No. 83023-1

MADSEN, C.J. (concurring/dissenting)—I agree with the majority that evidence as to potential treatment options at the Special Commitment Center and the possibility of future release to a less restrictive alternative was irrelevant to a determination of Charles Post's sexually violent predator (SVP) status and that the admission of this evidence was not harmless error. However, unlike the majority, I would hold that the trial court properly excluded evidence as to the hypothetical possibility that the State could file a new SVP petition should Post commit a "recent overt act" upon his release. Because its potential to confuse and mislead the jury far outweighs its probative value, this evidence is inadmissible under Evidence Rule (ER) 403.

The probative value of this evidence is limited at best. Under RCW 71.09.015, the legislature "clarifies that it intends, and has always intended, in any proceeding [relating to SVPs] that the court and jury be presented only with *conditions that would exist* or that the court would have the authority to order in

the absence of a finding that the person is a sexually violent predator." (Emphasis added); *see also* RCW 71.09.060(1).

The majority contends that RCW 71.09.030(1)(e), which allows the State to bring an SVP petition against an individual who has been convicted of a sex offense and who commits a "recent overt act" upon release, undoubtedly would apply to Post. Accordingly, the majority argues that the State's ability to bring an SVP petition should Post commit a "recent overt act" is a condition that "would exist" upon his release. *See* RCW 71.09.015; .060(1).

However, the provision on which the majority relies does not address the preclusion problems that may arise where the individual who commits the "recent overt act" upon release has defeated an SVP petition in the past. Indeed, the majority gives short shrift to the roles that collateral estoppel and res judicata might play under these circumstances in barring the State from bringing a second SVP petition. *See* majority at 16 n.3 ("We need not and do not decide the precise contours of res judicata and collateral estoppel in these circumstances."). However, these doctrines have direct bearing on the conditions that "would exist" upon Post's release and thus merit more than a passing reference.

As the majority notes, other courts have addressed the role of these doctrines in the SVP context. *Id*. These courts have found that while collateral estoppel does not categorically bar the State from bringing multiple SVP petitions against a single individual, new petitions are only proper where time has elapsed

or circumstances have changed. *See, e.g., Turner v. Superior Court*, 105 Cal. App. 4th 1046, 130 Cal. Rptr. 2d 300 (2003) (changed circumstances); *Commonwealth v. Chapman*, 444 Mass. 15, 825 N.E.2d 508 (2005) (elapsed time).

Moreover, even if preclusion were no hindrance to bringing a new SVP petition, the State's ability to bring such a petition is contingent on the State's detection of the "recent overt act." Because sex offenses often take place out of the public eye, with no eyewitnesses, it is not at all clear that Post would be caught if he committed such an act upon release.

In sum, it cannot be said with certainty that the State would be able to bring a new SVP petition should Post commit a "recent overt act." At best, it can be said that the State would be able to bring a new SVP petition if Post committed a "recent overt act," if the State caught him, and if time had passed or circumstances had changed. This remote possibility has little, if any, deterrent value beyond the deterrent value of generally applicable criminal sanctions for sex offenses. As such, it has little probative force in establishing Post's likelihood of reoffending. *See State v. Harris*, 141 Wn. App. 673, 680, 174 P.3d 1171 (2007) (excluding evidence as to the State's ability to file a new SVP petition should the respondent commit a "recent overt act" upon release, because this evidence was "hypothetical evidence" rather than a condition that "would exist" upon release).

Furthermore, establishing the possibility of a new SVP petition with any degree of certainty would require the trial court to conduct a highly tangential mini-

trial before admitting evidence of this nature.

Moreover, as the trial court recognized, evidence of the State's ability to bring a new SVP petition is likely to confuse the jury by suggesting that Post would be monitored upon his release. In fact, the defense offered this evidence in order to rebut the State's claim that Post's release would be unconditional, and on appeal, it went so far as to argue that "the personal injunction of a sentence condition operates the same way as the societal injunction of a statute." Suppl. Br. of Resp't at 27. However, the remote possibility of being subject to a second SVP petition is a far cry from supervised release, and Post's attempt to analogize these scenarios was likely to confuse and mislead the jury.

"Although 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." ER 403. Here, evidence as to the State's ability to bring a new SVP petition should Post commit a "recent overt act" has little bearing on his likelihood of reoffending, and it would lead to a substantial risk of confusing or misleading the jury. Thus, I dissent from the majority's position that the trial court erred by excluding this evidence.

AUTHOR:
Chief Justice Barbara A. Madsen

WE CONCUR: