

NO. 45120-4-II

IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION III

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In re the Detention of:

MARK ROBINSON,

Appellant.

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

The Honorable James Lawler, Judge

OPENING BRIEF OF APPELLANT

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**A. ASSIGNMENTS OF ERROR**

1. The trial court erred when it entered an order of commitment as a sexually violent predator (SVP) because the State failed to prove beyond a reasonable doubt that the appellant would likely engage in predatory acts of sexual violence unless confined to a secure facility.

2. The State failed to meet its burden to prove that the appellant continues to meet the definition of an SVP.

**B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Does a trial court err if it enters an order of commitment as a sexually violent predator when the State has failed to prove beyond a reasonable doubt that the appellant would likely engage in predatory acts of sexual violence unless confined to a secure facility? Assignment of Error 1.

2. The State failed to prove beyond a reasonable doubt that the appellant continues to meet the definition of a person who should be indefinitely committed under RCW 71.09 because it failed to prove that the appellant is currently dangerous? Assignment of Error 2.

**C. STATEMENT OF THE CASE**

Appellant Mark Robinson, who was 46 years old at the time of his RCW 71.09 trial in June, 2013, was convicted of rape in the first degree and

kidnapping in the second degree in 2000. Exhibit 8. Mr. Robinson later acknowledged that he committed approximately eleven other rapes, sometimes using a knife, during a five year period, concluding with his arrest in 2000. 6RP at 738.<sup>1</sup>

Mr. Robinson, who worked as a truck driver, was arrested for solicitation of a prostitute in Pierce County, Washington in 1998 while he was in his semi truck. 2RP at 91. After his arrest, police discovered that he had a illegal double edged knife in a sheath on his belt. 2RP at 95, 100. He was convicted in Tacoma Municipal Court of patronizing a prostitute and unlawfully carrying a weapon. Exhibits 3, 4, and 5.

On September 27, 2000, he was convicted of kidnapping and rape in Lewis County. In that case, he gave a ride to C.S. in his truck, who was hitchhiking near Spokane. 2RP at 113. He agreed to take her to Winlock, Washington. He raped C.S. in the sleeping compartment of the truck, using a knife to threaten her. 2RP at 118, 3RP at 236. C.S. told police that later

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<sup>1</sup> The Verbatim Report of Proceedings consists of nine volumes:  
RP May 14, 2013, probable cause hearing;  
RP June 24, 2013, pretrial motions;  
1RP June 25, 2013, jury trial;  
2RP June 26, 2013, jury trial;  
3RP June 27, 2013, jury trial;  
4RP; June 28, 2013, jury trial;  
5RP July 2, 2013, jury trial;  
6RP July 3, 2013, jury trial; and  
7RP July 5, 2013, jury trial and verdict.

they continued driving and then stopped. C.S. told police that he took her to the edge of a cliff and he made her promise not to report the rape. Near Toledo she saw someone she knew in traffic and got out of the truck. He drove away and C.S. was taken by her boyfriend's mother to the hospital. 2RP at 116.

Law enforcement was notified and the truck was searched. Numerous items were discovered in the truck cab, including knives, rope, duct tape, and zip ties. 2RP at 164. Mr. Robinson was subsequently convicted by plea of second degree kidnapping with sexual motivation and first degree rape and was sentenced to 143 months. Exhibit 8. He remained incarcerated until the State filed its petition to commit him in May, 2012.

While in custody in Lewis County, Mr. Robinson was questioned on June 15, 2000, by law enforcement regarding other alleged rapes in Pierce and King Counties. 2RP at 176. Mr. Robinson was identified as a suspect in the rape of D.G. in Ponders Corner, Pierce County, which occurred approximately one month before his arrest for rape and kidnapping. 2RP at 176. The deposition of D.G. was played to the jury and a transcript of the deposition was entered as Exhibit 31. 2RP at 108. D.G. alleged that Mr. Robinson raped her in his truck after agreeing to pay for sex, and that he used

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a knife to threaten her in the commission of the crime. 2RP at 234, 235. During the interview with police, Mr. Robinson acknowledged that he had raped approximately sixty women in a five year period, primarily in Pierce and King Counties. 2RP at 178, 203.

