [sic] hair. He was wearing a gray sweatshirt and blue jeans. Pierre said he was bent down with his*

hands on the bottom of the window. He said it looked like he was trying to get the screen off the window. Pierre said at first he thought it was his friend Lewis but when he stood up he realized it was not his friend. Pierre said he got out of the car and the man looked startled and ran around to the back of the house. Pierre said he followed him into the back yard but could not find him in the back yard. He returned to the house and had his wife Plasina call the police" (Bates Stamp 0539-0540).

The investigating officers traced the phone number to Mr. Herrick's residence. He was arrested and positively identified by the victim's father. When questioned by the investigating officers, Mr. Herrick said that he, "....was in Seattle for his MRT class. The class ended at about 1900 hrs and he took Metro Bus #347 home. He talked to a girl on the bus and she gave him her phone number. He got off at NE 170/5 NE at about 2100 hrs. It took him about 5 minutes to walk home and he walked straight home. When he got home he made some Chili and watched FOX News. After he ate he called his girlfriend C - Azurina Schalk. He called from his cell phone and called her cell phone. He said he talked to her for a little bit and then he hung up so he could change. After he changed he called her back and talked to her until the police arrived. He said he did not follow anyone and he did not look in to anyone's window" (Bates 0547).<sup>10</sup>

Mr. Herrick was sentenced on 6/28/07 to 22 months confinement, 36 to 48 months of community supervision, and was given credit for 204 days of time served (Bates Stamp 0552-0557). He returned to the community on supervision on or around 9/23/08 (Bates Stamp 1313).

#### NON-SEXUAL CRIMINAL HISTORY:

Mr. Herrick has an extensive history of non-sexual criminal activity with his first adjudication occurring as a 14 year-old juvenile. As summarized in the 9/22/97 Amended Presentence Investigation Identification Information for Cause # 97-1-00069-7 authored by Anthony L. Dobson, CCO-2 (Bates Stamp 0523-0535), Mr. Herrick's criminal history predating his 1997 predicate offense (Bates Stamp 0528-0529) included:

#### **Juvenile Felony:**

<b>Date</b>	<b>Charge, County, Cause #</b>	<b>Disposition &amp; Status</b>
10/16/89	Burglary in the 2 <sup>nd</sup> Degree King Co. 89-8-03656-0	Guilty
8/7/90	Taking a Motor Vehicle Without Permission	Guilty

<sup>10</sup> When interviewed by Andrei Dandescu, MA on 4/5 and 4/6/07, Mr. Herrick acknowledged the offense however he continued a pattern of minimization. Specifically, he stated that, "...he was not sure whether the victim lived there. He stated that he would not of minded it if he was able to see her nude while looking through the window. He stated that he was not there intending to peep, but that he would not have minded if he was able to do so" (Bates Stamp 1486).

**Adult Felony:**

5/6/94	Unlawful Possession of a Firearm King Co. 94-1-061549	Guilty, 3 months jail terminated, failed to pay LFO's
6/29/94	Vehicle Prowling I King Co. 94-1-057835	Guilty 45 days jail terminated failed to pay LFO's

**Misdemeanor:**

1/21/94	Attempted Theft 2 King Co. 93-1-064396	Guilty
6/1/94	Driving While License Suspended or Revoked Seattle 194808	Guilty
6/1/94	Suspended Drivers License 3 Seattle 200413	Guilty
6/6/94	Suspended Drivers License 3 Seattle 200828	Guilty
6/10/94	Suspended Operator's License 3 <sup>rd</sup> Degree Seattle 201017	Guilty
6/22/94	Driving While License Suspended/Revoked 3 <sup>rd</sup> Degree King County 8016453	Guilty
8/20/94	False Reporting Emergency Seattle 208545	Guilty
6/22/95	Suspended Operator's License in the 3 <sup>rd</sup> Degree Seattle 244408	Guilty
10/8/95	Assault in the 4 <sup>th</sup> Degree - DV King Co. CP31201KC	Guilty
10/20/95	DUI Seattle 244760	Guilty
10/21/95	Reckless Driving King Co. C005597	Guilty

11/7/95	Driving While License Suspended in the 2 <sup>nd</sup> Degree King Co. CP 13239KC	Guilty
12/21/95	Driving While License Suspended in the 2 <sup>nd</sup> Degree King Co. CP06610KC	Guilty
1/12/96	Driving While License Suspended/Revoked Seattle 263339	Guilty
5/7/96	Driving While License Suspended in the 2 <sup>nd</sup> Degree	Guilty
5/12/96	Assault in the 4 <sup>th</sup> Degree Malicious Mischief - DV King CP46799SH	Guilty

Records also indicate that concurrent with Mr. Herrick's predicate offense of Rape in the 1<sup>st</sup> Degree he was charged and convicted for Possession With Intent to Deliver Marijuana in reference to King County Cause # 97-1-02166-5. Mr. Herrick was sentenced to 9 months incarceration to run concurrent with his incarceration on Cause # 97-1-00069-7, Rape in the 1<sup>st</sup> Degree (Bates Stamp 0292-0294).

**IN-CUSTODY AND COMMUNITY ADJUSTMENT:**

Mr. Herrick was remanded to the Department of Corrections on 10/23/97 pursuant to Cause # 97-1-00069-7 (Bates Stamp 0519). In-custody adjustment was problematic with multiple infractions denoted (Bates Stamp 0173-0174). Mr. Herrick received multiple infractions for Fighting (11/14/00; 3/30/02; 2/6/03), Group Demonstration (11/17/00; 2/14/01), Refusing Cell Assignments (3/2/01; 8/22/01), and Tampering with a Lock (9/1/00; 11/17/00). He was also infraacted for Possession of a Controlled Substance (5/29/99), Assault of an Inmate (11/14/00); Staff Interference (1/27/01); Refusing to Leave (5/8/01), Refusing to Transfer (8/22/01), 4 General Infractions (6/11/02), and Possession of Tattoo Paraphernalia (2/4/00).

Perhaps most notable during Mr. Herrick's initial incarceration at Stafford Creek Correctional Center was a referral to administrative segregation on 12/27/05 when it was discovered that Mr. Herrick was surreptitiously viewing female custody staff and employees from a bathroom window (Bates Stamp 0831; 1000). In a 2/9/06 e-mail to Mark Kepler, Gregory Jones wrote that Mr. Herrick; "...was investigated for predatory behavior exhibited while at T-Bldg. Offender Herrick was found in the T-Building Offender Bathroom [sic] with the lights out and the sign indicating it was open. He was not on the callout and did not have staff permission to be in the building. His behavior was consistent with reports of predatory/stalking behavior being conducted by an offender in the past couple of weeks. Information was received that an offender was

*entering the T-Building offender bathroom and preying upon staff (T-Building has a high number of female staff). The description was consistent with offender Herrick. When offender Herrick was approached by Lt. Haley, he fit the scenario and was shocked to have been approached. Lt. Haley recommends Demotion [sic] to Medium Custody [sic] with an INT override, due to offender Herrick's continued crime related behavior (current crime Rape 1). He is considered a threat to security and staff. He should be monitored at a higher security level than M13" (Bates Stamp 1000).<sup>11</sup>*

Following incarceration on Cause # 06-1-10627-6 SEA, records indicate that Mr. Herrick incurred 1 infraction for being "out of bounds" on 2/5/08. No other infractions were noted in available discovery.

