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NO. 69844-3

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

In re the Detention of Michael Bargas

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

APPELLANT'S REPLY BRIEF



Rachael E. Seevers
Attorney for Appellant
WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-271

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PRELIMINARY STATEMENT

This Reply Brief is submitted in answer to the Brief of Respondent (“Resp. Brief”) filed by the State of Washington (“State”) on November 13, 2013. It is also offered in further support of the brief of appellant, Michael Bargas, submitted on September 16, 2013 (“App. Brief”).

The State’s argument that the trial court’s findings of fact cannot be challenged on appeal due to Mr. Bargas’s failure to assign error with sufficient specificity is undermined by both the Rules of Appellate Procedure as well as established precedent. The State’s argument that the trial court properly found beyond a reasonable doubt that Mr. Bargas’s mental condition qualifies him for civil commitment must also fail because there was no evidence that linked Mr. Bargas’s mental condition to a compulsion to commit sexual offenses, nor sufficient evidence that he is likely to sexually reoffend if not confined. Finally, the testimony offered by the State’s own expert established that the type of treatment Mr. Bargas needs is unavailable at the SCC, rendering his confinement there for care and treatment unconstitutional.

ARGUMENT

A. Mr. Bargas's alleged noncompliance with the technical requirements of RAP 10.3 does not preclude appellate review of the trial court's determination that he suffers from a mental abnormality.

1. Under the Rules of Appellate Procedure as well as appellate case law, a full review of the merits is required.

In its brief the State repeatedly alleges that Mr. Bargas failed to assign error with sufficient specificity in accordance with RAP 10.3(a)(4) and therefore the trial court's findings of fact cannot be challenged on appeal. Resp. Brief, 7-9, 22-23. However, both the Rules of Appellate Procedure as well as established appellate practice counsel that this Court should review a case on its merits when doing so would be in the interests of justice, where an appellant's arguments are clear from the brief, and where doing so would not prejudice the respondent, all conditions that are met here.

RAP 1.2(a) states that the Rules of Appellate Procedure "will be liberally interpreted to promote justice and facilitate the decision of cases on the merits. Cases and issues will not be determined on the basis of compliance or noncompliance with these rules except in compelling circumstances where justice demands..." Indeed, when confronted with challenges raised under RAP 10.3(a)(4), alleging a failure to sufficiently assign error on appeal, the appellate courts have routinely found that

where the nature of the appeal is clear and the respondent is not prejudiced, the appellate court should “decide the case on its merits, promoting substance over form.” *State v. Olson*, 74 Wn. App. 126, 129, 872 P.2d 64 (1994), *aff’d*, 126 Wn.2d 315, 893 P.2d 629 (1995). Indeed, as the court noted in *Daughtry v. Jet Aeration Co.*, 91 Wn.2d 704, 592 P.2d 631(1979) the courts should place “the serving of justice” over “a strict technical application of the rules” and therefore, noncompliance with RAP 10.3(g) “will not prevent review when the nature of the challenge is clear and the finding in question is set forth in the text of the argument on the issue.” *See Viereck v. Fibreboard Corp.*, 81 Wn. App. 579, 915 P.2d 581 (1996), *review denied* 130 Wn.2d 1009, 928 P.2d 414 (“RAP 1.2(a) calls for a liberal interpretation of the rules and it is clear that the party made clear to the opposition its arguments on appeal.”); *Brock v. Tarrant*, 57 Wn. App. 562, 789 P.2d 112 (1990)(despite the absence of specific assignments of error, “When it is apparent from [appellant’s] argument which items are asserted as error, we have analyzed the issue.”)