Following the 2000 conviction, Mr. Robinson was in sex offender treatment starting in July 2012. 4RP at 410-11. While he was in the sex offender treatment program (SOTP), he was described as having made ‘minimal progress.’ 4RP at 411. He did, however, remain in the SOTP for the twelve month duration of the program and completed it. 4RP at 411.

On May 10, 2012, several days before he completed his sentence from the rape and kidnapping conviction, the State filed a petition in Lewis County Superior Court to civilly commit Mr. Robinson as a sexually violent predator (SVP) under RCW 71.09. Clerk’s Papers (CP) 1-2. The State also filed a Certification for Determination of Probable Cause in support of its petition. A stipulated order of probable cause was entered on May 14, 2012. CP 4-5. The court remanded Mr. Robinson to the custody of the Special Commitment Center (SCC) at McNeil Island during the pendency of the case, and ordered him to submit to interviews and testing by the State. CP 4-5.

Because Mr. Robinson was in custody for a sexually violent offense at

the time the petition was filed, the State was relieved of the obligation to plead and prove a recent overt act.

This case came on for trial before a jury beginning on June 25, 2013, and continuing June 26, 27, 28, July 2, 3, and 5, 2013, the Honorable James W. Lawler presiding. During the trial, the State called six witnesses, and played excerpts from a deposition the State took of Mr. Robinson. 1RP at 74, 2RP at 207.

As its final witness, the state called Dr. C. Mark Patterson. Initially, Dr. Patterson testified concerning his training as a psychologist and his experience in diagnosing sexually violent predators. He also explained that he had testified in many sexually violent predator cases as an expert for the State in California, and in two cases in Washington. 3RP at 223.

Dr. Patterson interviewed Mr. Robinson in 2011 and 2013. 3RP at 225. Following the recitation of his training and experience, Dr. Patterson testified concerning his two interviews with Mr. Robinson, his review of the testing performed on Mr. Robinson, his review of Mr. Robinson's prior offenses from 2000, his review of Department of Corrections treatment records and of Mr. Robinson's deposition. 3RP at 225.

Based upon his interviews and review of materials presented, Dr. Patterson rendered a number of opinions. The first was that Mr. Robinson suffered from Paraphelia (Not Otherwise Specified) as contained in the American Psychiatric Association's "Diagnostic and Statistical Manual of Mental Disorders (DSM-IV)." 3RP at 229. Specifically, he testified that Mr. Robinson suffers from Paraphelia (Not Otherwise Specified), sexual sadism, and secondarily, the paraphilia of frotteurism. 3RP at 229, 245. He also diagnosed Mr. Robinson as having antisocial personality disorder. 3RP at 250.

Dr. Patterson described sexual sadism as a congenital as well as acquired mental abnormality as defined by RCW 71.09. 3RP at 258. He stated that the abnormality affected Mr. Robinson's volitional and emotional control. 3RP at 261.

Dr. Patterson stated that in his professional opinion, Mr. Robinson was likely to engage in predatory sexual acts if not confined to a secure treatment facility. 3RP at 261, 265. Dr. Patterson went on to explain that he was basing this prediction upon Mr. Robinson's test results on three actuarial prediction tools that he administered: the Static-99R, the Static 2002R, and the SORAG. 3RP at 269. He described these instruments as being

generally accepted in the psychological community as valid predictors of potential sexual recidivism. 3RP at 269. He testified that Mr. Robinson's Static 99R score indicated a 15 percent chance to reoffend within five years, and 23 to 24 percent within ten years. 3RP at 277. He stated that according to the Static 2002R, Mr. Robinson's results showed a 15 percent chance to reoffend within five years and a 24 percent chance to reoffend within ten years. 3RP at 281. According to the SORAG results, individuals who scored in Mr. Robinson's category have a 39 percent chance of reoffending within seven years after release to the community, and a 59 percent chance after ten years. 3RP at 282. Dr. Patterson opined that the offense Mr. Robinson would be most likely to commit or attempt to commit in the future if not confined was a predatory act of sexual violence against a stranger, possibly forcible rape. 3RP at 312. Dr. Paterson concluded by stating that Mr. Robinson is more likely than not to engage in predatory acts of sexual violence if not confined in a secure facility. 3RP at 314.