Community programming has been equally problematic. While records regarding Mr. Herrick's community adjustment prior to the index offense were not included in available discovery, in his 9/22/97 Amended Presentence Investigation Identification Information for Cause # 97-1-00069-7 (Bates Stamp 0523-0535), Mr. Dobson noted that, *"Herrick has been on continuous community supervision and/or probation since January of 94. He has three adult convictions, including the instant offense, and 16 misdemeanor convictions. Herrick has not been successful in complying with the conditions of community supervision or district court probation. While on community supervision for Attempted Theft Second Degree, Herrick was convicted of Unlawful Possession of a Firearm and later, Vehicle Prowling First Degree. Herrick's community supervision was not successful. He failed to report regularly, had two positive urinalysis for marijuana, and had two bench warrants issued for violations. The Court [sic] ultimately terminated his supervision. It should be noted that his supervision was terminated because it was unsuccessful rather than discharged for successful completion. All the while, Herrick continued to commit new misdemeanors, and/or be in violation of current district court probation conditions. The most significant violations, in my opinion, center around his domestic violence convictions and the Court [sic] orders of not to drink use illegal drugs, complete alcohol treatment, and complete domestic violence perpetrators treatment. While on District Court probation for these offenses, Herrick continued to drink, use marijuana, and failed to complete drug and alcohol treatment. It was during this probation time, that Herrick committed the First Degree Rape, while by his own admission, he was under the influence of both alcohol and marijuana. Herrick seems to have a total disregard and lack of respect for court orders and laws" (Bates Stamp 0532-0533).*

This pattern of behavior continued following Mr. Herrick's release back into the community on or around 9/15/06 (Bates Stamp 0201) following his incarceration on Cause # 97-1-00069-7.<sup>12</sup> Mr. Herrick was at liberty for less than 3 months prior to being

<sup>11</sup> The significance of this behavior is discussed below in the section entitled *Diagnosis*.

<sup>12</sup> Interestingly, in a 7/12/06 letter to his presumptive CCO (Bates Stamp 1357-1360), Mr. Herrick professed remorse for his prior offending and stated that he had, *"...no desire to return to any semblance of my previous lifestyle" (Bates Stamp 1357)* and that he wanted a, *"...chance to prove myself in the most adventurous [sic] way..."* Within 5 months of writing this letter Mr. Herrick was arrested for his index offense.

arrested on Cause # 06-1-10627-6 SEA on 12/5/06 (Bates Stamp 0538-0542). During the 2.5 months he was at liberty, Mr. Herrick was violated for failing to abide by curfew, failing to complete 8 hours of community service and failing to submit to polygraph testing (Bates Stamp 1264-1268). Mr. Herrick was taken into custody on 10/26/06 (Bates Stamp 0209) and released following the violation hearing on 11/13/06 (Bates Stamp 0210). Mr. Herrick was found guilty on all violations (Bates Stamp 1273-1275). As a sanction, Mr. Herrick was ordered to enter into and complete Moral Reconciliation Therapy.

Mr. Herrick was next violated on 12/8/06<sup>13</sup> for failing to work at a community service site on work crew for 8 hours by 11/19/06 and for failing to pay his legal financial obligations incurred pursuant to Cause # 97-1-00069-7 (Bates Stamp 1287-1291). A hearing was held on 12/21/06 at the Regional Justice Center in which Mr. Herrick was found not guilty for the violation of not completing work crew, but was found guilty for failure to pay his legal financial obligations. Mr. Herrick was sentenced to 45 days confinement starting from 12/6/06 (Bates Stamp 1295-1299).<sup>14</sup>

Following his release to the community on 9/23/08 pursuant to incarceration on Cause # 06-1-10627-6 SEA, Mr. Herrick continued a pattern of non-compliance with supervision. In a 12/16/08 violation report to the court (Bates Stamp 1311-1323), CCO Christopher Ervin alleged 22 violations including: failing to obtain CCO approval for employment; accessing the internet without prior CCO approval; entering into a romantic relationship without CCO approval (2 counts); having contact with minors; failing to participate in a sexual deviancy evaluation; failing to participate in or make progress in sexual deviancy treatment; possessing pornographic materials; failure to participate in GPS monitoring (5 counts); entering North Acres Park; failure to abide by geographic boundary; failure to abide by curfew hours (5 counts), and; visiting a residential address without CCO approval (2 counts) (Bates Stamp 1312-1313).

Mr. Herrick was found guilty on 19 of the 22 violations on 12/18/08 and sentenced to 120 days confinement (Bates Stamp 1324-1335).

Mr. Herrick was next violated on 7/29/09. In his 7/29/09 Report of Alleged Violation (Bates Stamp 1339-1346), Mr. Ervin alleged the following: failure to make reasonable progress in sexual deviancy treatment; entering a place where minors congregate (4 counts); visiting a residential address without prior CCO approval, and; failure to abide by a CCO directive. Mr. Herrick was found guilty on all violations on 8/4/09.<sup>15</sup>

The next series of violations were submitted on 7/8/10 (Bates Stamp 1884-1893). In his violation report, Mr. Ervin alleged that Mr. Herrick committed the following

<sup>13</sup> Mr. Herrick was already in custody following his arrest on Cause # 06-1-10627-6 SEA.

<sup>14</sup> Bates Stamp 0552-0557 indicates that Mr. Herrick was continuously incarcerated between 12/5/06 and 9/23/08.

<sup>15</sup> The Hearing and Decision Summary dated 8/4/09 was handwritten. The quality of the photocopy was so poor as to preclude a full review. Review of Bates Stamp 1886 suggests that Mr. Herrick was incarcerated and tolling between 7/23/09 and 10/30/09 for a total of 99 days in custody.

violations: failure to obey all laws by driving without a valid driver's license on 6/17/10 and by engaging in stalking behavior on multiple occasions since on or about 2/8/10; failure to abide by the conditions of supervision by using the Internet in an unauthorized manner; failure to abide by the conditions of sexual deviancy treatment or make reasonable progress in treatment on or about 2/8/10, and; being around or in places where minor congregate on or about 6/17/10. Mr. Herrick was found guilty of all violations in a tripartite hearing held on 7/15, 7/21 and 7/22/10 and sentenced to 240 days of detention with credit for time served since 6/24/10 (Bates Stamp 1904-1905).<sup>16</sup>

#### SUBSTANCE ABUSE HISTORY:

Mr. Herrick has an extensive self-reported history of substance abuse. Records (Bates Stamp 0533; 1488-1489) indicate that Mr. Herrick began use of alcohol when he was in the 6<sup>th</sup> grade and began smoking marijuana on a regular basis in the 7<sup>th</sup> grade (Bates Stamp 1488). When interviewed on 4/5 and 4/6/07 by Andrei Dandescu, MA, Mr. Herrick reported that as an adolescent he used drugs, went to parties and participated in drug trafficking with other gang members. He reported that he began dealing marijuana, at the age of 14, with subsequent progression into cocaine, methamphetamine, and "basically everything really" such that by age 19 he was able to support himself solely through illicit means (Bates Stamp 1489).

When interviewed by Anthony L. Dobson in the Island County Jail on 8/28/97 in reference to Cause # 97-1-00069-7, Mr. Herrick admitted being under the influence of alcohol and marijuana at the time of the predicate offense. More generally, *"Herrick admits to having an alcohol problem. He said he normally drinks beer, but his inhibitions would become lower when he drank, and then he would drink to intoxication. He said alcohol also causes problems in his relationships. When drinking, he said, he gets argumentative and treats his girlfriend poorly. In fact, he has two Assault 4 (DV) convictions which he said occurred when he had been drinking. Herrick also said that marijuana along with alcohol makes him blackout. Herrick was on probation for domestic violence at the time of his arrest for this crime. He had conditions as a result of those convictions to get an alcohol assessment, complete in or out patient alcohol treatment as recommended, have no violations of the law during this period, and not use alcoholic beverages or non-prescribed drugs. In fact, Herrick was in an alcohol treatment program because of a DWI conviction he received. He did not complete the program because of the arrest for this crime. He said he completed about nine months of the program. Herrick seems to have a clear understanding of the effects alcohol and marijuana have on him. He also had court orders not to use alcohol or non-prescribed drugs. In spite of his own self-knowledge about the effect of drug [sic] and alcohol on him, and court orders prohibiting him from using alcohol or illegal drugs, Herrick chose to drink and use illegal drugs, and as a result, he committed a violent rape"* (Bates Stamp 0533).

<sup>16</sup> As violation 3 of this series of violations constitutes the "recent overt act" as defined by RCW 71.09.020 (12) it will be discussed in greater detail below in the section entitled *Recent Overt Act*.

Mr. Herrick continued to smoke marijuana pursuant to his incarceration on Cause # 97-1-00069-7 through 2000 (Bates Stamp 1490) and incurred one infraction on 6/29/99 for possession of a controlled substance (Bates Stamp 0173).<sup>17</sup>

#### IN-CUSTODY AND COMMUNITY PROGRAMMING:

Records from in-custody programming indicate that while incarcerated on Cause # 97-1-00069-7 and Cause # 06-1-10627-6 SEA Mr. Herrick participated in and completed Stress and Anger Management in 2003 (Bates Stamp 0881) and again in 2008 (Bates Stamp 0887) and Human Relations in 2004 (Bates Stamp 0883). There is no record of Mr. Herrick completing substance abuse programming while incarcerated. Mr. Herrick did not participate in specialized sex offender treatment during his incarceration for Cause # 97-1-00069-7 or Cause # 06-1-10627-6 SEA.<sup>18</sup>

Following his release on 9/23/08 pursuant to Cause # 06-1-10627-6 SEA, Mr. Herrick began participation in sexual deviancy treatment with Northwest Treatment Associates on or around 9/29/08 (Bates Stamp 1496-1510; 1512-1515; 1517-1521; 1526-1529). Records (Bates Stamp 1514) indicate that Mr. Herrick attended sex offender treatment on 4 consecutive weeks between 10/22 and 11/12/08. Following 120 days of confinement on a series of violations (Bates Stamp 1324-1335) Mr. Herrick briefly returned to treatment on 6/30 and 7/20/09 (Bates Stamp 1514) but attendance was described as "unsatisfactory" due to "traffic, illness and a scheduling mix-up" (Bates Stamp 1514). More generally, it was noted that, "Mr. Herrick demonstrates the same kind of behavior in treatment that he does with his Community Corrections Officer. He manipulates and lies when it seems to him to serve his best interests. It appears to be in his character to be an argumentative individual who questions cooperation before he decides whether to get involved or not. He argues frequently and often questions authority" (Bates Stamp 1518).

Mr. Herrick appears to have resumed treatment sometime following his release from custody on 10/30/09 (Bates Stamp 1886) and remained in treatment through being taken back into custody on the most recent series of violations on 6/24/10 (Bates Stamp 1905). The most recent report authored by Steve Silver, ACSW dated 6/10/10 (Bates Stamp 1526-1529) suggested apparent compliance with treatment.<sup>19</sup>

<sup>17</sup> Interestingly, in an 8/9/99 letter to his brother, Mr. Herrick requested that he send him "recipes" for production of crystal meth and LSD in the of guise of legal mail from his attorney (Bates Stamp 0901).

<sup>18</sup> Records reviewed but not extensively utilized in this report (Bates Stamp 0284) reported that Mr. Herrick declined sex offender treatment on 1/6/05. He was deemed to have insufficient time to participate in the program following incarceration on Cause # 06-1-10627-6 SEA.

<sup>19</sup> This report predates Mr. Herrick's most recent violations. An OMNI Chronos entry dated 7/6/10 authored by CCO Christopher Ervin noted "Spoke with NW TX Steve Siler regarding allegations of Stalking [sic]. C stated P is clearing [sic] in violation of SOTX and that he will be terminated from tx for non-compliance. C stated P's behavior indicates he is too high risk and not making attempts to curb deviancy, but instead appears to be trying to put up a false front" (Bates Stamp 0218).

**DEVELOPMENTAL HISTORY:**

Mr. Herrick's developmental history is derived from the Amended Presentence Investigation Identification Information for Cause # 97-1-00069-7 authored by Anthony L. Dobson, CCO-2, dated 9/22/97 (Bates Stamp 0523-0535); Donald Herrick Autobiography, undated (Bates Stamp 1403-1417), and; Letter to Attorney Lisa Leone in reference to Case # 06-1-10627-6 SEA authored by Andrei Dandescu, MA, dated 4/27/07 (Bates Stamp 1485-1495).

Mr. Herrick reported that he was born on 5/15/75, the second child of a sibship of 3 born to Lorinda Gene and Donald Herrick (Bates Stamp 1488). Mr. Herrick reported one older sister and one younger brother (Bates Stamp 1403; 1488). Mr. Herrick described a chaotic younger childhood characterized by separation and divorce and multiple family relocations to Pennsylvania, Florida, Arizona, California and Washington State (Bates Stamp 1403-1404). Mr. Herrick reported after his parent's second divorce he wound up being in the sole custody of his mother.

Mr. Herrick described a history of maternal alcoholism and drug abuse partially predicated upon his mother's employment as a bartender (Bates Stamp 1405; 1488). Supervision and oversight during Mr. Herrick's developmental years would best be considered neglectful and chaotic (if not abusive) with a history of paternal kidnapping and brief placement in an orphanage (Bates Stamp 1488).

Mr. Herrick described a history of antisocial conduct beginning at 8 years of age including vandalism, truancy and shoplifting (Bates Stamp 1489). Mr. Herrick reported onset of alcohol abuse when he was in the sixth grade with onset of marijuana abuse approximately 1 year later (Bates Stamp 1488).

Mr. Herrick last completed the 6<sup>th</sup> grade<sup>20</sup> and was expelled from the 7<sup>th</sup> and 8<sup>th</sup> grades for fighting. He attempted to attend the 9<sup>th</sup> grade but dropped out after a short time. He reportedly obtained his GED at the age of 16 (Bates Stamp 1489).

