73337-1

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No. 73337-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

M.R.

Appellant,

v

M.D.

Respondent.

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

The Honorable Judge DOUGLASS NORTH Presiding

BRIEF OF APPELLANT

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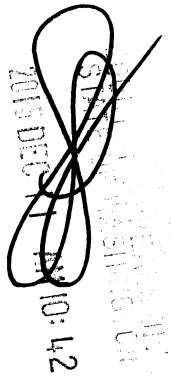

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I. INTRODUCTION

Under chapter 7.90 RCW, the Sexual Assault Protection Order ("SAPO") Act persons in the State of Washington who are victims of nonconsensual sexual conduct or penetration may petition the court and are entitled to obtain protection from their assailants. Protections under the SAPO statute are specifically for persons who are not eligible for protection under chapter 26.50 RCW, the Domestic Violence Prevention Act, which requires a qualifying household, dating or family relationship between the petitioner and the respondent. Petitioner M.R. sought a permanent SAPO against respondent M.D., a classmate at the University of Washington, after he sexually assaulted her during their first encounter. Appellant M.R. has complied with every requisite procedural step under the SAPO Act, and provided uncontested evidence to support her petition. However, the trial court denied M.R. a final order SAPO on the basis that too much time had passed for her to seek protection and that she had no reasonable fear of future dangerous acts by M.D.. Under the trial court (and respondent's) reading of the statute, M.R., along with many other victims of sexual assault, cannot seek a remedy under the SAPO statute due to passage of time, cannot seek an *ex parte* temporary order upon filing because

they could not provide clear examples of future dangerous acts by the offender to cause reasonable fear, and can be denied a full hearing to determine whether they are eligible for a permanent protection order. M.R. seeks appellate review of this decision.

II. ASSIGNMENTS OF ERROR

1. Assignment of Error 1: It was an error of law for the Court to deny a full hearing for a SAPO.
2. Assignment of Error 2: It was an error of law to find Petitioner's ex parte temporary order invalid.
3. Assignment of Error 3: It was an error of law for the Court to deny a permanent SAPO based on findings on the temporary ex parte order.
4. Assignment of Error 4: It was an error of law for the Court to require proof of elements outside the statutory requirement for a SAPO.
5. Assignment of Error 5: It was an error of law for the Court to deny a permanent SAPO when Petitioner met the evidentiary burden for the SAPO statute

III. STATEMENT OF THE CASE

Appellant M.R. filed this appeal after the trial court denied her Motion for Reconsideration on March 13, 2015. CP 118. M.R. had asked the trial court to reconsider its dismissal of her Petition for a Sexual Assault Order on February 20, 2015. CP 97-98.

On the evening of May 9, 2014, M.R., an 18-year old freshman at the University of Washington, went out with friends to celebrate her birthday, which was on the following day. VRP 15, CP 4. As a part of celebrating, M.R. was drinking alcohol and estimated that she had approximately eight drinks for starting around 9:30 until the sexual assault. VRP 15, 19. She met M.D., also a student at the University of Washington, at a party where they engaged in consensual kissing. VRP 16. M.R. did not know M.D. prior to meeting him at the party. *Id.* After the students left because law enforcement had arrived, she invited him over to her dormitory. VRP 17-18. There they initially engaged in limited consensual sexual conduct such as kissing. VRP 19; CP 4. However, M.D. ignored M.R.'s statements that she did not want to engage in any further sexual acts and sexually assaulted her, which including forcing her underwear off, digitally penetrating her vagina, vaginally penetrating her with his penis and orally penetrating her with his

penis. VRP 20-21; CP 4. He also bit her in her genital area. CP 4. The acts were so violent that at the end of the assault, M.R. was bleeding. VRP 21; CP 4. M.R. was observed moments after the sexual assault by a witness, who noticed she had been crying VRP 23; CP 28-29. The witness called M.R.'s friends, in front of whom she continued crying and stated that things had "gone much further than she was ready for." CP 18, 20, 26-27. The next day, M.R. disclosed in detail to her friend, Angelina Caplanis, the specifics of the sexual assault. CP 18-19.

After the sexual assault, M.R. returned home for the summer quarter and did not return to the University of Washington until the fall. CP 18-19. Once back on campus in September, she reported the sexual assault both to law enforcement and the University's student conduct process. CP 18. The King County Prosecutor's Office declined to file charges within a month of M.R. reporting the sexual assault. CP 11. The University initiated an investigation and issued an on-campus no-contact order. CP 3-4, 10. However, in the following months M.R. continued to encounter M.D. on campus and at social events. CP 3-4, 16,18, 30.