Mr. Robinson worked as a truck driver during the course of his marriage. He described his marriage as not being good, and was characterized by arguing and cheating on his part. He acknowledged that he

raped C.S. using a knife. 6RP at 724. He described what he learned in SOTP and stated that he did not think that he would reoffend and that he had learned what made him originally offend and had learned to stop that cycle. 6RP at 721. He acknowledged that he needed continued treatment. He described his "release plan," which consisted of participating in the "out patient" portion of SOTP while living with his sister in his house in Thurston County. 6RP at 731, He noted that after release from the Department of Corrections he would be required to be on community supervision for three years. 6RP at 731. He denied having 60 victims, as he told law enforcement in June, 2000, and stated that he thought the number of victims was twelve. 6RP at 738.

Mr. Robinson presented the deposition of Dr. Gerald Hover, and a transcript of the deposition was entered as Exhibit 54. 4RP at 504.

Dr. Jan Looman, a clinical manager at Regional Treatment Center in Kingston Ontario, Canada, testified for the respondent. 5RP at 512. Dr. Looman evaluated Mr. Robinson and determined that although he suffers from the mental abnormality of sexual sadism, he does not meet the criterion of lacking volitional control. 5RP at 536, 537. He stated that Mr.

Robinson's abnormality was acquired, not congenital. 5RP at 539. Dr. Looman found that the diagnosis of antisocial personality disorder did not apply to Mr. Robinson because he did not demonstrate conduct disorder as a juvenile. 5 RP at 545.

During his evaluation, Dr. Looman administered the Static 99R risk assessment instrument. Dr. Looman stated that the Structured Risk Assessment Forensic Version (SRA-FV), the instrument used by Dr. Patterson to assess dynamic factors, is considered experimental and research on the instrument has not been peer reviewed 5RP at 568. Instead of the SRA-FV, Dr. Looman used another instrument, the Stable 2007, to assess dynamic risk factors in Mr. Robinson. 5RP at 569. Using the score he obtained from the Stable 2007, Dr. Looman determined that Mr. Robinson was in the low risk group in the Static 99R. The Static 99 placed Mr. Robinson in the group that would reoffend at a rate of 9.5 percent over five years, and 14.5 percent over ten years. 5RP at 582.

Dr. Looman testified that it was not valid to raise the risk numbers, as Dr. Patterson did in his evaluation, based on the number of victims reported by Mr. Robinson because the number of victims are not reliably related to recidivism. 5RP at 589. Similarly, he stated that research shows that the

recidivism risk number cannot be raised due to other factors such as the knives and ropes found in Mr. Robinson's truck or the allegation that he held C.S. over a cliff and telling her not to report the rape and kidnapping. 5RP at 590.

After both sides rested, the court instructed the jury. 6RP at 754-766; CP 890-916. Neither exceptions nor objections to the jury instructions were taken by counsel. 6RP at 752.

Following instruction, the parties presented closing argument. 6RP at 766-788 (State's closing argument); 6RP at 790-823 (the respondent's closing argument); 6RP at 823-830 (State's rebuttal argument). Following deliberation, the jury returned its verdict, finding that the State had proven beyond a reasonable doubt that Mr. Robinson was a sexually violent predator. 7RP at 843; CP 917.

After accepting the verdict of the jury, the court entered an order on July 5, 2013, committing Mr. Robinson to the Special Commitment Center near Steilacoom, Washington, under the custody of the Department of Social and Health Services. CP 918.

Timely notice of appeal was filed July 12, 2013. CP 925-27. This appeal follows.

D. ARGUMENT

1. THE TRIAL COURT ERRED WHEN IT ENTERED AN ORDER OF COMMITMENT AS A SEXUALLY VIOLENT PREDATOR BECAUSE THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT MR. ROBINSON WAS LIKELY TO ENGAGE IN PREDATORY ACTS OF SEXUAL VIOLENCE.

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).

Under RCW 71.09.060, prior to committing a person to a secure treatment facility and thereby taking away that person's liberty, the State must

prove beyond a reasonable doubt that the person to be committed is a “sexually violent predator.” Under RCW 71.09.020(18), the term “sexually violent predator” is defined as follows:

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

RCW 71.09.020(18).

This subsection contains four phrases that have special definitions under RCW 71.09.020. They are: (1) “crime of sexual violence,” (2) “mental abnormality or personality disorder,” and (3) “likely to engage in predatory acts of sexual violence if not confined in a secure facility.”

Subsection (17) of the statute defines the first phrase as follows:

(17) “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 burglary, or unlawful imprisonment, which acts, 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.

RCW 71.09.020(17).

Subsections (8) and (9) of the statute define the second set of terms as follows:

(8) "Mental abnormality" means 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 the health and safety of others.

(9) "Personality disorder" means 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. Purported evidence of a personality disorder must be supported by testimony of a licensed forensic psychologist or psychiatrist.

RCW 71.09.020(8) and (9).

Finally, subsection (7) of RCW 71.09.020 gives the following definition to the last phrase:

(7) “Likely to engage in predatory acts of sexual violence if not confined in a secure facility” means that the person more probably than not will engage in such acts if released unconditionally from detention on the sexually violent predator petition. Such likelihood must be evidenced by a recent overt act if the person is not totally confined at the time the petition is filed under RCW 71.09.030.

RCW 71.09.020(7).

Since an order to commit an individual as a sexually violent predator under RCW 71.09.060 constitutes a significant curtailment of that individual’s civil rights, due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, require that the State prove beyond a reasonable doubt that the person to be committed is both “mentally ill” and is “currently a danger to others.” *Detention of Thorell*, 149 Wn.2d 724, 731, 72 P.3d 708 (2003); *Foucha v. Louisiana*, 504 U.S. 71, 112 S.Ct. 1780, 118 L.Ed.2d 437 (1992). Under RAP 2.2(a)(8), a person committed as an SVP has a right to appeal that determination and the order of commitment.

As part of the due process rights guaranteed under both Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, and as part of the “proof beyond a reasonable doubt standard,” the Court on appeal must reverse the order of commitment unless each factual

finding necessary for commitment under RCW 71.09 is supported in the record by substantial evidence. *Detention of Sease*, 149 Wn.App. 66, 201 P.3d 1078 (2009). This is the same “proof beyond a reasonable doubt” and “substantial evidence” requirement that exists in criminal cases. *Detention of Thorell*, 149 Wn.2d at 731.

“Substantial evidence” in the context of a criminal case, as well as an SVP case, means evidence sufficient to persuade “an unprejudiced thinking mind of the truth of the fact to which the evidence is directed.” *State v. Taplin*, 9 Wn.App. 545, 513 P.2d 549 (1973) (quoting *State v. Collins*, 2 Wn.App. 757, 759, 470 P.2d 227, 228 (1970)). In the context of a criminal case, the test for determining the sufficiency of the evidence is whether “after viewing the evidence in the light most favorable to the prosecution any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 334, 99 S.Ct. 2781, 2797, 61 L.Ed.2d 560 (1979). To paraphrase *Jackson v. Virginia*, in an SVP case, the test for determining the sufficiency of the evidence is whether “after viewing the evidence in the light most favorable to the [State] any rational trier of fact could have found the essential required elements of [commitment] beyond a reasonable doubt.”

In the case at bar, Mr. Robinson argues that the record does not contain substantial evidence that proved beyond a reasonable doubt that he was “likely to engage in predatory acts of sexual violence if not confined in a secure facility” as that phrase is used in the definition of an SVP. The State’s evidence on this issue was presented through Dr. Patterson’s testimony concerning the three actuarial assessment tools he employed to evaluate Mr. Robinson’s propensity to commit further crimes of sexual violence. 3RP at 279-82. According to Dr. Patterson, Mr. Robinson’s scores on the first of these three tests, the Static-99, indicated a “low moderate” risk of reoffense, meaning that there was a 15% risk for reoffense within 5 years, and a 24% risk for reoffense within 10 years. 3RP at 279. On the Static-2002R actuarial assessment tool, Dr. Patterson scored Mr. Robinson with a 15% risk of reoffense after 5 years and a 24% risk of reoffense after 10 years. 3RP at 281. Finally, on the SORAG, Dr. Patterson’s scoring predicted a 39% risk of reoffense after seven years of release, and a 59% chance after ten years. 3RP at 282. However, relying on the Structured Risk Assessment Forensic Version (SRA-FV), Dr. Patterson, seemingly arbitrarily, asserted Mr. Robinson’s risk of recidivism was considerably higher than denoted by the actuarials.

