In the Matter of the Detention of Post (Charles W.)

No. 83023-1

Stephens, J. (concurring)—I agree with the majority that Post is entitled to a new trial. The scope of the evidence admitted comparing the Special Commitment Center (SCC) treatment plan against Post's voluntary plan, the lack of a limiting instruction, and the improper prosecutorial argument all require this. But I disagree with the majority's categorical conclusion that any evidence of the SCC treatment plans in which Post did not participate was irrelevant.

The majority's reasoning follows the analysis of the Court of Appeals majority. Both misapprehend the role of treatment evidence under the statutory scheme. I agree with Judge Becker that the statute contemplates two options: community release with no conditions or confinement in a secure facility. *In re Det. of Post*, 145 Wn. App. 728, 761-62, 187 P.3d 803 (2008) (Becker, J., dissenting). A jury may not consider a third option: placement in a setting less restrictive than total confinement but more restrictive than unconditional release. *See* RCW 71.09.060(1); *In re Det. of Thorell*, 149 Wn.2d 724, 751-53, 72 P.3d 708 (2003).

But this statutory restriction does not mean a jury cannot evaluate the two permitted options in full. Understanding what treatment the alleged sexually violent predator (SVP) needs is part of determining whether he is likely to engage in predatory acts if not confined in a secure facility, and the testimony concerning the full arc of treatment available to Post at the SCC was relevant for this purpose. Under the minimal threshold test of ER 401, it is a mistake to conclude that such evidence is never permitted.

The majority's focus on relevancy rather than ER 403 rests in part on its reading of *In re Detention of Turay*, 139 Wn.2d 379, 986 P.2d 790 (1999). *See* majority at 9-10. There, we observed that "[t]he trier of fact's role . . . is to determine whether the defendant constitutes an SVP; *it is not* to evaluate the potential conditions of confinement." *Turay*, 139 Wn.2d at 404. But, any discussion of *Turay* must acknowledge subsequent legislative changes to RCW 71.09.060 and our holding in *Thorell*, both of which limit the fact finder's consideration to the options of unconditional release or confinement in a secure facility. Contrary to the trial court's decision in *Turay*, 139 Wn.2d at 403 n.17, a third possibility involving less restrictive alternatives to total confinement is not an option at an SVP determination trial. Thus, when the statute states that 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," this simply means that evidence of less restrictive

alternatives is off the table. RCW 71.09.060(1).

It does not mean, as the majority suggests, that the only admissible evidence must necessarily be one-sided: the alleged SVP can offer evidence of his alternative treatment plan, but evidence of the treatment offered in the SCC is irrelevant. To me, this conclusion defies common sense.

Although evidence regarding the SCC treatment plan is relevant, this is not to say the evidence should always come in. Permitting testimony about the SCC's treatment programs certainly creates a risk that the jury may believe it is supposed to compare the general efficacy of treatment alternatives for an alleged SVP, which it may not do. *In re Pers. Restraint of Duncan*, 167 Wn.2d 398, 409-10, 219 P.3d 666 (2009). Under ER 403, balancing the probative value against the prejudicial impact of the evidence remains a concern. In this case, the record reveals that the scope of the evidence about SCC treatment program phases in which Post did not participate, coupled with an inadequate limiting instruction and improper arguments, misdirected the jury's focus away from the statutory elements and suggested it should find Post to be an SVP if it believed that the SCC treatment program, when compared to his voluntary plan, would be better for him. This was error requiring a new trial. On this basis—under ER 403, not ER 401—I concur.

AUTHOR:
Justice Debra L. Stephens

WE CONCUR: