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DIVISION II

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STATE OF WASHINGTON NO. 39566-5-II

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IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION TWO

IN RE THE DETENTION OF

ANTHONY JACKA

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

The Honorable Robert Harris, Judge

APPELLANT'S BRIEF

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TABLE OF CONTENTS

	Page
A. ASSIGNMENTS OF ERROR.....	1
1. The trial court erred and misapplied the law when it refused to allow testimony that Mr. Jacka took polygraphs as part of his treatment and evaluation requirements under RCW 71.09.....	1
2. The trial court abused its discretion by refusing to allow evidence that Mr. Jacka agreed to polygraph examinations.	1
3. The trial court violated Mr. Jacka’s state and federal constitutional rights to present a defense and to confront witnesses against him by refusing to allow him to explain why he was angry with certain Special Commitment Center (SCC) staff.	1
4. The trial court abused its discretion by refusing to allow Mr. Jacka to explain why he was angry with certain Special Commitment Center (SCC) staff.	1
5. Mr. Jacka’s confinement violates his Fourteenth Amendment right to due process.	1
6. RCW 71.09 is not narrowly tailored to achieve a compelling government interest.	1
7. RCW 71.09 fails to provide any timeframe within which the likelihood of re-offending is to be assessed.	1
B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR	1
1. There are exceptions to the general rule that polygraph information is not admissible unless stipulated to by the parties. Did the trial court abuse its discretion when it refused to acknowledge any exception to the rule and refused to allow admissible evidence that Mr. Jacka agreed to polygraphs during treatment and as part of his RCW 71.09 annual evaluation?.....	1

2. A person facing continuing civil commitment under RCW 71.09 is entitled to the same rights as a person facing criminal charges. A person facing criminal charges is constitutionally guaranteed the right to present a defense and to cross-exam witnesses. Did the trial court, at Mr. Jacka’s unconditional release trial under RCW 71.09 violate Mr. Jacka’s constitutional rights by refusing to allow Mr. Jacka to testify and rebut claims made by State’s witnesses? 2

3. Civil commitment statutes must be narrowly tailored to achieve a compelling government interest. RCW 71.09 allows the State to confine a person based on a probability of re-offense at some time over the remainder of that person’s lifetime, instead of limiting civil commitment to those who are currently dangerous. Does RCW 71.09 violate substantive due process under the Fourteenth Amendment? 2

C. STATEMENT OF FACTS..... 2

D. ARGUMENT 7

1. THE TRIAL COURT ERRED IN REFUSING TO ADMIT EVIDENCE THAT MR. JACKA VOLUNTARILY TOOK POLYGRAPH EXAMINATIONS.

2. THE TRIAL COURT DENIED MR. JACKA HIS FEDERAL AND STATE CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE AND TO CONFRONT WITNESSES AGAINST HIM BY REFUSING TO ALLOW MR. JACKA TO EXPLAIN WHY HE WAS ANGRY AT CERTAIN SCC STAFF AND BY LIMITING THE CROSS EXAMINATON OF STATE’S WITNESS DR. RAWLINGS. 12

3. THE COMMITMENT ORDER VIOLATED MR. JACKA’S FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BECAUSE THE JURY WAS NOT REQUIRED TO FIND THAT MR. JACKA IS CURRENTLY DANGEROUS. 20

E. CONCLUSION..... 24

TABLE OF AUTHORITIES

Page

Cases

<u>Ariz. Right to Life PAC v. Bayless</u> , 320 F.3d 1002 (9th Cir. Ariz. 2003)	21
<u>Dean v. State</u> , 325 So.2d 14 (Fla.Dist.Ct.App. 1975), <u>cert. denied</u> , 333 So.2d 465 (1976).....	10
<u>Foucha v. Louisiana</u> , 504 U.S. 71, 112 S. Ct. 1780, 118 L. Ed. 2d 434 (1992).....	21
<u>Humphrey v. Cady</u> , 405 U.S. 504, 92 S.Ct. 1048, 31 L.Ed.2d 394 (1972)	21
<u>In re Albrecht</u> ,147 Wn.2d 1, 51 P.3d 73 (2002).....	21, 22, 23
<u>In re Detention of Marshall</u> , 156 Wn.2d 150, 125 P.3 d 113 (2005)	22
<u>In re Detention of Paschke</u> , 121 Wn.App. 614, 90 P.3d 74 (2008)	22
<u>In re Detention of Thorell</u> , 149 Wn.2d 724, 72 P.3d 708 (2003).....	21
<u>In re Harris</u> , 98 Wn.2d 276, 654 P.2d 109 (1982).....	21
<u>In re Detention of Moore</u> , 167 Wn.2d 113, 216 P.3d 1015 (2009).....	22
<u>Johnson v. State</u> , 166 So.2d 798 (Fla.Dist.Ct.App. 1964)	10
<u>State v. Anderson</u> , 41 Wn.App. 85, 702 P.2d 481 (1985), <u>review denied</u> , 107 Wn.2d 745 (1987).....	11
<u>State v. Asaeli</u> ,150 Wn.App. 543, 208 P.3d 1136 (2009).....	7
<u>State v. Cherry</u> , 61 Wn.App. 301, 810 P.2d 940, <u>review denied</u> , 117 Wn.2d 1018 (1991)	11
<u>State v. Descoteaux</u> , 94 Wn.2d 31, 614 P.2d 179 (1980)	10