On January 14, 2015, M.R. filed her petition for a Sexual Assault Protection Order. CP 1-5. Along with providing details of

the non consensual sexual penetration and conduct she was subjected to, M.R. also stated in her petition that she was fearful of future contact with M.D. based on her single experience with him being so violent and the fact that she had encountered him several times on campus. CP 3. Not knowing him well, she did not know what else he was capable of. *Id.* Based on the facts alleged in the petition, the court granted an *ex parte* temporary protection order and set the full hearing for January 28, 2015. CP 6-8. At the initial SAPO hearing, both parties agreed to a continuance to February 10, 2015. CP 14. Prior to the second hearing, M.R. filed witness declarations including statements of friends who observed her minutes after the sexual assault. CP 17-21, 26-29. Her witnesses also provided affidavits about M.R.'s eventual disclosure about the details of the sexual assault. CP 16, 18, 22, 25. Finally, her witnesses also attested to the visible fear and reactions M.R. would undergo since the sexual assault, particularly when she encountered M.D.. CP 16, 19, 27, 30.

At the second hearing on February 10, assigned to Judge Douglass North, M.R. began providing sworn testimony about her sexual assault. VRP 14-23. Midway through her testimony M.D. interrupted her testimony, alleging he had never received witness

declarations filed by M.R.. VRP 23-29. M.R. objected, providing the trial court proof that the declarations had been served on M.D.. VRP 26-27. Nevertheless, the trial court permitted the interruption of her testimony and granted a continuance. The hearing was continued to February 20, 2015. CP 32. M.D. filed nearly 40 pages of motions and declarations. CP 33-70. With his submissions, he included a 9-page declaration from his father, a member of the Washington State Bar and former prosecutor. CP 44-52. M.D also filed a motion to dismiss based the claim that M.R. had no reasonable fear of future dangerous acts. CP 42-43.

At the February 20 hearing, instead of continuing with M.R.'s testimony and allowing the hearing to proceed as before, the trial court granted M.D.'s motion to dismiss. VRP 52-79; CP 97-99. The trial court voiced concern that seven to eight months was too much time since the sexual assault for M.R. to pursue a protection order and that it was "peculiar" for her to be filing for protection now. VRP 77-78; CP 97-99. The trial court granted the Respondent's motion to dismiss without allowing M.R. to resume the full hearing, stating in its Denial Order that she "failed to establish that she had any reasonable fear of future dangerous acts from the Respondent and therefore the temporary order was invalid." CP 93 M.R. filed a

Motion for Reconsideration, which the trial court dismissed on March 13, 2015. CP 102-118. The Notice of Appeal was filed on April 12, 2015. CP 119.

IV. ARGUMENT

A. This Appeal Requires De Novo Review of Legal Errors, De Novo Review of Applications of Law to Uncontested Facts, and Upholding the Statutory Purpose and Text.

The trial court's errors in this case related to its interpretation of the legal elements in a Sexual Assault Protection Order case, its erroneous application of the law to M.R.'s undisputed evidence, and a failure to uphold the statute's explicit legislative purpose. On appeal, conclusions of law are reviewed *de novo* to determine if the findings support the conclusions. *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 880, 73 P.3d 369 (2003). Findings of fact may be subject to different standards of review, depending on whether the facts are contested or uncontested. The substantial evidence standard of review applies only when, and because, the trial judge has resolved conflicting evidence in favor of one side. *E.g. Id.* at 879-80; *accord Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 4 P.3d 123 (2000)("When a trial court evaluates conflicting evidence and resolves factual disputes,

appellate review requires determining whether substantial evidence supports the ruling."). In contrast, when a party appeals a ruling that grants or denies relief based on the application of the law to undisputed facts, the standard is *de novo*. *Heller v. McClure & Sons, Inc.*, 92 Wn.App. 333, 337, 963 P.2d 923 (1998). This appeal focuses on the trial court's errors in interpreting the SAPO statute and in applying the statute to the undisputed evidence in this case (and credibility is not at issue); therefore the standard of review in this appeal is *de novo*.

The trial court's errors in interpreting the SAPO statute RCW 7.90 fell in two categories. First, the most important principle of statutory interpretation is that "statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous." *Whatcom County v. City of Bellingham*, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996). In this case the trial court's interpretation of the statute made the word "shall" meaningless, by denying M.R.'s protection based on an analysis that weighed factors that cannot be given weight if "shall" is to have any meaning. *See infra* Section E.