Mr. Herrick reported an escalation of antisocial conduct during his adolescent years to include gang affiliations, burglary, theft, assault, and drug trafficking. Mr. Herrick reported that by age 19 he had saved enough money from his illegal endeavors he was able to afford a rental home. Licit employment was inconsistent and of short duration. When interviewed by Mr. Dandescu, prior to his 1997 sexual assault conviction Mr. Herrick reported his longest legitimate employment was of 6 months in duration while employed as a lancer in Florida (Bates Stamp 1490).

When not in custody Mr. Herrick has continuously been on community supervision or probation from January 1994 (Bates Stamp 0532) to the present time.

Relationally, Mr. Herrick identified one marriage which entailed limited cohabitation due to relational instability and incarceration (Bates Stamp 1407-1413). The

<sup>20</sup> Other records, notably Bates Stamp 0534, indicate that Mr. Herrick completed the 7<sup>th</sup> grade.

brief marriage resulted in the birth of 1 daughter on 6/18/96 (Bates Stamp 1491). Mr. Herrick has acknowledged 2 additional significant relationships and is currently involved in a relationship with a woman he reportedly met at a health club or gym.

### DIAGNOSES:

Prior diagnostic evaluations. (Bates Stamp 1485-1495; 1496-1510) did not yield any diagnostic formulations aside from noting, "*Significant character pathology was noted, to include strong personality characteristics related to antisociality (impulsivity, aggressiveness, consistent irresponsibility, disregard for safety of self and others, lack of remorse, and difficulties following rules) and moderate narcissism (interpersonally exploitative, sense of entitlement, limited empathy, and some grandiose expectations)*" Bates Stamp 1494).

When approached about his participation in the current evaluation on 9/2/10, Mr. Herrick initially agreed to be interviewed.<sup>21</sup> In subsequent phone calls to my office<sup>22</sup>, Mr. Herrick vacillated in regard to his willingness to participate in the evaluation. He indicated that while it was his desire to speak with me, he had received informal legal advice recommending against participation. In our last phone conversation on or around 10/15/10, Mr. Herrick decided to participate in the interview prompting me to schedule an interview at the Regional Justice Center on 10/25/10. Following a 2 hour interview during which I reviewed the nature of the evaluation, limits of confidentiality and possible dispositional outcomes, Mr. Herrick ultimately chose not to participate in the interview.

Based upon review of recent records (Bates Stamp 1496-1510; 1512-1515; 1517-1521; 1526-1529) and Mr. Herrick's demeanor when briefly interviewed on 10/25/10, there did not appear to be evidence of an DSM-IV-TR<sup>23</sup> Axis I affective disorder.

The DSM-IV-TR defines Paraphilia as, "*recurrent, intense sexually arousing fantasies, sexual urges, or behaviors generally involving 1) non-human objects, 2) the suffering or humiliation of oneself or one's partner, or 3) children or other non-consenting persons that occur over a period of at least 6 months.*" The DSM-IV-TR continues by stating, "*For Pedophilia, Voyeurism, Exhibitionism and Frotteurism, the diagnosis is made if a person has acted on these urges or sexual fantasies and causes marked distress or interpersonal difficulty. For the remaining Paraphilias, the diagnosis is made if the behavior, sexual urges, or fantasies cause clinically significant distress or impairment in social, occupational, or other important areas of functioning (Criterion B).*" (p. 566).

In regard to paraphilias, the DSM-IV-TR notes that "*Certain of the fantasies and behaviors associated with Paraphilias may begin in childhood or early adolescence but*

<sup>21</sup> My consent form was initially presented to him by CCO Dana Hufford.

<sup>22</sup> I did not keep a record of the dates of these phone contacts.

<sup>23</sup> American Psychiatric Association (2000). *Diagnostic and Statistical Manual of Mental Disorders (4<sup>th</sup> ed. Text Revision)*. Washington DC: Author.

*become better defined and elaborated during adolescence and early adulthood. Elaboration and revision of paraphilic fantasies may continue over the lifetime of the individual. By definition, the fantasies and urges associated with these disorders are recurrent...The disorders tend to be chronic and lifelong, but both the fantasies and the behaviors often diminish with advancing age in adults. The behaviors may increase in response to psychosocial stressors, in relation to other mental disorders, or with increased opportunity to engage in the Paraphilia" (p. 568).*

Mr. Herrick has one adjudicated rape which occurred during the early morning hours of 4/24/97 and was associated with a home invasion robbery (Bates Stamp 0320-0362). In the course of interviews conducted on 4/5 and 4/7/07 pursuant to incarceration on Cause # 06-1-10627-6 SEA, Andrei Dandescu, MA noted that while Mr. Herrick, "...stated that he did not entertain sexual fantasies about rape" that, "...in the past he fantasized about some of the "more turbulent" sexual encounters with his wife" and that he was making, "...a conscious effort to fantasize about "more normal" behaviors" (Bates Stamp 1493).

Although denying explicit paraphilic arousal on interview, a follow-up plethysmography evaluation conducted at Northwest Treatment Associates on 3/5/09, yielded clear evidence of paraphilic arousal to rape. As noted on Bates Stamp 1505, "*The assessment consisted of audio recordings of different sexual scenarios involving adult and minor partners, with varying levels of consent and compliance, and graduated in terms of sexual contact and level of coercion and violence employed in the scenarios.*" Overall arousal was generally low with, "...signs of manipulation and suppression of responses [were indicated] throughout the trace, across all categories" (Bates Stamp 1506). However, "...while reporting on a scenario of a humiliation rape, Mr. Herrick reached a 26% level of arousal, roughly 5% greater than that exhibited during the actual playing of the scenario" (Bates Stamp 1506). Ms. Wolfe summarized by noting "Mr. Herrick heard verbalized standard descriptions of (1) a man and woman having consensual sex, (2) an adult man raping an adult woman, (3) an adult female being raped, (4) an adult female being humiliated and raped, (5) an exhibitionistic act with female victim in car, (6) fondle of a female minor, (7) rape of a female minor, (8) male anal rape, (9) completed male sexual encounter [appropriate], and, (10) a male partner where there is nonphysical coercion. Mr. Herrick shows arousal to those scenes which describe raping an adult female and one scene to raping a female child. None of the other scenarios elicit a response above the cutoff point. These findings would suggest that Mr. Herrick is more interested in violent sex than nonviolent sex and there is some tendency toward being interested in minor females as victim partners" (Bates Stamp 1509). Ms. Wolfe concluded, "As noted above, I believe that Mr. Herrick is a more serious rapist than many of the young men who get inebriated and do foolish things. He not only gets involved in that scenario, but probably by utilizing masturbation fantasies which model the behavior he had developed an autonomic nervous system arousal response to violent sex. If he is not a full-blown rapist by now, he is on his way to developing that problem" (Bates Stamp 1509).

Based upon the presence of one adjudicated rape (Bates Stamp 0506-0515) and a pattern of paraphilic arousal as denoted on plethysmography (Bates Stamp 1506; 1509), I believe there is sufficient evidence to warrant a diagnosis of Paraphilia, Not Otherwise Specified (Non-Consent) (302.9) on Axis I.<sup>24</sup>

The DSM-IV-TR defines the paraphilic focus of Voyeurism as a disorder involving the, "...act of observing unsuspecting individuals, usually strangers, who are naked, in the process of disrobing, or engaging in sexual activity" (p. 575). The capsular definition of the disorder entails that the individual, "Over a period of at least 6 months [experiences] intense sexually arousing fantasies, sexual urges, or behaviors involving the act of observing an unsuspecting person who is naked, in the process of disrobing, or engaging in sexual activity" In addition, "The person has acted on these sexual urges, or the sexual urges or fantasies cause marked distress or interpersonal difficulty" (p.575).