The problem with this evidence is the actuarial tests that Dr. Patterson employed did not constitute evidence of what current risk Mr. Robinson was for reoffense. Rather, they only provided an assignment of risk many years into the future. The State's evidence of Mr. Robinson's supposed current dangerousness consisted almost exclusively of things Mr. Robinson did or thought between 1995 and his conviction in 2000, and omitted any consideration of his completion of the SOTP program. Moreover, Dr. Patterson, in order to bolster the "low moderate" risk of reoffense predicted by the Static 99 and Static 2002R, supplemented the percentages, by applying the SRA-FV to measure what he termed "dynamic risks." 3RP at 298. Dr. Patterson stated that Mr. Robinson's risk of reoffending was higher than indicated by the actuarial results due to non-clinical factors such as other, unreported rapes, which the State claimed may be as high as sixty based on Mr. Robinson's statement to law enforcement in 2000. Dr. Patterson also relied on the discovery of ropes and knives in the truck during the police search. Dr. Looman stated that research showed that it was incorrect methodology to use these types of external factors to increase the risk scores obtained from the testing instruments.

Dr. Looman described the SRA-FV as experimental and not peer

reviewed and that Dr. Patterson was incorrect to use the test in order to increase the percentage of risk of reoffending. 5RP at 568. He stated that Mr. Robinson's mental abnormality was acquired, not congenital, and that he does not suffer from antisocial personality disorder due to a lack of conduct disorder issues when he was a child. In short, Dr. Patterson's opinion that the actual risk of reoffending was higher than indicated by the actuarial instruments appears to be purely arbitrary or speculative and not tied to any specific scientific study or database. Dr. Looman, on the other hand, indicated that the risk of reoffending was lower than predicted by the Static 99. Using the Stable 2007, and the Static 99R, he determined that Mr. Robinson is in the group that had a recidivism rate of 9.5 percent after five years and 14.5 percent after ten years. 5RP at 582.

Dr. Patterson's testimony was largely a reflection of his view that sexual sadism cannot go into remission. Based on Dr. Patterson's testimony, it is unlikely he would ever opine that Mr. Robinson is not an SVP because he doesn't believe sexual sadism can be overcome. Likewise, in an example of *reductio ad absurdum*, Dr. Patterson believes that Mr. Robinson lacks emotional and volitional control because he is a sexual sadist who committed an underlying crime of sexual violence. In other words, he is a sexual sadist

and was convicted of sex offenses and therefore he will reoffend. Two of the elements the State was required to prove in order to have Mr. Robinson committed as an SVP, namely that Mr. Robinson suffers from a mental abnormality (in this case, sexual sadism) and that he had a prior conviction for a crime of sexual violence, are the very two elements that Dr. Patterson believes renders Mr. Robinson incapable of volitional control.

In addition, even had the assessment tools assigned current levels of risks, those levels ran from a low of 15% to a high of 59%. This did not constitute evidence that proved “beyond a reasonable doubt” that Mr. Robinson was “likely to engage in predatory acts of sexual violence if not confined in a secure facility.” This is in contrast to “proof beyond a reasonable doubt” in criminal cases; if a jury heard a case involving a criminal charge of a sex offense in which the only evidence of who committed the offense comes from a DNA sample obtained from the body of the victim of the crime, and if the record reveals that the only evidence identifying the defendant as the perpetrator of the offenses is the testimony of the State’s expert that there is a 15% to 59% statistical probability that the DNA belonged to the defendant, a reviewing court would almost certainly reverse the conviction based upon this evidence because a 15% to 59%

statistical probability does not constitute proof beyond a reasonable doubt. Yet in the case at bar, this is precisely what occurred. The jury evidently found that a 15% to 59% statistical probability of reoffense, and that sometime years into the future, constituted proof beyond a reasonable doubt that Mr. Robinson was “likely to engage in predatory acts of sexual violence if not confined in a secure facility.” Since this does not constitute proof “beyond a reasonable doubt,” this Court should reverse the verdict that the State has proven all of the elements necessary to justify commitment in the case at bar.

**E. CONCLUSION**

The State failed to prove all of the elements requisite for commitment under RCW 71.09. As a result, this Court should reverse the order of commitment and order the appellant released from DSHS custody.

DATED: March 21, 2014.

Respectfully submitted,

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## ATTACHMENT

### *RCW 71.09.020*

#### Definitions.

Unless the context clearly requires otherwise, the definitions in this section apply throughout this chapter.

(1) "Department" means the department of social and health services.