Second, "If a statute is ambiguous, we apply the tools of statutory construction. Our aim is to give effect to the intent and

purpose of the Legislature." *Heller,* 92 Wn.App. at 337. The trial court's ruling in this case directly contravened the "intent and purpose of the Legislature." *Id.* The Washington state legislature enacted the Sexual Assault Protection Order Act because it acknowledged that the criminal justice system and domestic violence protection order laws do not offer adequate protection for many victims of sexual assault:

> Sexual assault is the most heinous crime against another person short of murder. Sexual assault inflicts humiliation, degradation, and terror on victims. Rape is recognized as the most underreported crime [...]. Victims [...] desire safety and protection from future interactions with the offender. Some cases in which the rape is reported are not prosecuted. In these situations, the victim should be able to seek a civil remedy requiring that the offender stay away from the victim....

RCW 7.90.005. The Act created a civil remedy to ensure that protection is available for victims of a wide range of nonconsensual sexual behaviors who are ineligible for Domestic Violence Protection Orders (DVPOs). RCW 7.90.005, .030(1), .040(1); RCW 26.50. Any victim of sexual assault who is not eligible for a DVPO may seek relief under the SAPO statute by filing a petition alleging that the person has been the victim of nonconsensual sexual conduct or penetration committed by the respondent. RCW

7.90.030(1)(a). The trial court's interpretation of the SAPO statute would deny relief to the vast majority of petitioners who can prove that they were sexually assaulted, contrary to the statutory intention to create a special proceeding to make relief available to them. As such, the trial court's statutory interpretation was clearly erroneous and should be reversed.

B. M.R.'s Petition Satisfied the Specific Elements Required of a SAPO Petition.

The trial court erred in this case by finding that there was no "statutory basis for a petition here," when M.R.'s petition did contain every element required of a SAPO petition. VRP 78; RCW 7.90.020(1).

1. *The Standard of Review for Sufficiency of a SAPO Petition is De Novo.*

The determination of whether a SAPO petition is legally sufficient, and includes all elements required by the statute, is a legal conclusion based on review of the petition itself. It does not require weighing contested facts, making credibility determinations, taking oral testimony, or giving the respondent any opportunity for rebuttal. RCW 7.90.020, .110.

De novo review is the appropriate standard of review when

considering the sufficiency of a SAPO petition, as the appellate court is in just as good a position as the trial court to review the petition—and any supplemental affidavits or other documentary evidence filed with it—to verify conformity with statutory requirements. In contrast, the Court held in *In re Marriage of Rideout* that in a contempt hearing based on competing affidavits:

> [T]he substantial evidence standard of review should be applied here where competing documentary evidence had to be weighed and conflicts resolved. The application of the substantial evidence standard in cases such as this is a narrow exception to the general rule that where a trial court considers only documents, such as parties' declarations, in reaching its decision, the appellate court may review such cases de novo because that court is in the same position as trial courts to review written submissions."

150 Wn.2d 337, 77 P.3d 1174 (2003).

2. *M.R.'s SAPO Petition Satisfied Each Required Element.*

A petition filed under the Act must include three specific elements:

> A petition for relief shall allege the existence of nonconsensual sexual conduct or nonconsensual sexual penetration, and shall be accompanied by an affidavit made under oath stating the specific statements or actions made at the same time of the sexual assault or subsequently thereafter, which give rise to a reasonable fear of future dangerous acts, for which relief is sought. Petitioner and respondent shall disclose the existence of any other litigation or of any other restraining, protection, or no-contact orders between the parties.

RCW 7.90.020(1). M.R.'s petition included every element required for a SAPO petition.

First, M.R.'s petition did "allege the existence of nonconsensual sexual conduct and penetration." *Id.* M.R.'s petition stated that despite her protests, including saying 'no' and trying to push him away, M.D. engaged in multiple acts of nonconsensual sexual conduct or penetration including: intentionally displaying M.R.'s genitals for the purposes of his sexual gratification by forcefully pulling down her underwear; fondling and penetrating her genitals with his fingers; penetrating her vagina with his penis; and penetrating her mouth with his penis. CP 4; RCW 7.90.010(4)(a), .010(4)(d), .010(5).

Second, M.R.'s petition "stat[ed] the specific statements or actions... which give rise to a reasonable fear of future dangerous acts, for which relief is sought." RCW 7.90.020 (1). The sworn affidavit in M.R.'s petition described how during the sexual assault M.D. penetrated her mouth with his penis with such force she thought she was choking, bit and penetrated her vagina so violently that it left her bleeding. CP 4. She further stated that she did not know M.D. prior to the sexual assault and therefore did not

know what he could be capable of, other than that she knew that he was capable of violently raping a fellow student he had never met before. CP 4.