<u>State v. Harris</u> , 122 Wn.App. 547, 90 P.3d 1133 (2004).....	23
<u>State v. Hudson</u> , 150 Wn.App. 646, 208 P.3d 1236 (2009).....	7
<u>State v. Hudlow</u> , 99 Wn.2d 1, 659 P.2d 514 (1983).....	13
<u>State v. Ransleben</u> , 135 Wn.App. 535, 144 P.3d 397, 400 (2006)	13
<u>State v. Reay</u> , 61 Wn.App. 141, 810 P.2d 512 (1991).....	11
<u>State v. Roberson</u> , 118 Wn.App. 151, 74 P.3d 1208 (2003).....	11
<u>State v. Sutherland</u> , 94 Wn.2d 527, 617 P.2d 1010 (1980).....	10, 11
<u>State v. Woo</u> , 84 Wn.2d 472, 527 P.2d 271 (1974).....	10
<u>State v. Young</u> , 89 Wn.2d 613, 574 P.2d 1171, <u>cert. denied</u> , 439 U.S. 870, 99 S.Ct. 200, 58 L.Ed.2d 182 (1978).....	10
<u>Sullivan v. State</u> , 303 So.2d 632 (Fla.1974), <u>cert. denied</u> , 428 U.S. 911, (96 S.Ct. 3226), 49 L.Ed.2d 1220 (1976)	10
<u>Wygant v. Jackson Bd. of Education</u> , 476 U.S. 267, 106 S. Ct. 3320, 92 L. Ed. 2d 728 (1986).....	21

Statutes

RCW 71.09.....	i, ii, 1, 2, 5, 11, 13, 22
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Other Authorities

Const. Art. 1, § 22	13
Sixth Amendment to the United States Constitution	13
U.S. Const. Amend. XIV	20

A. ASSIGNMENTS OF ERROR

1. The trial court erred and misapplied the law when it refused to allow testimony that Mr. Jacka took polygraphs as part of his treatment and evaluation requirements under RCW 71.09.
2. The trial court abused its discretion by refusing to allow evidence that Mr. Jacka agreed to polygraph examinations.
3. The trial court violated Mr. Jacka's state and federal constitutional rights to present a defense and to confront witnesses against him by refusing to allow him to explain why he was angry with certain Special Commitment Center (SCC) staff.
4. The trial court abused its discretion by refusing to allow Mr. Jacka to explain why he was angry with certain Special Commitment Center (SCC) staff.
5. Mr. Jacka's confinement violates his Fourteenth Amendment right to due process.
6. RCW 71.09 is not narrowly tailored to achieve a compelling government interest.
7. RCW 71.09 fails to provide any timeframe within which the likelihood of re-offending is to be assessed.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. There are exceptions to the general rule that polygraph information is not admissible unless stipulated to by the parties. Did the trial court abuse its discretion when it refused to acknowledge any exception to the rule and refused to allow admissible evidence that Mr. Jacka agreed to polygraphs during treatment and as part of his RCW 71.09 annual evaluation?

2. A person facing continuing civil commitment under RCW 71.09 is entitled to the same rights as a person facing criminal charges. A person facing criminal charges is constitutionally guaranteed the right to present a defense and to cross-exam witnesses. Did the trial court, at Mr. Jacka's unconditional release trial under RCW 71.09 violate Mr. Jacka's constitutional rights by refusing to allow Mr. Jacka to testify and rebut claims made by State's witnesses?
3. Civil commitment statutes must be narrowly tailored to achieve a compelling government interest. RCW 71.09 allows the State to confine a person based on a probability of re-offense at some time over the remainder of that person's lifetime, instead of limiting civil commitment to those who are currently dangerous. Does RCW 71.09 violate substantive due process under the Fourteenth Amendment?

C. STATEMENT OF FACTS

Anthony Jacka wants to be released from the Special Commitment Center (SCC). When he was tried to a Clark County jury in June 2009, the question was whether he should be unconditionally released from his RCW 71.09 commitment. RP III-A at 106. The jury concluded that he should not be unconditionally released. CP 27-28. This appeal follows. CP 29-32

Mr. Jacka was committed to the SCC in 1997 after a jury found that he met the criteria for civil commitment under RCW 71.09. RP IV-A at 218-19. During the 12 years of confinement, Mr. Jacka consistently engaged in sex offender treatment. RP VI-B at 797-800. By June 2009,

he was in SCC's highest treatment achievement phase and living in its least restrictive environment. RP III-A at 58-59; RP VI-B at 788. He had a long and successful work history at SCC, he got along well with his peers, he attended church regularly, and he did not partake of any drugs or alcohol available in the SCC facility. RP VI- A at 676-77; RP VI-B at 773, 803-809.

Mr. Jacka had a plan in place for his release. RP VI-B at 802-820. He would live with his brother and sister-in-law in Vancouver, Washington. RP VI B at 742-45. He would actively look for a job. He would continue to go to church. He would attend sex offender treatment. He would treat his psoriasis. He would avoid negative triggers. He would not re-offend. RP VI-B at 802-860.

The State did not want Mr. Jacka unconditionally released from SCC. To convince a jury that Mr. Jacka should not be released, the State presented evidence from Mr. Jacka, from Mr. Jacka's current SCC counselor, Debra Larowe-Prado, and from forensic psychologist Dr. Leslie Rawlings. RP III-A at 52 through RP VA at 512.

Mr. Jacka came onto Ms. Larowe-Prado caseload in December 2007. RP III-A at 58. Since spring 2008, Mr. Jacka was in a program called Barriers to Discharge. RP III-A at 59, 61. This was a program for

persons deemed not to be progressing in treatment because they had hit a wall or a stumbling block of some kind. RP III-A at 59.

Ms. Larowe-Prado did not support Mr. Jacka's unconditional release, in essence, for two reasons. RP III-A at 67. First, she felt that he lacked transparency. RP III-A at 64. There were just some things he kept to himself. RP III-A at 64. For instance, he did not reveal that he had postage stamp size photos of women in bathing suits on his personal computer until he was asked about the pictures. RP III-A at 81-85. Second, Ms. Larowe-Prado felt that Mr. Jacka had anger issues with people in a position of power, especially certain SCC staff members. RP III-A at 62-66. Based upon Mr. Jacka's history, she believed that he would break into houses and rape women when he was frustrated.¹ RP III-A at 68. Unless he developed pro-social skills for dealing with everyday stress and frustration, that history might repeat itself if he was released from SCC. RP III-A at 67-69.

Dr. Rawlings interviewed Mr. Jacka at that time of the initial commitment in 1997 and again in 2009 in preparation for the unconditional release trial. RP IV-A at 216-218. Dr. Rawlings testified at Mr. Jacka's initial commitment trial when a jury found that Mr. Jacka

¹ Mr. Jacka provided a detailed account of his sexual assault, arrest, and conviction history. RP 3-B at 117-183.

fit the criteria for commitment under RCW 71.09. RP IV-A at 218. Dr. Rawlins testified at the 2009 unconditional release trial that Mr. Jacka still fit the criteria for commitment under RCW 71.09. He diagnosed Mr. Jacka with a continuing mental abnormality and personality disorder. RP IV-A at 235-49, 298, 301, 304; RP IV-B at 325. Dr. Rawlings used actuarial risk assessment instruments to assess Mr. Jacka's risk to re-offend. RP IV-B at 351-74. He used the Static 99, the SORAG, and the Minnesota Sex Offender Screening Tool (Revised). He concluded that Mr. Jacka was more likely than not to re-offend. RP IV-B at 374.

The State also used Dr. Rawlings to establish the Mr. Jacka felt bitterness toward the SCC and that Mr. Jacka's anger stood in the way of his fully completing treatment. RP IV-B at 380-86. The trial court refused to allow Mr. Jacka to cross-examine Dr. Rawlings about the source of his bitterness and anger at SCC staff. RP IV-B at 396-405.

To address the concern about lack of transparency, Mr. Jacka moved pre-trial to allow his positive history of taking polygraphs to be admitted in evidence. RP III-A at 33-41. The State refused to stipulate to the admissibility of the proposed polygraph evidence. RP III-A at 33-41. The trial court ultimately ruled that without a stipulation, the mere fact that Mr. Jacka consented to taking polygraphs was inadmissible. RP IV-A at 189-90.

To address the anger issues, Mr. Jacka wanted to testify why he was angry with certain SCC staff. RP IV-B at 311-321, 396-405. He made this record through an offer of proof. RP IV-B at 396-405. Specifically, in 2008, he agreed to forego his right to challenge his continuing SCC commitment. In exchange, SCC agreed to conditionally release Mr. Jacka. In anticipation of his conditional release, Mr. Jacka spent a great deal of time and money developing a release plan to include housing, employment, and continuing sex offender treatment. He was also looking forward to spending time with family and friends in other than the SCC setting. But SCC reneged on the promised conditional release. And in the meantime, several of those people he looked forward to spending time with died. He was upset. He felt that he got a raw deal. He felt that some of the SCC staff were to blame. RP VII-B at 1016-31.

The trial court refused to allow Mr. Jacka to explain why he was angry with certain SCC staff and refused to allow cross examination of witnesses about the root of Mr. Jacka's anger. The State convinced the trial court that even though Mr. Jacka's anger was important to the State's case, the basis for Mr. Jacka's anger, that he was not conditionally released, would only confuse the jury. RP IV-B at 311-321.

D. ARGUMENT

1. THE TRIAL COURT ERRED IN REFUSING TO ADMIT EVIDENCE THAT MR. JACKA VOLUNTARILY TOOK POLYGRAPH EXAMINATIONS.

Relevant evidence is admissible at trial. ER 402. ER 401 defines relevant evidence as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Under ER 403, relevant evidence “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”

A trial court’s evidentiary rulings are reviewed for an abuse of discretion. State v. Hudson, 150 Wn.App. 646, 652, 208 P.3d 1236 (2009). A trial court abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons, i.e., if the court relies on unsupported facts, takes a view that no reasonable person would take, applies the wrong legal standard, or bases its ruling on an erroneous view of the law. Hudson, at 652. An erroneous ruling requires reversal if it is prejudicial. State v. Asaeli, 150 Wn.App. 543, 579, 208 P.3d 1136 (2009). An error is prejudicial if there is a

reasonable probability that it materially affected the outcome of the trial.

Asaeli, at 579.

Prior to the trial, the State moved in limine to exclude from testimony any reference to polygraph examinations taken by Mr. Jacka. RP III-A at 33. Mr. Jacka agreed that the results of the polygraphs should be excluded but not the fact of the taking of the polygraphs.

[DEFENSE COUNSEL] If you look at Dr. Rawling's deposition, it starts at the bottom of the first page, I asked him:

"What's the value of polygraph examination in an evaluation?"

And Dr. Rawlings says:

"The value of a polygraph examination is to encourage people to make disclosures about their behavior."

"It doesn't really tell you whether we're lying or telling the truth; correct?"

Now this is a question.

"Not to a sufficient degree of scientific reliability."

If you look at the deposition of Debra LaRowe-Prado, she indicated that the use of a polygraph examination is to basically be able to determine transparency.

So really the way they use these in treatment and in these evaluations is to, in an attempt to get the subject or the client to fully disclose things. It's not to determine if whether they're telling the truth or not, it's just the fact of giving them the polygraph examination to get them to disclose things.

I have three of these cases currently. In virtually every one of them, the residents are asked to take polygraph examinations from time to time as part of treatment, as part of the annual review process.

We think it's very relevant that Mr. Jacka has agreed – that'll be the testimony – to take the polygraph examinations as they have been admitted – or as they have been requested.

We don't intend to ask anything, will not ask anything about the results. I agree, I don't think the results come into

evidence. But the fact that he has been willing to take these examinations is relevant towards his sense of transparency, his sense of, you know, disclosing what he's done.

So we think for those purposes that fact that he's taken polygraph examinations should be admissible.

RP III-A at 34-35.

The State argued that the mere mention that Mr. Jacka took polygraphs invited the jury to speculate on the results. RP III-A at 38. The court replied that juror speculation could be controlled by a limiting instruction saying "it specifically is not being offered for the truth of anything that maybe contained in tests, but using it as a treatment tool."

RP III-A at 42.

Despite the trial court's acknowledgment that the jury's application of the polygraph testimony could be limited, the court ruled against any admission of polygraph testimony.

THE COURT: Well, as near as I can tell, the State is, by law, is still – it's not admissible unless agreed to by stipulation of the parties, and apparently I don't have that stipulation.

[ASSISTANT ATTORNEY GENERAL]: That 's correct.

THE COURT: So I guess I deny the motion for use of the polygraph and discussions thereof. Somehow I think it should have come up in some type of an appellate decision as many cases as there are in this particular field, but absent that authority, I'm – I feel I have to continue to follow the existing case authority. Okay?

RP IV-A at 190.

The trial court's blanket ruling that all polygraph evidence is inadmissible absent a stipulation by the parties is wrong. The trial court abused its discretion when it based its decision on an erroneous view of the law. And the error was prejudicial.

In a general sense, it is a long-standing rule in Washington that the results of polygraph examinations are not admissible, except by stipulation. State v. Sutherland, 94 Wn.2d 527, 529, 617 P.2d 1010 (1980); State v. Descoteaux, 94 Wn.2d 31, 614 P.2d 179 (1980); State v. Young, 89 Wn.2d 613, 621, 574 P.2d 1171, cert. denied, 439 U.S. 870, 99 S.Ct. 200, 58 L.Ed.2d 182 (1978); State v. Young, 87 Wn.2d 129, 131, 550 P.2d 1 (1976); State v. Woo, 84 Wn.2d 472, 473, 527 P.2d 271 (1974). However, this rule is not inviolable. Like virtually all rules, it has exceptions. The opinion in Sutherland recognizes that there are exceptions to its rule:

In State v. Descoteaux, *supra*, we stated at 183:

The mere fact a jury is apprised of a lie detector test is not necessarily prejudicial if no inference as to the result is raised or if an inference raised as to the result is not prejudicial. See Dean v. State, 325 So.2d 14 (Fla. Dist. Ct. App. 1975), cert. denied, 333 So.2d 465 (1976); Sullivan v. State, 303 So.2d 632 (Fla. 1974), cert. denied, 428 U.S. 911, (96 S.Ct. 3226), 49 L.Ed.2d 1220 (1976). However, “ ‘ ”such evidence is liable to be prejudicial and should be admitted only when clearly relevant and unmistakably nonprejudicial.“ ‘ ” Dean v. State, *supra*, 325 So.2d at 18, quoting Johnson v. State, 166 So.2d 798, 805 (Fla. Dist. Ct. App. 1964).