Here, the interests of justice clearly warrant a review of Mr. Bargas’s claims on the merits. Mr. Bargas is facing indeterminate confinement under RCW 71.09. Such commitment has been deemed a “massive curtailment of liberty.” *Humphrey v. Cady*, 405 U.S. 504, 509, 92 S. Ct. 1048, 31 L.Ed.2d 394 (1972); *Foucha v. Louisiana*, 504 U.S. 71,

80, 112 S. Ct. 1780, 118 L. Ed.2d 437 (1992) (freedom from physical restraint “has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action”). Moreover, due to the statutory scheme of RCW 71.09, the initial commitment proceeding that is the subject of the instant appeal is the only opportunity Mr. Bargas is likely to have in which he may challenge the factual basis for his commitment. *State v. McCuiston*, 174 Wn.2d 369, 384, 275 P.3d 1092 (2012) *cert denied* 133 S. Ct. 1460, L. Ed. 2d 368 (2013)(once an individual is found to meet the criteria for confinement under RCW 71.09 the “court accepts this initial conclusion as a verity in determining whether an individual is mentally ill and dangerous at a later date.”). Thus, under *McCuiston*, any subsequent review of Mr. Bargas’s need for commitment will be premised upon the facts and conclusions set forth in relation to his initial commitment proceeding. If those facts and conclusions are not reviewed on appeal, they will stand unchallenged in perpetuity. Such a result would contravene RAP 1.2(a).

Moreover, Mr. Bargas’s argument on appeal was clear from the assignments of error, the issues presented, and the argument set forth in his main brief. In his brief, Mr. Bargas first alleged that the “State failed to prove beyond a reasonable doubt that Mr. Bargas has a mental condition that renders him unable to control his sexual impulses.” Assignment of

Error 1, App. Brief, p. 1. Mr. Bargas further argued that because his only diagnoses were ASPD, polysubstance abuse, and psychopathy, the State had failed to prove beyond a reasonable doubt that he has a mental condition that makes it so difficult for him to control his sexual impulses that he is likely to sexually reoffend if not confined. Issues Pertaining to Assignments of Error, Assignment 1, App. Brief, p. 2. This error was thereafter addressed with specificity in the brief, with extensive argument that included citations to the record as well as to controlling case law. App. Brief, p. 6-18.¹

Finally, the State was clearly able to respond to Mr. Bargas's argument on appeal and has incurred no prejudice as a result of his alleged noncompliance with the technical briefing requirements of RAP 10.3(a). *See* Resp. Brief, p. 9-22 (addressing Mr. Bargas's first assignment of error, including citation to particular findings of fact that respondent identifies as related to that error). Clearly, despite the State's repeated characterization of Mr. Bargas's arguments as "vague" and "general," the State was nevertheless able to respond to his claims, even going to far as to identify

¹ To the extent that specific assignments of error may provide any additional clarity, Mr. Bargas hereby assigns error to the trial court findings of fact 13, 14, 15, and 16, which were not supported by sufficient evidence. CP 457. The trial court therefore erred in concluding that Mr. Bargas suffers from a mental condition that causes him serious difficulty in controlling his sexual conduct and Mr. Bargas assigns error to the trial court's conclusions of law 4, 5, and 6 accordingly. CP 458

the relevant trial court findings of fact that pertained to each of Mr. Bargas's arguments.

Because the interests of justice will be served by reviewing Mr. Bargas's case in its entirety, and because his argument was clear from the brief and the State was not prejudiced by Mr. Bargas's alleged technical noncompliance, Mr. Bargas respectfully submits that this Court should determine the instant appeal on its merits, reviewing the trial court's findings of fact and conclusions of law. RAP 1.2(a); *State v. Olson*, 74 Wn. App. at 128-29.

2. The trial court's finding that Mr. Bargas suffers from a mental abnormality was not supported by substantial evidence.

The State's arguments as to the merits of Mr. Bargas's claims are also unavailing. In rebuttal to Mr. Bargas's position that the trial court erred in finding that he suffers from a mental abnormality, the State first quotes two sentences of Mr. Bargas's brief and alleges that he has misstated the applicable legal standard. Resp. Brief, p. 9, n.2. In so doing, the State overlooks the extensive discussion in Mr. Bargas's opening brief, which set forth the constitutionally minimum requirements for confinement under RCW 71.09, as determined by both the US and Washington State Supreme Courts. App. Brief, p. 6-10.

Contrary to the State's insinuation, Mr. Bargas does not argue that the State must show that he is "completely unable to control his sexual impulses." Resp. Brief, p. 9. Indeed, Mr. Bargas specifically acknowledged the Supreme Court's holding in *Kansas v. Crane*, 534 U.S. 407, 122 S. Ct. 867, 151 L. Ed.2d 856 (2002), which stated that a "total and complete lack of control" over sexually violent behaviors is not required in order to sustain SVP commitment. App. Brief, p. 8. However, as that court went on to note, a person must have "a special and serious lack of ability to control behavior." *Crane*, 534 U.S. at 412-13. The State failed to make this requisite showing at trial and the trial court erred in ruling to the contrary. See App. Brief, p. 6-10.

While the State next turns to *In re Det. of Thorell*, 149 Wn.2d 724, 72 P.3d 708 (2003), cert. denied, 541 U.S. 990, 124 S. Ct. 2015, 158 L. Ed.2d 496 (2004) in arguing that the evidence submitted at trial was sufficient to sustain a finding of mental abnormality, there, the court found that under the precedent of *Crane*, the state must "demonstrate[] the cause and effect relationship between the alleged SVP's mental disorder and a high probability the individual will commit future acts of violence." *Thorell*, 149 Wn.2d at 737. Moreover, in *Thorell* the court found, "if the existence of this link is challenged on appeal, this case specific approach requires the reviewing court to analyze the evidence and determine

whether sufficient evidence exists to establish a serious lack of control.”
Id., at 736.

Here, there is insufficient evidence of Mr. Bargas’s inability to control his sexual behavior. Though Dr. Richards testified at trial that Mr. Bargas suffers from antisocial personality disorder (ASPD), alcohol abuse, polysubstance abuse, and psychopathy, none of those alleged disorders provides the requisite linkage to a “serious and special” inability to control sexual behavior. *Id.*; App. Brief, p. 10-18.² Moreover, though the trial court found that those mental disorders “predispose [Mr. Bargas] to commit sexual acts” and “cause him serious difficulty controlling his behavior,” the court similarly failed to identify any link between Mr. Bargas’s alleged disorders and a current compulsion to commit sexual offenses. *See* CP 457, findings of fact. 14, 15.³

The State alleges that Dr. Richard’s testimony supplies this link because he stated “if Bargas did not have that disorder [ASPD], we would

² Though Dr. Richards placed significant emphasis on his additional diagnosis of psychopathy, as does the State on appeal, as even the trial court noted, psychopathy is not a distinct mental abnormality, it is descriptive of Mr. Bargas’s ASPD. CP 457, finding of fact 13. Indeed, as Dr. Richards ultimately admitted at trial, in the most recent edition of the DSM-V, psychopathy has been consolidated with ASPD. RP V. 3, p. 95, 101.

³ The trial court’s conclusions of law 4, 5, and 6 similarly lack this requisite connection. CP 458.

not be seeing multiple sex offenses.” Resp. Brief, p. 12. The State points to other similar statements by Dr. Richards that Mr. Bargas “reoffends in a sexual way.” Resp. Brief, p. 13. However, those assertions reveal nothing about *why* Mr. Bargas has sexually offended in the past and it is precisely this motivational or causal connection that is at issue in a RCW 71.09 proceeding. “Ordinary recidivists choose to re-offend...” *Crane*, 534 U.S. at 420-21. However, only those whose sexual offending is “is an affliction and not a choice,” are subject to civil commitment as opposed to criminal sanction. *Id.*

Indeed, in *Thorell*, the Washington Supreme Court noted with approval the finding that a State must prove “that the disorder, rather than a voluntary decision, makes the person act in a certain manner.” *Thorell*, 149 Wn.2d at 737. Without parsing out *why* a person is reoffending, neither an expert nor a trial court can accurately determine whether an individual is likely to recidivate due to a compulsion to commit sexual violent acts or because they *choose* to commit such acts as part of a volitional, albeit deviant, course of action.⁴ It is this necessary distinction

⁴ To the extent that the State argues that ASPD is a statutorily sufficient basis for commitment under RCW 71.09, the State is mounting an unneeded attack. Resp. Brief, p. 19-22. Mr. Bargas never argued that ASPD is never enough. He simply argued that in light of the absence of any diagnosed paraphilia, in order to make out a case for confinement as a sexually violent predator, the State must show a link between the alleged

that is lacking from both Dr. Richard's testimony and the trial court's ultimate finding in Mr. Bargas's case.

While the State urges that this Court may not disturb the trier of fact's credibility determinations, nor must this Court simply accept as true all statements made by the State's expert. Resp. Brief, p. 9, 13. On appeal, this Court applies a criminal standard of review to determine "whether substantial evidence supports a trial court's challenged findings of fact and, in turn, whether they support the conclusions of law." *State v. Madarash*, 116 Wn. App. 500, 509, 66 P.3d 682 (2003); *Thorell*, 149 Wn.2d at 744. Thus, this Court must evaluate whether Dr. Richard's testimony established that Mr. Bargas is compelled to commit sexual offenses. Because Dr. Richards in essence stated that Mr. Bargas's sexual offending was attributable to his substance abuse, and that he "would be a different person" if he did not use substances, his testimony cannot be considered sufficient evidence upon which to base such a determination. App. Brief, p. 12-16.

While the State points out that Dr. Richards was less equivocal in his trial testimony than he had been in his pretrial deposition regarding Mr. Bargas's likelihood of re-offending if he abstained from substances,

abnormalities and sexual offending. As experts in the field have noted, that link is necessarily harder to draw when there is no diagnosed sexual disorder. App. Brief, 11-12.

the pre-trial deposition testimony was published at trial and the State offers no explanation for his altered testimony. RP V. 4, p. 42. Moreover, even the trial testimony the State relies upon in arguing that Mr. Bargas “mischaracterizes” the evidence is equivocal and unclear. Resp. Brief, p. 16. “If he were different it would be different…” is far from a cogent explanation as to how Mr. Bargas would be compelled to commit sexual offenses even if he were not abusing substances. Id.

To the extent that the State directs the court to the trial court’s finding of fact in relation to Mr. Bargas’s credibility, such a finding is irrelevant to the determination that Mr. Bargas is challenging—to wit, that Dr. Richard’s conclusion that he suffers from a condition that causes him to have serious difficulty controlling his sexual behavior was not supported by the evidence or his own testimony. Whether or not the court believed Mr. Bargas with respect to his past sexual offending, the question of whether he will offend in the future does not hinge upon Mr. Bargas’s self-report.

Moreover, the determination as to whether an individual has a “mental abnormality” as that term is defined by RCW 71.09.020(8) and is therefore a “sexually violent predator,” is a legal conclusion, not a medical one. RCW 71.09.020(18). Therefore, while Dr. Richards may opine as to whether Mr. Bargas has mental conditions that render him disposed to

commit sexual offenses, it is ultimately the sole province of the trial court to determine whether that testimony is sufficient evidence upon which to make a determination that Mr. Bargas meets the legal criteria for confinement. Thus, while the appellate court must give deference to the trial court's finding of credibility, such deference does not relieve the burden on this Court to consider whether the trial court's ultimate legal finding was supported by substantial evidence. Upon such review, Mr. Bargas submits that the trial court's determination that he suffers from a mental abnormality should be reversed by this Court.

B. Mr. Bargas's argument that the State failed to prove beyond a reasonable doubt that he is likely to sexually reoffend if not confined should be heard and reversed on the merits.

1. Mr. Bargas's argument was clear in the brief and should be reviewed on appeal.

With respect to Mr. Bargas's argument that the State failed to prove beyond a reasonable doubt that he is likely to reoffend if not confined, the State first alleges that because Mr. Bargas did not sufficiently assign error to the trial court's findings of fact, this Court is limited in its review. However, as set forth previously, RAP 1.2 directs that review should be granted despite such technical noncompliance when it would serve the interests of justice and where an appellant's arguments are otherwise clear. *Olson*, 74 Wn. App. at 128-29.

Moreover, though Mr. Bargas's second assignment of error, that "the State failed to show beyond a reasonable doubt that [he] is likely to commit future sexually violent offenses if not confined," is admittedly general, the contours of his argument are patently clear from the rest of the brief. Indeed, in his Issues Pertaining to Assignments of Error, Mr. Bargas detailed this assignment of error, arguing that his penile plethysmograph and actuarial testing revealed no deviant sexual interests and placed him at a low percentage risk of re-offense, thereby undermining the State's claim, and the trial court's finding, that he was likely to reoffend if not confined. App. Brief, p. 2.⁵ This argument was also set forth in detail in Mr. Bargas's main brief, with citations to the State's expert's testimony as well as to relevant case law. App. Brief, p. 18-23.⁶

Though the State alleged that Mr. Bargas argued "vaguely" that the State failed to prove he is likely to sexually reoffend, the State was clearly

⁵ Notably, though RAP 10.3(a)(4) describes "[a] separate concise statement of each error a party contends was made by the trial court" it also states that the appellate court may consider any "claimed error which is included in an assignment of error *or clearly disclosed in the associated issue pertaining thereto.*" (emphasis added). RAP 10.3(g). Mr. Bargas's assignments of error were clearly disclosed in the issues pertaining to that error.

⁶ As before, to the extent that additional clarity may be provided by specific citation to findings of fact, Mr. Bargas hereby assigns error to the trial court's findings of fact 16, 17, 18, 19, and 20 as unsupported by sufficient evidence. CP 457-58. Mr. Bargas further assigns error to the trial court's conclusions of law 7 and 8. CP 458-59.

able to discern both Mr. Bargas's argument as well as related findings of fact and conclusions of law, going so far as to identify the findings in its brief. Resp. Brief, p. 22-28. Because Mr. Bargas's arguments were clear from the brief and the State was not prejudiced by his technical noncompliance, this Court should review both the findings of fact and conclusions of law issued by the trial court pursuant to RAP 1.2. *Olson*, 74 Wn. App. at 129.

2. The trial testimony of Dr. Richards was insufficient evidence upon which to find beyond a reasonable doubt that Mr. Bargas is likely to sexually reoffend if not confined.

The equivocal and unsupported testimony of Dr. Richards is insufficient evidence to support the trial court's determination that Mr. Bargas is likely to sexually reoffend if not confined. The State begins its argument to the contrary by first citing an actuarial tool that Dr. Richards testified was unreliable, and another tool that measures violent, not sexual recidivism. Resp. Brief, p. 24; RP V.3, p. 78. Moreover, to the extent that Dr. Richards testified regarding the Static 99R, his own scoring indicated a seventeen to twenty three percent risk of re-offense over a five-year period, hardly numbers that prove a "likelihood" of re-offense. RP V. 3, p.152-57. Though he opined that the ten-year risk of recidivism rate is an underestimate of lifetime risk because the instrument is limited to a ten-

year time frame, he also admitted that most recidivism occurs within two years of release and acknowledged that the risk of recidivism declines with age, particularly in the fourth decade of life. RP V. 4, p. 24; RP V. 3, p. 95. In ten years Mr. Bargas will be over 65, well past his fourth decade of life, making Dr. Richards's claim that the Static-99 is an underestimate of Mr. Bargas's life-time risk specious at best.

Moreover, as set forth in Mr. Bargas's opening brief, Dr. Richards's claim that his risk estimate increases to over 50% upon consideration of dynamic risk factors must be rejected. Not only are the factors that he allegedly considered unchanging and therefore not dynamic, but they are also unsupported by the evidence. App. Brief, p. 21-22. Indeed, Dr. Richards acknowledged that there is very little reliable science available to accurately predict an individual's risk of sexual recidivism. RP V. 4, p. 71. However, RCW 71.09.060(1) requires that the State prove beyond a reasonable doubt that a person is "likely to engage in predatory acts of sexual violence if not confined in a secure facility." "Beyond a reasonable doubt" is the most stringent evidentiary standard in our jurisprudence and is "designed to exclude as nearly as possible the likelihood of an erroneous judgment." *Addington v. Texas*, 441 U.S. 418, 423, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979). Thus, to the extent that the trial court may have credited Dr. Richards's testimony regarding the

predictive accuracy of the Static-99, Dr. Richards's own admissions as to the instrument's limitations preclude a finding that Mr. Bargas was likely to sexually reoffend beyond a reasonable doubt. Again, though this Court does not review trial court determinations of credibility, it does review trial court findings of fact and conclusions of law, and here the trial court's finding that the State had proven beyond a reasonable doubt that Mr. Bargas was likely to reoffend if not confined is not supported by sufficient evidence.