(2) "Health care facility" means any hospital, hospice care center, licensed or certified health care facility, health maintenance organization regulated under chapter 48.46 RCW, federally qualified health maintenance organization, federally approved renal dialysis center or facility, or federally approved blood bank.

(3) "Health care practitioner" means an individual or firm licensed or certified to engage actively in a regulated health profession.

(4) "Health care services" means those services provided by health professionals licensed pursuant to RCW 18.120.020(4).

(5) "Health profession" means those licensed or regulated professions set forth in RCW 18.120.020(4).

(6) "Less restrictive alternative" means court-ordered treatment in a setting less restrictive than total confinement which satisfies the conditions set forth in RCW 71.09.092. A less restrictive alternative may not include placement in the community protection program as pursuant to RCW 71A.12.230.

(7) "Likely to engage in predatory acts of sexual violence if not confined in a secure facility" means that the person more probably than not will engage in such acts if released unconditionally from detention on the sexually violent predator petition. Such likelihood must be evidenced by a recent overt act if the person is not totally confined at the time the petition is filed under RCW 71.09.030.

(8) "Mental abnormality" means 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 the health and safety of others.

(9) "Personality disorder" means 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. Purported evidence of a personality disorder must be supported by testimony of a licensed forensic psychologist or psychiatrist.

(10) "Predatory" means acts directed towards: (a) Strangers; (b) individuals with whom a relationship has been established or promoted for the primary purpose of victimization; or (c) persons of casual acquaintance with whom no substantial personal relationship exists.

(11) "Prosecuting agency" means the prosecuting attorney of the county where the person was convicted or charged or the attorney general if requested by the prosecuting attorney, as provided in RCW 71.09.030.

(12) "Recent overt act" means 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.

(13) "Risk potential activity" or "risk potential facility" means an activity or facility that provides a higher incidence of risk to the public from persons conditionally released from the special commitment center. Risk potential activities and facilities include: Public and private schools, school bus stops, licensed day care and licensed preschool facilities, public parks, publicly dedicated trails, sports fields, playgrounds, recreational and community centers, churches, synagogues, temples, mosques, public libraries, public and private youth camps, and others identified by the department following the hearings on a potential site required in RCW 71.09.315. For purposes of this chapter, "school bus stops" does not include bus stops established primarily for public transit.

(14) "Secretary" means the secretary of social and health services or the secretary's designee.

(15) "Secure facility" means a residential facility for persons civilly confined under the provisions of this chapter that includes security measures sufficient to protect the community. Such facilities include total confinement facilities; secure community transition facilities, and any residence used as a court-ordered placement under RCW 71.09.096.

(16) "Secure community transition facility" means a residential facility for persons civilly committed and conditionally released to a less restrictive alternative under this chapter. A secure community transition facility has supervision and security, and either provides or ensures the provision of sex offender treatment services. Secure community transition facilities include but are not limited to the facility established pursuant to RCW 71.09.250(1)(a)(i) and any community-based facilities established under this chapter and operated by the secretary or under contract with the secretary.

(17) "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 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.

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

(19) "Total confinement facility" means a secure facility that provides supervision and sex offender treatment services in a total confinement setting. Total confinement facilities include the special commitment center and any similar facility designated as a total confinement facility by the secretary.

[2009 c 409 § 1; 2006 c 303 § 10. Prior: 2003 c 216 § 2; 2003 c 50 § 1; 2002 c 68 § 4; 2002 c 58 § 2; 2001 2nd sp.s. c 12 § 102; 2001 c 286 § 4; 1995 c 216 § 1; 1992 c 145 § 17; 1990 1st ex.s. c 12 § 2; 1990 c 3 § 1002.]

***RCW 71.09.060***

Trial — Determination — Commitment procedures.

(1) The court or jury shall determine whether, beyond a reasonable doubt, the person is a sexually violent predator. In determining whether or not the person would be likely to engage in predatory acts of sexual violence if not confined in a secure facility, the fact finder may consider only placement conditions and voluntary treatment options that would exist for the person if unconditionally released from detention on the sexually violent predator petition. The community protection program under RCW 71A.12.230 may not be considered as a placement condition or treatment option available to the person if unconditionally released from detention on a sexually violent predator petition. When the determination is made by a jury, the verdict must be unanimous.