Mr. Herrick was convicted of Voyeurism on 6/28/07 (Bates Stamp 0552-0557) for an incident which occurred on 12/5/06 (Bates Stamp 0538-0542; 0544-0546; 0547-0548) less than 3 months following his release on Cause # 97-1-00069-7 (Bates Stamp 0201). Mr. Herrick had previously been remanded to administrative segregation on 12/27/05 for surreptitious viewing of female custody staff at Stafford Creek Correctional Center while serving his sentence on Cause # 97-1-00069-7 (Bates Stamp 0831; 1000).

When interviewed by Andrei Dandescu on 4/5 and 4/6/07 in reference to Cause # 06-1-10627-6 SEA, Mr. Herrick acknowledged a history of voyeurism. Mr. Herrick reported, "...that while in prison, he got in a habit of masturbating while looking at women through the door of his cell. He stated that he was incarcerated for 9 years and that he spent a significant amount of time in solitary confinement" (Bates Stamp 1487). More generally, "...in his [4/12/07] pre-polygraph report, Mr. Herrick disclosed having peeped on approximately 6 women, ranging in age from 16 to 35. He stated that he engaged in peeping behaviors between the age of 14 and 31" (Bates Stamp 1487). Cumulatively, Mr. Herrick's history of adjudication and self-reported conduct provisionally support a diagnosis of Voyeurism (302.82).<sup>25</sup>

<sup>24</sup> When polygraphed by Norm Matzke on 4/12/07, Mr. Herrick was asked if he had accurately reported all instances of using physical force during a sexual act and if he had lied, omitted or distorted any part of his sexual history (Bates Stamp 1493). Mr. Herrick passed the polygraph examination (Bates Stamp 1486). In my 11/16/10 interview with Mr. Ervin, he indicated some skepticism regarding the polygraph results. He noted that Mr. Herrick has the ability to be deceptive while passing polygraph examinations. As evidence, Mr. Ervin cited the 11/6/08 polygraph conducted by David McNeill (Bates Stamp 1438-1446).

<sup>25</sup> Mr. Herrick's refusal to take a 10/10/06 sexual history polygraph (Bates Stamp 0205) and subsequent 10/26/06 refusal to take a compliance polygraph and answer questions about anything other than drug use (Bates Stamp 0209) was interpreted as an effort to hide violation behavior. In conjunction with curfew violations (Bates Stamp 1264-1268), it would appear likely that Mr. Herrick was engaging in voyeuristic behavior. I regard Mr. Herrick's pattern of voyeuristic behavior as significantly enhancing his risk for hands-on sexual recidivism in light of his 4/24/97 home-invasion rape. Moreover, I question whether his voyeuristic behavior constitutes an independent paraphilia or whether this is instrumental behavior for purposes of perpetrating a hands-on offense. Thus, I have chosen to assign a provisional specifier to the diagnosis.

The DSM-IV-TR defines substance abuse as, "A maladaptive pattern of substance use leading to clinically significant impairment or distress, as manifested by one (or more) of the following, occurring within a 12-month period: 1) recurrent substance use resulting in a failure to fulfill major role obligations at work, school, or home (e.g., repeated absences or poor work performance related to substance use; substance-related absences, suspensions, or expulsions from school; neglect of children or household); 2) recurrent substance use in situations in which it is physically hazardous (e.g., driving an automobile or operating a machine when impaired by substance use); 3) recurrent substance-related legal problems (e.g., arrests for substance-related disorderly conduct); 4) continued substance use despite having persistent or recurrent social or interpersonal problems caused or exacerbated by the effects of the substance (e.g., arguments with spouse about consequences of intoxication, physical fights)." (p. 199). In contrast the DSM-IV-TR defines substance dependence as, "A maladaptive pattern of substance use, leading to clinically significant impairment or distress, as manifested by three (or more) of the following, occurring at any time in the same 12-month period: 1) tolerance, as defined by either of the following: a) a need for markedly increased amounts of the substance to achieve intoxication or desired effect; b) markedly diminished effect with continued use of the same amount of the substance; 2) withdrawal, as manifested by either of the following: a) the characteristic withdrawal syndrome for the substance (refer to Criteria A and B of the criteria sets for Withdrawal from the specific substances); b) the same (or a closely related) substance is taken to relieve or avoid withdrawal symptoms. 3) the substance is often taken in larger amounts or over a longer period than was intended; 4) there is a persistent desire or unsuccessful efforts to cut down or control substance use; 5) a great deal of time is spent in activities necessary to obtain the substance (e.g., visiting multiple doctors or driving long distances), use the substance (e.g., chain smoking), or recover from its effects; 6) important social, occupational, or recreational activities are given up or reduced because of substance use; 7) the substance use is continued despite knowledge of having a persistent or recurrent physical or psychological problems that is likely to have been caused or exacerbated by the substance (e.g., current cocaine use despite recognition of cocaine-induced depression, or continued drinking despite recognition that an ulcer was made worse by alcohol consumption)" (p. 197).

As noted above, Mr. Herrick has an extensive self-reported history of substance abuse. Records (Bates Stamp 0533; 1488-1489) indicate that Mr. Herrick began use of alcohol when he was in the 6<sup>th</sup> grade and began smoking marijuana on a regular basis when in the 7<sup>th</sup> grade (Bates Stamp 1488). Licit and illicit substance abuse were implicated in Mr. Herrick's 1997 (Bates Stamp 0189; 0190; 0436) offense as well as prior assault charges and one DUI (Bates Stamp 0529; 0533). Concurrent with his conviction on Cause # 97-1-00069-7, Mr. Herrick was convicted of VUCSA: Possession With Intent to Deliver Marijuana in reference to King County Cause # 97-1-02166-5 and was sentenced to 9 months incarceration to run concurrent with Cause # 97-1-00069-7. Mr. Herrick continued to smoke marijuana pursuant to his incarceration on Cause # 97-1-00069-7 through 2000 (Bates Stamp 1490) and incurred one infraction on 6/29/99 for possession of a controlled substance (Bates Stamp 0173).<sup>26</sup>

<sup>26</sup> Cannabis.

Cumulatively, it appears that Mr. Herrick meets criteria for Alcohol Abuse (By History) (305.00) and Cannabis Abuse (By History) (305.20).<sup>27</sup>

The DSM-IV-TR identifies a personality disorder as, "*an enduring pattern of inner experience and behavior that deviates markedly from the expectations of the individual's culture. This pattern is manifested in two (or more) of the following areas: 1) Cognition (i.e., ways of perceiving and interpreting self, other people, and events); 2) Affectivity (i.e., the range, intensity, lability, and appropriateness of emotional response); 3) Interpersonal Functioning; 4) Impulse Control: B) The enduring pattern is inflexible and pervasive across a broad range of personal and social situations. C) The enduring pattern leads to clinically significant distress or impairment in social, occupational, or other important areas of functioning. D) The pattern is stable and of long duration, and its onset can be traced back at least to adolescent or early adulthood*" (p. 689). In addition to the above, the diagnosis of a personality disorder entails that the enduring pattern is not better accounted for as a manifestation of another mental disorder.