Finally, contrary to the trial court's findings of fact 7, 13, 15, and 19, and conclusion of law 7, there is no evidence that Mr. Bargas currently has deviant sexual interests that would render him likely to sexually offend. Dr. Richards stated before trial that PPG testing is a "potent" factor in assessing risk, however Mr. Bargas's PPG testing was inconclusive. CP 578; Resp. Brief, p. 26. Without the results it had anticipated from the PPG, at trial the State was left to rely upon decades old criminal offenses to assert Mr. Bargas's current sexual deviance. RP V. 4, p. 112-14. The State offers no more on appeal.

Not only are historical acts insufficient evidence to make out a finding that Mr. Bargas is *currently* likely to reoffend, but Dr. Richards acknowledged that Mr. Bargas has not had a serious disciplinary infraction, much less one for sexual misconduct, since 2004. RP V. 4, p.

82. Coupled with Mr. Bargas's low actuarial scores, this lack of evidence of any current sexual deviancy precluded a determination by the trial court that it was beyond a reasonable doubt that Mr. Bargas was sexually deviant and would sexually reoffend if not confined and this Court should reverse that determination as unsupported by substantial evidence.

C. Because intensive substance abuse treatment is not offered at the SCC, Mr. Bargas's confinement there for treatment violates his right to substantive due process.

In his opening brief Mr. Bargas stated that in light of the "uncontested testimony that intensive substance abuse treatment was unavailable at the SCC, the nature and duration of [his] confinement is unrelated to the purpose of his confinement, thereby rendering his commitment to that facility unconstitutional." App. Brief, p. 2. Though the State again urges that Mr. Bargas's argument should not be reviewed on the merits due to technical noncompliance, as before, Mr. Bargas's argument with respect to this error is sufficiently fleshed out in the brief so as to warrant a full review. App. Brief, p. 3, 23-29. Moreover, the State was clearly able to identify and respond to Mr. Bargas's arguments. Resp. Brief, p. 28-33 (addressing third assignment of error and identifying related findings of fact).

Despite this, the State alleges that Mr. Bargas "vaguely asserts that his confinement at the SCC violates due process." Resp. Brief, p. 28

(internal quotations omitted). However, simply labeling an argument “vague” does not make it so; in raising a constitutional challenge to his confinement at the SCC, Mr. Bargas cited to US Supreme Court case law as well as Washington State case law and legislative findings, all of which unequivocally premise the constitutionality of civil commitment schemes like RCW 71.09 upon the asserted need for specialized sex offender treatment. App. Brief, p. 23-24.

However, in Mr. Bargas’s case, Dr. Richards admitted that he would be a “different person” if he did not abuse *substances*, and the evidence adduced at trial revealed that every one of Mr. Bargas’s sexual offenses was committed while he was under the influence. CP 75; RP V. 4, pp. 19, 43. Dr. Richards also testified that Mr. Bargas is in need of intensive substance abuse treatment and, as the former director of the SCC, he was in a unique position to describe the substance abuse treatment programming, or lack thereof, at the SCC. Though the State argues that Mr. Bargas “assumes” there is no appropriate treatment at the SCC, Dr. Richards, stated as much. RP V. 3, p. 86-87 (admitting that there was limited substance abuse programming at the SCC); RP V. 3, p. 90 (noting that though he tried to improve substance abuse programming while at the SCC, he was largely unsuccessful); RP V. 4, p. 49 (admitting

that the SCC substance abuse program is not intensive and very few staff at the facility were actually certified in substance abuse counseling).⁷

As before, the State again attempts to dismiss Mr. Bargas's argument by alleging that he is erroneously trying to "frame his diagnosis." Resp. Brief, p. 30. Mr. Bargas is simply seeking to hold the State to its burden of only committing for treatment those individuals for whom a treatment program is actually available. As a matter of substantive due process, in order to constitutionally confine an individual for treatment related purposes, appropriate treatment must be forthcoming. *In re Young*, 122 Wn.2d 1, 25, 30-31, 857 P.2d 989 (1993).⁸ As the court noted in *Young*, because the intended purpose of RCW 71.09 is treatment, if that goal cannot be effectuated for a particular individual, his continued