If, on the date that the petition is filed, the person was living in the community after release from custody, the state must also prove beyond a reasonable doubt that the person had committed a recent overt act. If the state alleges that the prior sexually violent offense that forms the basis for the petition for commitment was an act that was sexually motivated as

provided in \*RCW 71.09.020(15)(c), the state must prove beyond a reasonable doubt that the alleged sexually violent act was sexually motivated as defined in RCW 9.94A.030.

If the court or jury determines that the person is a sexually violent predator, the person shall be committed to the custody of the department of social and health services for placement in a secure facility operated by the department of social and health services for control, care, and treatment until such time as: (a) The person's condition has so changed that the person no longer meets the definition of a sexually violent predator; or (b) conditional release to a less restrictive alternative as set forth in RCW 71.09.092 is in the best interest of the person and conditions can be imposed that would adequately protect the community.

If the court or unanimous jury decides that the state has not met its burden of proving that the person is a sexually violent predator, the court shall direct the person's release.

If the jury is unable to reach a unanimous verdict, the court shall declare a mistrial and set a retrial within forty-five days of the date of the mistrial unless the prosecuting agency earlier moves to dismiss the petition. The retrial may be continued upon the request of either party accompanied by a showing of good cause, or by the court on its own motion in the due administration of justice provided that the respondent will not be substantially prejudiced. In no event may the person be released from confinement prior to retrial or dismissal of the case.

(2) If the person charged with a sexually violent offense has been found incompetent to stand trial, and is about to be or has been released pursuant to RCW 10.77.086(4), and his or her commitment is sought pursuant to subsection (1) of this section, the court shall first hear evidence and determine whether the person did commit the act or acts charged if the court did not enter a finding prior to dismissal under RCW 10.77.086(4) that the person committed the act or acts charged. The hearing on this issue must comply with all the procedures specified in this section. In addition, 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. After hearing evidence on this issue, the court shall make specific findings on whether

the person did commit the act or acts charged, the extent to which the person's incompetence or developmental disability affected the outcome of the hearing, including its effect on the person's ability to consult with and assist counsel and to testify on his or her own behalf, the extent to which the evidence could be reconstructed without the assistance of the person, and the strength of the prosecution's case. If, after the conclusion of the hearing on this issue, the court finds, beyond a reasonable doubt, that the person did commit the act or acts charged, it shall enter a final order, appealable by the person, on that issue, and may proceed to consider whether the person should be committed pursuant to this section.

(3) Except as otherwise provided in this chapter, the state shall comply with RCW 10.77.220 while confining the person. During all court proceedings where the person is present, the person shall be detained in a secure facility. If the proceedings last more than one day, the person may be held in the county jail for the duration of the proceedings, except the person may be returned to the department's custody on weekends and court holidays if the court deems such a transfer feasible. The county shall be entitled to reimbursement for the cost of housing and transporting the person pursuant to rules adopted by the secretary. The department shall not place the person, even temporarily, in a facility on the grounds of any state mental facility or regional habilitation center because these institutions are insufficiently secure for this population.

(4) A court has jurisdiction to order a less restrictive alternative placement only after a hearing ordered pursuant to RCW 71.09.090 following initial commitment under this section and in accord with the provisions of this chapter.

[2009 c 409 § 6; 2008 c 213 § 13; 2006 c 303 § 11; 2001 c 286 § 7; 1998 c 146 § 1; 1995 c 216 § 6; 1990 1st ex.s. c 12 § 4; 1990 c 3 § 1006.]



**TILLER LAW OFFICE**

**March 24, 2014 - 9:36 AM**

**Transmittal Letter**

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Court of Appeals Case Number: 45120-4

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Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

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Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

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**Comments:**

ATTN: KIM

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CERTIFICATE OF SERVICE

The undersigned certifies that on March 21, 2014, that this Appellant's Opening Brief was sent via JIS Link, to (1) Mr. David Ponzoha, Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, (2) and was sent by first class mail, postage pre-paid to the following:

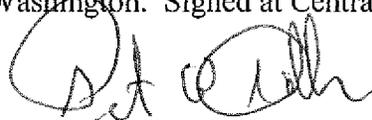
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**LEGAL MAIL/SPECIAL MAIL**

This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on March 21, 2014.



PETER B. TILLER

**TILLER LAW OFFICE**

**March 21, 2014 - 4:46 PM**

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