The DSM-IV-TR defines Antisocial Personality Disorder as a "*...pervasive pattern of disregard for and violation of the rights of others occurring since age 15 years, as indicated by three (or more) of the following: 1) failure to conform to social norms with respect to lawful behaviors as indicated by repeatedly performing acts that are grounds for arrest; 2) deceitfulness, as indicated by repeated lying, use of aliases, or conning others for personal profit or pleasure; 3) impulsivity or failure to plan ahead; 4) irritability and aggressiveness, as indicated by repeated physical fights or assaults; 5) reckless disregard for the safety of self or others; 6) consistent irresponsibility, as indicated by repeated failure to sustain consistent work behavior or honor financial obligations; 7) lack of remorse, as indicated by being indifferent to or rationalizing having hurt, mistreated, or stolen from another.*" (p. 706). Moreover, the disorder entails that the individual is at least 18 years of age and that there is evidence of a Conduct Disorder prior to the age of 15 years.

Mr. Herrick clearly meets criteria for a diagnosis of Antisocial Personality Disorder (301.7) on Axis II. As an adult Mr. Herrick has demonstrated a failure to conform to social norms (Bates Stamp 0506-0515; 0528-0530; 0552-0557), demonstrated deceitfulness (Bates Stamp 0209; 0218; 0234; 0567), impulsivity (Bates Stamp 0231; 0528-0530; 0567; 1490), irritability and aggressiveness (Bates Stamp 0173-0174; 0528-0530; 1493), consistent irresponsibility (Bates Stamp 0533; 1273-1275; 1295-1299; 1324-1335; 1491) and a demonstrable lack of remorse (Bates Stamp 0500; 0528-0530; 1249; 1267).

Mr. Herrick clearly met criteria for a diagnosis of Conduct Disorder prior to age 15. In addition to the adjudicated felony of Burglary in the 2<sup>nd</sup> Degree at the age of 14 (Bates Stamp 0528), Mr. Herrick had an extensive history of non-adjudicated juvenile

<sup>27</sup> I included the 'By History' specifier as polygraphs on 11/15/06 (Bates Stamp 1424-1429), 11/6/08 (Bates Stamp 1438-1446) and 11/13/09 (Bates Stamp 1448-1454) did not indicate use of alcohol or illicit drugs. Mr. Herrick was deemed to have responded inconclusively to a question about drug and alcohol use when polygraphed on 10/14/08 (Bates Stamp 1431-1437).

offending. When interviewed by Andrei Dandescu, MA on 4/5 and 4/6/07 in reference to Cause # 06-1-10627-6 SEA, Mr. Herrick stated that, "...while growing up he got into trouble on several occasions. He stated that he first got in trouble at age 8 when he, his brother; and a friend vandalized a neighborhood house. He stated that he later became involved in vandalism (breaking windows) at school, began skipping classes, and began shoplifting. He stated that he would shoplift cigarettes for his sister and candy bars. He stated that he got two charges for shoplifting. He stated that he served a few days in a juvenile hall as a result of his last shoplifting (age 14). Mr. Herrick stated that around age 12 he started climbing the roofs in his neighborhood and that this lead [sic] to some situations where he broke first [sic] broke in some houses, then began burglarizing residences. He stated that he was charged and convicted of Burglary in the Second Degree. He served two days in jail. He stated that a few months later he went to Portland with a friend who stole a car from his sister. He stated that he was charged with Taking a Motor Vehicle Without Permission. (The official documentation confirmed the client pled guilty to offenses committed on 10/1989 and 08/1990). He stated that he ran away on the day of his court hearing. He stated that he was on the run for about a month and a half" (Bates Stamp 1489). Mr. Herrick also reported a history of school expulsion; drug use and drug dealing prior to age 15 (Bates Stamp 1489).

As Mr. Herrick's antisocial conduct did not occur exclusively during the course of Schizophrenia or a manic episode, I believe Mr. Herrick conclusively meets the diagnostic criteria for Antisocial Personality Disorder (301.7) on Axis II.

In summary, Mr. Herrick meets diagnostic criteria for Paraphilia Not Otherwise Specified (Nonconsent) (302.9), Alcohol Abuse (By History) (305.00), Cannabis Abuse (305.20), and a provisional diagnosis of Voyeurism (302.82) on Axis I. Mr. Herrick meets the diagnostic criteria for Antisocial Personality Disorder (301.7) on Axis II. Of these disorders, I regard the disorder of Paraphilia Not Otherwise Specified (Nonconsent) (302.9) as constituting a "mental abnormality" as defined in RCW 71.09.020 (8) which predisposes Mr. Herrick to the commission of criminal sexual acts which endangers the health and safety of adult and adolescent females.

**C) Is Mr. Herrick as a result of a mental abnormality or personality disorder "likely to engage in predatory acts of sexual violence if not confined in a secure facility?"**  
**YES.**

This question refers to the risk and likelihood of a person re-offending in a sexually violent fashion. A number of actuarial measures have been developed to assist evaluators in determining the offender's level of risk if returned to the community. Likelihood of recidivism is usually presented as a percentage in a given time frame, such as 7 to 10 years. It should be remembered that for the purposes of RCW 71.09 no such time limit exists. In addition, the probabilities derived from the studies upon which these instruments were developed are considered to be low boundary estimates of actual recidivism due to the fact that in all such studies some recidivism was undetected. Estimates derived from actuarial instruments may also underestimate the likelihood of recidivism due to limited follow-up periods and continuing failure rates for new charges

of between 1 to 2% after the first 5 years.<sup>28</sup> Other studies denote aggregate sexual recidivism rates of 10 to 15% after 5 years, 20% after 10 years, and 30 to 40% after 20 years.<sup>29</sup> These same authors estimate actual recidivism rates are 10 to 15% higher than detected, yielding 20 year rates at 35 to 55%. As with Prentky et al., Hanson et al. denoted declining recidivism rates with increased time in the community.

Mr. Herrick was assessed with the PCL-R, 2<sup>nd</sup> Edition. Factor analysis of the PCL-R has yielded 2 main factors and 4 facets. Broadly, Factor 1 is comprised of 8 items which load on interpersonal traits broadly described as selfishness, callousness, lack of empathy, and remorseless use of others. Factor 2 is comprised of 10 items pertaining to an unstable antisocial lifestyle and social deviance. Scores on the PCL-R range from 0 to 40. Categorically, individuals obtaining scores of 30 and above are regarded as being psychopathic and therefore at a significantly higher risk for violent and antisocial recidivism. In addition, scores on the PCL-R can be viewed dimensionally such that individuals obtaining higher scores on the measure are at a relatively higher risk of violent recidivism compared to individuals obtaining lower scores.

Mr. Herrick obtained a prorated score of 31.6<sup>30</sup> on the PCL-R placing him at the 91<sup>st</sup> percentile compared to North American male offenders and at the 96<sup>th</sup> percentile compared to North American male forensic psychiatric patients.