Sutherland, 94 Wn.2d at 529-530. There are any number of Washington cases in which polygraph evidence was admitted without a stipulation by the parties. See, State v. Reay, 61 Wn.App. 141, 810 P.2d 512 (1991) (polygraph results admitted to show that the decedent could not have been the victim of a murder); State v. Anderson, 41 Wn.App. 85, 702 P.2d 481 (1985) (evidence of polygraph examination admitted to impeach a witness's credibility), review denied, 107 Wn.2d 745 (1987); State v. Cherry, 61 Wn.App. 301, 810 P.2d 940 (polygraph results used to determine the existence of probable cause for a search warrant), review denied, 117 Wn.2d 1018 (1991); State v. Roberson, 118 Wn.App. 151, 74 P.3d 1208 (2003) (polygraph results admitted as to question of whether the defendant breached his plea bargain where defendant's successfully passing was a condition of his plea).

Here, as in the exception-to-the-rule cases noted above, Mr. Jacka wanted the fact that he agreed to polygraph testing admitted at trial to demonstrate his willingness to cooperate and be transparent during both treatment and during the State's RCW 71.09 annual review evaluation as requested and conducted by the State's expert, Dr. Rawlings. Mr. Jacka's willingness to cooperate was made relevant by the State's inquiry into Mr. Jacka's transparency. The State elicited from his current counselor, Ms.

Larowe-Prado, her belief that Mr. Jacka is about 90% transparent. RP III-A at 58, 64. Mr. Jacka's lack of total transparency, in Ms. Larowe-Prado's opinion, holds Mr. Jacka back and recommends against his unconditional release. RP III-A at 69.

The State again focused on Mr. Jacka's need for transparency in the testimony from evaluator Dr. Rawlings. Dr. Rawlings testified that Mr. Jacka "recognized that not being transparent and not telling on himself was his most important risk factor" for re-offense. RP IV-A at 290. Finally, the State argued in closing that Mr. Jacka should not be released, in part, because he was not willing to be "honest and up-front" with his treatment providers." RP VII-B at 1071. But contrary to the State's argument, Mr. Jacka was transparent in the sense that he willingly engaged in polygraph testing. It was prejudicial error for the trial court to refuse to allow polygraph testimony about Mr. Jacka's willing participation in evaluation and treatment polygraphs.

- 2. THE TRIAL COURT DENIED MR. JACKA HIS FEDERAL AND STATE CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE AND TO CONFRONT WITNESSES AGAINST HIM BY REFUSING TO ALLOW MR. JACKA TO EXPLAIN WHY HE WAS ANGRY AT CERTAIN SCC STAFF AND BY LIMITING THE CROSS EXAMINATION OF STATE'S WITNESS DR. RAWLINGS.**

The Sixth Amendment to the United States Constitution and Const. Art. 1, § 22 guarantee a criminal defendant the right to present testimony in his own defense and the right to confront and cross examine the witnesses against him. State v. Hudlow, 99 Wn.2d 1, 14-15, 659 P.2d 514 (1983). In cases tried under RCW 71.09 proceedings, the rules of evidence applicable in criminal cases shall apply, and all constitutional rights available to defendants at criminal trials, other than the right not to be tried while incompetent, shall apply. State v. Ransleben, 135 Wn.App. 535, 540, 144 P.3d 397, 400 (2006). As such, Mr. Jacka was entitled to defend himself and to explain to the jury why he was mad at certain SCC staff. When the trial court refused to let Mr. Jacka testify about why he was angry, and prevented cross-examination of Dr. Rawlings about the source of the anger, the court violated Mr. Jacka's constitutional right to defend himself and to confront the witness. As such, Mr. Jacka was denied due process and a fair trial.

The State, in its case in chief, presented testimony that if Mr. Jacka was unconditionally released, his unreasonable and untreated anger put society at risk:

[ASSISTANT ATTORNEY GENERAL]: Okay. Do you have specific concerns about Mr. Jacka's anger and hostility if he's released into the community unconditionally?

[MS. LAROWE-PRADO]: my concern is, is that unless he has – is willing to take the classes that I’ve mentioned, the anger management, healthy communication, healthy relationships, some type of tools to learn how to relax and unless he takes something like that and starts practicing it, especially with the people that he’s most angry with, which happens to be clinical –

[ASSISTANT ATTORNEY GENERAL]: By clinical you mean?

[MS. LAROWE-PRADO]: Therapists, senior clinical. Senior clinical is our board of people that are forensic psychologists who meet once a week with different residents to mark their progress, give recommendations and say what, you know, this is what we’re seeing.