⁷ While the State attempts to minimize Mr. Bargas's objections to the substance abuse program at the SCC by alleging that they simply are not "the specific program that he professes to prefer," Mr. Bargas does not claim any particular programmatic preference. He simply seeks an intensive substance abuse program run by qualified professionals in the field, something the SCC has apparently been unable to achieve since its inception. RP V. 4, p. 49-50

⁸ Given the extensive case law cited by Mr. Bargas in his brief, it is unclear to what the State is objecting in arguing that "Bargas does not specify the basis for his due process argument." Resp. Brief, p. 30, n.7. To be completely clear, here, as in his opening brief, Mr. Bargas's constitutional argument is based upon a substantive due process challenge. App. Brief, p. 23 (citing, among other cases, *Young* and *Foucha*, both of which addressed a substantive due process challenge to a civil commitment scheme). As in those cases, because RCW 71.09 infringes upon a fundamental right, the challenged provisions must survive strict scrutiny. *Young*, 122 Wn.2d at 25.

confinement under that statutory regime is rendered unconstitutional. *Id.*, at 31.

While the challengers in *Young* failed to show that the conditions that placed them at risk of sexually reoffending could not be treated at the SCC, Mr. Bargas *has* made that showing. The testimony at trial showed that all of Mr. Bargas's sexual offenses have occurred while under the influence, and the State's own expert testified that he would not be likely to sexually reoffend if he did not abuse substances. Dr. Richards further testified that Mr. Bargas required intensive substance abuse treatment to mitigate that risk and that such treatment was unavailable at the SCC. To the extent that the State's attempts to highlight Dr. Richards's positive statements about the substance abuse programming, Resp. Brief, p. 32, the fact remains that he ultimately opined that the program was not intensive or well staffed and that "you fight the war with the Army you have, not with the Army you wish you had." RP V. 3, p. 90. Such an underwhelming attestation as to the efficacy of the program by the State's own witness is telling.

Finally, while the State argues that Mr. Bargas's constitutional challenge should be rejected because the trial court found him to not be credible, again, Mr. Bargas's argument does not rely upon a finding of his credibility. Both experts at trial testified that Mr. Bargas's risk of sexually

offending is tied to his substance abuse and that intensive substance abuse treatment is unavailable at the SCC. Given that expert testimony, it is irrelevant whether or not the trial court believed Mr. Bargas's testimony regarding his risk of re-offense. If the treatment that Mr. Bargas requires in order to address his risk of sexual recidivism is unavailable at the SCC then the State may not constitutionally confine him there under the guise of treatment. Therefore, this Court should reverse the trial court's order directing Mr. Bargas's confinement at the SCC as in violation of his right to due process.

CONCLUSION

For the foregoing reasons, as well as for those reasons set forth in his opening brief, Mr. Bargas respectfully submits that the trial court's order directing his total confinement at the SCC was not supported by substantial evidence and was in violation of his due process rights and should therefore be reversed by this Court.

Respectfully submitted this 13th day of December, 2013


RACHAEL E. SEEVERS-WSBA 45846
Washington Appellate Project - 91052
Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

IN RE THE DETENTION OF)	
)	
MICHAEL BARGAS,)	NO. 69844-3-I
)	
)	
APPELLANT.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, NINA ARRANZA RILEY, DECLARE THAT ON THE 13TH DAY OF DECEMBER, 2013, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] MARY ROBNETT, AAG	(X)	U.S. MAIL
[mary.robnett@atg.wa.gov]	()	HAND DELIVERY
OFFICE OF THE ATTORNEY GENERAL	()	_____
800 FIFTH AVENUE, SUITE 2000		
SEATTLE, WA 98104-3188		

[X] MICHAEL BARGAS	(X)	U.S. MAIL
SPECIAL COMMITMENT CENTER	()	HAND DELIVERY
PO BOX 88600	()	_____
STEILACOOM, WA 98388		

SIGNED IN SEATTLE, WASHINGTON THIS 13TH DAY OF DECEMBER, 2013.

x 

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CLERK OF COURT

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, Washington 98101
☎(206) 587-2711