In 9/09 the authors revised the Static-99 thereby creating the Static-99R. The revision was conducted in an effort to improve the sensitivity of the instrument to age related declines in recidivism. Whereas the Static-99 was scored from 0-12, the Static-99R scores range from -3 to 12.<sup>31</sup>

Percentile data for Static-99R scores is based on an international sample of sexual offenders from 8 studies, including samples from Canada, the United States, England, Austria, and Sweden (n = 4,040). The samples used for percentile data were considered to be relatively unselected groups that would be representative of the population of all adjudicated sex offenders within a given correctional system. The norms are presented as percentile ranges, reflecting the observed percentage of offenders scoring at or below a specified score. In other words, percentiles provide a relative ranking. Relative rankings are thought to be most useful in situations where the allocation of limited resources must be made, such as for treatment, community supervision, etc.

Compared to an international sample of other adult male sexual offenders, Mr. Herrick' Static-99R score of 7 falls into the 94.9 to 97.8 percentile compared to the

<sup>28</sup> Prentky, R.A., Lee, A.F.S., Knight, R.A., & Cerce, D. (1997). Recidivism rates among child molesters and rapists: A methodological analysis. *Law and Human Behavior*, 21, 635-659.

<sup>29</sup> Hanson, R.K., Morton, K.E., & Harris, A.J.R. (2003). Sexual offender recidivism risk: What we know and what we need to know. *Ann. N.Y. Acad. Sci* 989: 154-166.

<sup>30</sup> I chose to omit scoring Mr. Herrick on Item 13 *Lack of Realistic Long-Term Goals* due to his decision to not participate in the interview.

<sup>31</sup> Theoretically, a married offender over the age of 60 who committed an incestuous act with a related female victim and had no prior convictions for non-sexual or sexual violence could receive a score of -3 on the Static-99R.

standardization samples. This score places Mr. Herrick below 2.2 to 5.1 percent of the offenders in these same samples.

Relative risk data for Static-99R scores was based on 22 samples of sexual offenders from Canada, the United States, the United Kingdom, Denmark, Holland, Austria, Sweden, Germany, and New Zealand (n = 8,047). The recidivism rate for sex offenders with the same score as Mr. Herrick would be expected to be 3.8 times the recidivism risk of a typical sexual offender utilized in the standardization samples.

Absolute recidivism rates in individuals with scores similar to Mr. Herrick is 37.9%<sup>32</sup> within 5 years of time at risk and 48.6%<sup>33</sup> within 10 years of time at risk. No 15 year rates are available at the present time.<sup>34</sup>

Mr. Herrick was also assessed with the SORAG. Despite providing risk estimates for a more general outcome measure (violent recidivism) Rice et al.<sup>35</sup> has argued persuasively that the more general outcome measure of violent recidivism yields more accurate estimates of lifetime risk for sexually violent recidivism than simple rap sheet sexual violence. Based upon their study, Rice et al. argued that a multiplier of 1.48 for rap sheet index convictions and 1.66 for rap sheet historical offenses yielded a more accurate estimate of true sexually motivated offenses.

Mr. Herrick obtained a score of 33 on the SORAG placing him in Bin 9 at the 99<sup>th</sup> percentile compared to the standardization sample. All individuals with similar scores recidivated at 7 years and 10 years of time at risk.

Based upon the concordant findings of two actuarial measures which are differentially weighted for factors associated with recidivism,<sup>36</sup> I am of the opinion that Mr. Herrick constitutes a high risk for engaging in sexually violent recidivism. Given Mr. Herrick's remaining time at risk, I believe Mr. Herrick's risk exceeds the statutory criteria of "more probably than not" as defined in RCW 71.09.020 (7).

#### **RECENT OVERT ACT:**

RCW 71.09.020 (12) defines a "recent over act" as "any act, threat, or combination thereof that has either caused harm of a sexually violent nature or creates a reasonable apprehension of such harm in the mind of an objective person who knows of the history and mental condition of the person engaging in the act or behaviors."

<sup>32</sup> 33.1% to 42.9% at the 95% confidence interval compared to a reference sample of 1,313 offenders.

<sup>33</sup> 41.4% to 55.9% at the 95% confidence interval compared to a reference sample of 722 offenders.

<sup>34</sup> In a 12/7/09 presentation to the California Department of Mental Health, David Thornton, Ph.D. recommended a multiplier of 1.2 of the 10 year recidivism rates to obtain 15 year recidivism rates.

<sup>35</sup> Rice, M.E., Harris, G.T., Lang, C., & Cormier, C. (2006). Violent sex offenses: How are they best measured from official records. *Law and Human Behavior* 30, 525-541.

<sup>36</sup> Barbaree, H.E., Langton, C.E., & Peacock, E.J. (2006). The factor structure of static actuarial items: Its relation to prediction. *Sexual Abuse: A Journal of Research and Treatment*, 18, 207-226.

In his 7/8/10 Report of Alleged Violation to the court in reference to Cause # 97-1-00069-7 and Cause # 06-1-10627-6 SEA (Bates Stamp 1884-1893). Mr. Ervin alleged the following violations: failure to obey all laws by driving without a valid driver's license on 6/17/10 and by engaging in stalking behavior on multiple occasions since on or about 2/8/10; failure to abide by the conditions of supervision by using the Internet in an unauthorized manner; failure to abide by the conditions of sexual deviancy treatment or make reasonable progress in treatment on or about 2/8/10, and; being around or in places where minor congregate on or about 6/17/10.

Of the multiple violations alleged, the third violation alleged by Mr. Ervin appears to be germane to the issue of a "recent overt act" Mr. Ervin wrote, "On 6/17/10, Auburn Police Officers [sic] responded to an allegation of Stalking and Harassment at the Auburn Library - noted in Auburn Police Incident Report 10-07131."<sup>37</sup> Mr. Ervin continues, "On 7/1/10, I spoke with the adult female indicated by Auburn Police as the person whom contacted them originally because she felt that Mr. Herrick was stalking her. This person described multiple instances of Mr. Herrick seeing her in the library and following her through the city after she would leave. This person further indicated that she had first noticed Mr. Herrick in February of 2010, because he had been following her around the library while masturbating. I asked this person to clarify what Mr. Herrick was actually doing that would indicate to her he was masturbating. This person told me that Mr. Herrick followed her throughout the library with his hands down the front of his pants, and that he would stand in book aisles parallel to where she was peeking at her through books and moving his hands inside the front of his pants in a way which would indicate massaging of the male genital area. This person also told me that on occasions when she had left the library and noticed Mr. Herrick following her in his own vehicle, she would go to public locations such as Safeway and Burger King and enter those businesses in the hopes that Mr. Herrick would lose interest in her and leave. This person told me that Mr. Herrick would not leave, however, despite her making eye contact with him and gesturing to him to leave her alone. This person stated Mr. Herrick only left when she would make it appear she was calling for help on her cell phone, or when she would point at him while talking to security personnel. This person indicated to me that the last time Mr. Herrick had attempted to follow her, she began making erratic traffic maneuvers to make it clear to Mr. Herrick that she knew he was following her, and that Mr. Herrick followed her through several of her turns, and then turned into a Napa Auto Parts store. This person indicated she would be willing to write a detailed statement, highlighting more specific dates, time and locations. On 7/6/10, I received a written statement from the aforementioned adult female. This written statement reiterates the above mentioned information. In this statement, the adult female indicated that the first time she encountered Mr. Herrick was sometime during the week of February 7<sup>th</sup>, 2010 through February 12<sup>th</sup> 2010, at which time Mr. Herrick followed her to a Safeway. The next date indicated is June 16<sup>th</sup>, 2010, at which time Mr. Herrick followed her around several turns eventually pulled [sic] into a Napa Auto Parts store. On 7/6/10, I checked the GPS date information on Mr. Herricks's whereabouts during the above mentioned dates and times. GPS information confirmed Mr. Herrick's whereabouts on 2/8/10,

<sup>37</sup> Auburn Police Department Police Report for Case # 10-07131 authored by Officer Buie Arneson, dated 6/17/10, Bates Stamp 0567-0568.