Till he can get those tools and be able to soften his edge, my concern is he has a supervisor who tells him in a gruff or aggressive manner, what Mr. Jacka perceived as a gruff or aggressive manner that, hey, you know, You’re not doing this right or, you know, Why can’t you do this better, that the possibility would trigger him. This is my concern.

[ASSISTANT ATTORNEY GENERAL]: Trigger him to do what?

[MS. LAROWE-PRADO]: He could go off on them. Going off I’m meaning yelling at them. He might just get angry and just say, What the heck, and just slam out of the room, you know, and losing a job.

There are some skills there that I think would be beneficial for him.

[ASSISTANT ATTORNEY GENERAL]: And besides the obvious, what would be the downside of Mr. Jacka losing his job in a circumstance like that?

[MS. LAROWE-PRADO]: If Mr. Jacka was unconditionally released, one of – he would not have finances. If he doesn’t have finances, he can’t pay a place to live. If you can’t have a place to live, he could end up on the streets.

If he ends up on the streets, then we have a homeless level three sex offender. If he ends up on the streets, he could end up, you know, with antisocial people, prostitutes, drug addicts, you know, things of that type.

It could be a downward spiral if he doesn't learn some tools.

RP III-A at 76-77.

Dr. Rawlings added more information about Mr. Jacka's anger:

[DR. RAWLINGS]: My assessment of him when I say him, evaluated him, was that it – it appeared really to be more of a global kind of hostility. I mean, he is angry mostly at the – the SCC staff. He was angry towards me. And angry for a number of reasons.

RP IV-B at 380.

[DR. RAWLINGS]: At this point his impulsiveness really shows up more as inappropriate anger expression.

Poor cognitive solving skills. Mr. Jacka, I think, is pretty good at – at solving problems except when he gets angry, except when he gets riled, and then he begins to view the world as – as against him and becomes distrusting, feels that he's wronged.

And it's very hard when he's in that state to stop, sit back and say, Okay, you know, what's the best way to handle this situation?

[ASSISTANT ATTORNEY GENERAL]: And according to his treatment records, is he in that state a lot?

[DR. RAWLINGS]: He has been for a while, yes, he has been for a while.

Negative emotionalities refers to basically a pattern of feeling victimized, wronged, feeling resentful, rather than constructively solving problems, expressing negative nos – emotionality and so on.

And –

[ASSISTANT ATTORNEY GENERAL]: He's kind of striking back at the world; is that –

[DR. RAWLINGS]: Striking back at the world. And this is – has been, again, an issue for Mr. Jacka, viewing himself as being wronged by the SCC, feeling extremely bitter about the SCC, and interfering with his ability to actually participate, I believe, in ways that would be meaningful that would allow him to move forward in the treatment program.

[ASSISTANT ATTORNEY GENERAL]: You said that you believed that stands in the way of fully completing the treatment program.

[DR. RAWLINGS]: Correct.

[ASSISTANT ATTORNEY GENERAL]: Has he made strides in treatment at the Special Commitment Center?

[DR. RAWLINGS]: Yes, he has.

[ASSISTANT ATTORNEY GENERAL]: Okay. And, in fact, he's been in treatment for, what, close to twelve years at this point?

[DR. RAWLINGS]: About twelve years, yes.

[ASSISTANT ATTORNEY GENERAL]: Okay. What about the negative emotionality or, you know, all these – these dynamic risk factors that you've been talking about, how do you believe they hold him back?

[DR. RAWLINGS]: How do they what?

[ASSISTANT ATTORNEY GENERAL]: You're saying that he hasn't fully completed treatment.

[DR. RAWLINGS]: Right. Well, the way they hold him back is particularly the negative emotionality – and – and I didn't mention one, which is cooperating with supervision, and there has been an

undercurrent, maybe not just an undercurrent, it's been a top of the – top of the river flow, so to speak, of problems cooperating with – with staff at various times –

[ASSISTANT ATTORNEY GENERAL]: And people in a position of authority over him.

[DR. RAWLINGS]: Yeah, position – and people in positions of authority.

And so this made it very, very difficult for him to – to address some of these final issues.

[ASSISTANT ATTORNEY GENERAL]: Okay. And does that seem to – it has been a barrier to his unconditional discharge.

[DR. RAWLINGS]: Yes. That would be my (inaudible; hitting documents against microphone).

[ASSISTANT ATTORNEY GENERAL]: How is that relevant to life on the street?

[DR. RAWLINGS]: Well, it's – relevant in a number of different ways. Mr. Jacka if he was released to the street unconditionally, he would nonetheless be under community supervision for about twelve months.

Given his posture here and his attitude, it would concern me that –

[ASSISTANT ATTORNEY GENERAL]: Can you –

[DR. RAWLINGS]: Sure. It would concern me that he may not be willing to allow the instructions of his community corrections officer, that he would become disengaged.

In the past he has attempted to dictate the terms of treatment and that he may continue to do that, given the state of his intense anger that he has identified. That fact, facet of his functioning himself is a risk increasing factor for re-offense.