2/25/10, and 6/6/10 are [sic] consistent with the allegations mentioned above. Mr. Herrick's behavior described above is consistent with the definition of Stalking per RCW 9A.46.110 - a printout of which is included with this report. Per RCW 9A.46.110, Stalking in this manner is classified as a gross misdemeanor<sup>38, 39</sup> (Bates Stamp 1890).

Mr. Herrick was found guilty of Stalking by Hearings Officer K. Mortenson following a tripartite hearing which concluded on 7/22/10 (Bates Stamp 1904-1905).

Cumulatively, in light of Mr. Herrick's history of adjudicated offending in reference to Cause # 97-1-00069-7, and Cause # 06-1-10627-6 SEA and evidence of paraphilic arousal to rape (Bates Stamp 1506; 1509), Mr. Herrick's behavior on or around 2/8, 2/25 and 6/16/10 causes reasonable apprehension of harm of a sexually violent nature. As such, I regard this series of acts as constituting a "recent overt act" as defined by RCW 71.09.020 (12).

#### SUMMARY AND CONCLUSION:

Mr. Donald Herrick is a 35 year-old male with a history of broad-spectrum antisocial conduct beginning in childhood. Records indicate that he has been on continuous community supervision or incarcerated since 1994 when he was 19 years of age. Despite repetitive sanctioning, Mr. Herrick has not demonstrated the ability to be compliant with supervision or manage his behavior in the community. Pursuant to his release into the community on Cause # 97-1-00069-7 on 9/15/06, Mr. Herrick has been sanctioned to 522 days of confinement, independent of his incarceration on Cause # 06-1-10627-6 SEA. Mr. Herrick's paraphilic interests have been chronic and persistent and manifested both in his conduct as well as on physiological testing. Behaviorally, Mr. Herrick's paraphilic arousal manifested in a home-invasion rape on 4/24/97, a pattern of voyeuristic activity resulting in sanctioning while in custody on Cause # 97-1-00069-7 and subsequent incarceration on Cause # 06-1-10627-6 SEA. Mr. Herrick's pattern of apparent predatory behavior continued following his release on 9/23/08 resulting in sanctioning for Stalking on 7/15/10. Physiological testing conducted on 3/5/09 detected clear arousal to humiliation rape of an adult female and rape of a female minor, despite apparent efforts to suppress arousal. Mr. Herrick's arousal to these scenarios were absolutely higher than to scenarios depicting consensual sexual activity.

<sup>38</sup> RCW 9A.46.110 states (1) A person commits the crime of stalking if, without lawful authority and under circumstances not amounting to a felony attempt of another crime:

- (a) He or she intentionally and repeatedly harasses or repeatedly follows another person; and
- (b) The person being harassed or followed is placed in fear that the stalker intends to injure the person, another person, or property of the person or of another person. The feeling of fear must be one that a reasonable person in the same situation would experience under all the circumstances; and
- (c) The stalker either:
  - (i) Intends to frighten, intimidate, or harass the person; or
  - (ii) Knows or reasonably should know that the person is afraid, intimidated, or harassed even if the stalker did not intend to place the person in fear or intimidate or harass the person.

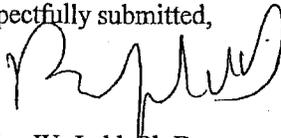
<sup>39</sup> At my request Mr. Ervin attempted to contact the victim on 11/18/10 to inquire as to whether she was followed on each occasion she observed Mr. Herrick at the library. Mr. Ervin returned my call a short time later to inform me that the victim's number had been disconnected.

A recent meta-analysis of 82 recidivism studies entailing 29,450 offenders<sup>40</sup> identified two broad factors associated with sexual recidivism: deviant sexual interests and antisocial orientation/lifestyle instability. Moreover, within the domain of sexual offenders, those offenders who demonstrated both high levels of psychopathy<sup>41</sup> and deviant arousal on plethysmography constituted a particularly high risk population for both violent and sexually violent recidivism.<sup>42, 43</sup> In light of Mr. Herrick's assessed level of psychopathy, level of deviant arousal and an absence of risk mitigation factors<sup>44</sup>, I regard him as being at a high risk to sexually recidivate.

**OPINION:**

Mr. Herrick meets the statutory definition of a "sexually violent predator" as defined in RCW 71.09.020 (18) based upon the existence of a "mental abnormality" which specifically predisposes him to the commission of criminal sexual as defined in RCW 71.09.020 (8), a high risk of recidivism as defined in RCW 71.09.020 (7) and the existence of a "recent overt act" as defined in RCW 71.09.020 (12).

Respectfully submitted,



Brian W. Judd, Ph.D.

Licensed Psychologist

Washington License 1522

Certified Sex Offender Treatment Provider 171

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

11/19/10 Olympia WA  
Date and Place

[Signature]  
Signature

<sup>40</sup> Hanson, R. K. & Morton-Bourgon, K. E. (2005). The characteristics of persistent sexual offenders: A meta-analysis of recidivism studies. *Journal of Consulting and Clinical Psychology*, 73, 1154-1163.

<sup>41</sup> A PCL-R score of 25 or above. Mr. Herrick obtained a prorated score of 31.6.

<sup>42</sup> Rice, M. E. & Harris, G. T. (1997). Cross-validation and extension of the Violence Risk Appraisal Guild for child molesters and rapists. *Law and Human Behavior*, 21, 231-241.

<sup>43</sup> Harris, G. T., Rice, M. E., Quinsey, V. L., Lalumière, M. L., Boer, D., & Lang, C. (2003). A multisite comparison of actuarial risk instruments for sex offenders. *Psychological Assessment*, 15, 413-425.

<sup>44</sup> For example, completion of sexual deviancy treatment, advancing age or physical infirmity. To date, community supervision and/or repetitive incarceration has not constituted an effective means to mitigate Mr. Herrick's risk.

NO. 69993-8-I

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

In re the Detention of:

DONALD HERRICK,

Appellant.

DECLARATION OF  
SERVICE

I, Joslyn Wallenborn, declare as follows:

On June 17, 2015, I sent via electronic mail, per service agreement, a true and correct copy of Brief of Respondent and Declaration of Service, addressed as follows:

Eric Nielsen and Eric Broman  
Nielsen, Broman, & Koch, PLLC  
[sloanej@nwattorney.net](mailto:sloanej@nwattorney.net)  
[nielsene@nwattorney.net](mailto:nielsene@nwattorney.net)  
[bromane@nwattorney.net](mailto:bromane@nwattorney.net)

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

DATED this 17<sup>th</sup> day of June, 2015, at Seattle, Washington.

  
JOSLYN WALLENBORN