So to the extent that he doesn't resolve that, it puts him at increased risk for activating his cycle of re-offending.

[ASSISTANT ATTORNEY GENERAL]: Okay. His cycle of offending?

[DR. RAWLINGS]: Yes.

RP IV-B at 384-388.

The State emphasized the concern over Mr. Jacka's unexplained anger during closing argument:

[ASSISTANT ATTORNEY GENERAL]: And until he sets his anger and his hostility and his ego aside and he gets the tools that he needs, he is not safe to release back into the community. He's making progress, and if he continues to make progress, he'll have another annual review and perhaps a recommendation for unconditional release.

But if he's released now without the tools that he needs in the community, what if he's released and he can't find a job right away? He's a convicted sex offender and he'll have to register he's a sex offender. And when he applies for jobs he'll have to say, I'm a sex offender.

It's gonna be tough for him to find a job. He doesn't have any money. He's got some debt. So if he was released and he can't find a job right away, he can't move out of Gary and Gretchen's house.

He might start to feel like he's overstayed his welcome. He can't pay his bills. He can't move on with his life.

Without the job, he doesn't have any money, he doesn't have any medical coverage, he doesn't get the injections and the ointments and the light therapy for his psoriasis. His psoriasis gets worse.

Because he doesn't have a job, he can't afford sex offender treatment in the community. And there's always the possibility

that his girlfriend decides she just doesn't need a relationship with somebody who's under that much scrutiny from the media and the neighbors and her friends.

Without the tools to manage his mental disorders, what's he likely to do? When you look at his past and you look at his history and you look at why he offended, he'll get depressed, he'll get bored. He'll start hanging out at taverns, he'll start drinking again.

He'll know he's overstayed his welcome at Gary and Gretchen's, he'll start wandering around the neighborhood, he won't have a job to go to, he'll hang out with the people who take him down the wrong path and he'll start looking at women and windows and door knobs.

If he doesn't have the tools he needs, he's likely to commit another sex offense.

Releasing him into the community is not giving him a second chance, it's giving him a tenth chance. And right now the risk is too high.

RP VII-B at 1087-1089.

It is obvious that Mr. Jacka's anger toward certain staff at SCC was central to the State's argument that Mr. Jacka's untreated anger put the community at risk and because the community was at risk, Mr. Jacka should not be unconditionally released.

During a break in Dr. Rawling's testimony, defense counsel told the court that he needed to be able to cross-examine Dr. Rawlings about the source of Mr. Jacka's anger and negative emotionality. RP IV-B at 396. Defense counsel offered that much of the anger had to do with the conditional release that was promised but subsequently denied to Mr.

Jacka. RP IV-B at 397. Defense counsel also argued that Dr. Rawlings' testimony opened the door to this testimony from Mr. Jacka. RP IV-B at 405. The State replied that the jury should not know about the conditional release offer because Mr. Jacka requested an unconditional release trial and not a conditional release trial. RP IV-B at 404. The trial court agreed with State and disallowed the requested cross examination and the offered rebuttal testimony from Mr. Jacka. RP IV-B at 405.

But the trial court ruling was in error. If the reason why Mr. Jacka was, as the trial court ruled, irrelevant, then the testimony that Mr. Jacka was angry is similarly irrelevant. The trial court's ruling deprived Mr. Jacka his constitutional right to present a defense and to confront witnesses. The commitment order should be reversed.

3. THE COMMITMENT ORDER VIOLATED MR. JACKA'S FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BECAUSE THE JURY WAS NOT REQUIRED TO FIND THAT MR. JACKA IS CURRENTLY DANGEROUS.

The Fourteenth Amendment provides that no state "shall deprive any person of life, liberty, or property without due process of law." U.S. Const. Amend. XIV. A statute that infringes a fundamental right—such as freedom from restraint—is constitutional only if it furthers a compelling

state interest and is narrowly tailored to further that interest. In re Albrecht, 147 Wn.2d 1, 7, 51 P.3d 73 (2002). A statute is narrowly drawn only if it is the least restrictive means of protecting the government interest. See, e.g., Ariz. Right to Life PAC v. Bayless, 320 F.3d 1002, 1011 (9th Cir. Ariz. 2003). As the U.S. Supreme Court has explained, “[t]he term ‘narrowly tailored’ so frequently used in our cases... may be used to require consideration of whether lawful alternative and less restrictive means could have been used.” Wygant v. Jackson Bd. of Education, 476 U.S. 267, 280 n. 6, 106 S. Ct. 3320, 92 L. Ed. 2d 728 (1986).

Freedom from bodily restraint is a fundamental and core liberty interest protected by the due process clause of the Fourteenth Amendment to the United States Constitution. In re Detention of Thorell, 149 Wn.2d 724, 732, 72 P.3d 708 (2003); U.S. Const. Amend. 14. Commitment for any reason constitutes a significant deprivation of liberty triggering due process protection. Foucha v. Louisiana, 504 U.S. 71, 80, 112 S. Ct. 1780, 118 L. Ed. 2d 434 (1992).

Involuntary civil commitment is a “massive curtailment of liberty.” In re Harris, 98 Wn.2d 276, 279, 654 P.2d 109 (1982) (quoting Humphrey v. Cady, 405 U.S. 504, 509, 92 S.Ct. 1048, 31 L.Ed.2d 394 (1972)). Because the civil commitment statute interferes with a fundamental right,

it must be narrowly tailored to achieve a compelling government purpose. Albrecht, supra. The Supreme Court has held that civil commitment violates due process unless it is based on proof that the individual is both mentally ill and dangerous. Albrecht, at 7. To satisfy due process, commitment is allowed only when the state establishes that an individual is currently dangerous; “[c]urrent dangerousness is a bedrock principle underlying the SVP commitment statute.” In re Detention of Paschke, 121 Wn.App. 614, 622, 90 P.3d 74 (2008); see also Albrecht, at 7; In re Detention of Marshall, 156 Wn.2d 150, 157, 125 P.3d 113 (2005).

RCW 71.09 does not explicitly require proof of current dangerousness. However, the statute is constitutional because

the “more probably than not” standard in RCW 71.09.020(7) includes a temporal component. For example, if an expert predicts that an alleged SVP will re-offend only in the far distant future, then there is less likelihood that the “more probable than not” standard has been legally satisfied. Whether that standard is satisfied depends on the facts underlying the SVP petition and the expert testimony. It also may depend on the statistical likelihood of re-offending. By properly finding a person to be an SVP, it is implied that the person is currently dangerous.

In re Detention of Moore, 167 Wn.2d 113, 124-25, 216 P.3d 1015 (2009)

(footnote omitted). In Moore, the detainee was committed following a bench trial.

Jury instructions must be “manifestly clear,” since juries lack the tools of statutory construction available to courts. See, e.g., State v. Harris, 122 Wn.App. 547, 554, 90 P.3d 1133 (2004). In this case, the court’s instructions did not require the jury to find that Mr. Jacka was currently dangerous. In the absence of such an instruction, the jury was permitted to commit Mr. Jacka even if it believed that he was not currently dangerous. Under the court’s instructions, Mr. Jacka could be committed upon proof of a statistical likelihood of re-offense at some point over the remainder of his lifetime, regardless of the jury’s assessment of his current dangerousness.²

Proof of current dangerousness is a critical component of a civil commitment. Albrecht, supra. Because the court’s instructions did not require proof of current dangerousness, the constitutionally required standard was not “manifestly clear.” Harris, supra. The court’s instructions permitted confinement even if the jury believed Mr. Jacka was not currently dangerous; accordingly, his commitment violated his Fourteenth Amendment right to due process. Albrecht, supra. The order must be vacated and the case remanded for a new trial, with directions to

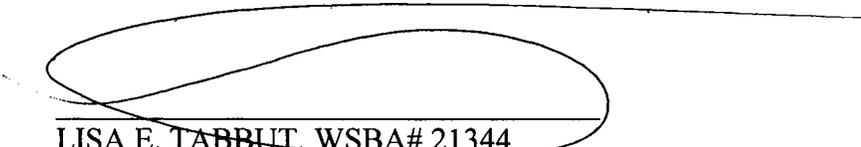
² In the absence of an instruction explicitly requiring proof of current dangerousness, confinement can be required regardless of current dangerousness. For example, if expert testimony establishes that an individual has a 1% likelihood of re-offending over the course of a single year and that the overall likelihood of recidivism increases to 51% over the course of 51 years, the individual could be committed because he more probably than not will re-offend—even though he is not currently dangerous.

instruct the jury that it must find Mr. Jacka currently dangerous in order to commit him as a sexually violent predator. Albrecht, supra

E. CONCLUSION

The Order of Commitment entered by the trial court should be reversed and Mr. Jacka unconditionally released.

Respectfully submitted this 8th day of February, 2010.



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Attorney for Mr. Jacka

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CERTIFICATE OF MAILING

In re the Detention of Anthony Jacka^{DEPUTY}

No. 39566-5-II

I certify that I mailed copy of Appellant's Brief to:

Mr. Anthony Jacka
Special Commitment Center
P.O. Box 85450
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and to:

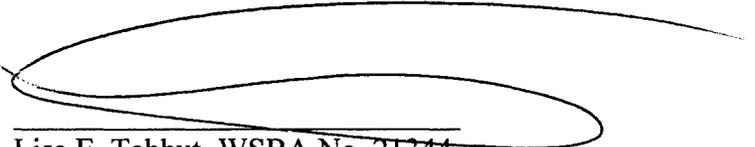
Ms. Sarah Sappington
Assistant Attorney General
800 Fifth Avenue, Suite 2000
Seattle, WA 98104

And that I sent an original and one copy to the Court of Appeals, Division II, for filing:

All postage prepaid, on February 8, 2010.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT .

Signed at Longview, Washington, on February 8, 2010.



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