Third, M.R. "disclose[d] the existence of any other litigation or of any other restraining, protection, or no-contact orders between the parties." RCW 7.90.020(1). Specifically, she disclosed that she had reported the sexual assault to both law enforcement and the University of Washington, and that the University had issued a no-contact order. CP 2-4.

Because M.R. unambiguously met the statutory requirements for a SAPO petition, the trial court committed a legal error by finding it insufficient under the SAPO statute. VRP 78.

C. M.R. Met Her Burden for an *Ex Parte* Temporary SAPO.

The trial judge erred by reviewing and reversing the *ex parte* court's decision to grant M.R.'s request for temporary relief. The trial judge further erred by denying M.R.'s request for a final order based on the *ex parte* judge's alleged error in granting temporary relief. These errors were based on inaccurate statutory interpretation, and inaccurate application of the statute to uncontested facts. Therefore, the standard of review is *de novo*.

Heller, 92 Wn.App. at 337; *Rideout*, 150 Wn.2d at 337.

1. *The Ex Parte Court Properly Granted Ex Parte Relief, Which is Mandatory if the Statutory Elements are Satisfied.*

Upon filing a SAPO petition *ex parte*, a petitioner may seek immediate protection through an *ex parte* temporary order. The *ex parte* judge "shall" grant the temporary order if the evidence submitted in or with the petition establishes two elements by a preponderance of the evidence:

> (a) The petitioner has been a victim of nonconsensual sexual conduct or nonconsensual sexual penetration by the respondent; and
> (b) There is good cause to grant the remedy, regardless of the lack of prior service of process or of notice upon the respondent, because the harm which that remedy is intended to prevent would be likely to occur if the respondent were given any prior notice, or greater notice than was actually given, of the petitioner's efforts to obtain judicial relief.

RCW 7.90.110(1)(a),(b). In contrast, a final order SAPO shall be granted or denied based solely on the first of those two elements. RCW 7.90.090(1)(a); *see infra* subsection E.

The preponderance of the evidence "merely means the greater weight of the evidence." *State v. Harris*, 74 Wn. 60, 64, 132 P. 735 (1913). Accordingly, if the petitioner's sworn statement (or other evidence) is sufficient to satisfy both elements and no

evidence is presented to dispute it, the petitioner is entitled to temporary relief.

An *ex parte* judge lacks the discretion to deny a temporary SAPO if the Petitioner meets that standard, because "it is well settled that the word 'shall' in a statute is presumptively imperative and operates to create a duty. The word 'shall' in a statute thus imposes a mandatory requirement unless a contrary legislative intent is apparent." *The Erection Co. v. Dept. of Labor and Industries of State of Wn*, 121 Wn.2d 513, 519, 852 P.2d 288 (1993)(citations omitted). Moreover, because the Act's purpose is to ensure that protection is available to victims of sexual assault, the Act provides an additional safeguard against denials of *ex parte* relief:

> [I]f the court declines to issue an ex parte temporary sexual assault protection order, the court shall state the particular reasons for the court's denial. The court's denial of a motion for an ex parte temporary order shall be filed with the court."

RCW 7.90.110(3).

The *ex parte* court determined that M.R. had met her burden for *ex parte* relief under the Act. VRP 4-5; CP 6-8. M.R. provided details of her sexual assault in her petition that demonstrated that she had been a victim of nonconsensual sexual conduct and sexual

penetration by M.D.. CP 4. M.R. also provided good cause for the *ex parte* temporary order by describing incidents of running into M.D. around campus and at student events, and being afraid of what he was capable of based on the limited but violent experience she had with him. CP 3-4. At the *ex parte* hearing, M.R. also established good cause by describing the inadequacy of the University's no-contact order process, explaining the investigation had been taking several months. VRP 5. M.D. did not receive notice of the *ex parte* hearing and therefore did not appear and refute any of this evidence. Therefore, the *ex parte* judge found that M.R. met the preponderance standard, and properly granted *ex parte* relief. CP 6-8.

2. *The Trial Court Lacked Authority to Evaluate the Sufficiency of Evidence for Entry of Ex Parte Relief.*

After the February 20, 2015 hearing in which M.R. was seeking a two year final SAPO order, the trial court indicated in the denial order that "Petitioner has failed to establish that she had any reasonable fear of future dangerous acts from the respondent and therefore the temporary order was invalid." CP 93. This finding was legally erroneous in two ways: (1) the trial court had no authority to review and reverse the *ex parte* court's ruling regarding temporary

relief, and (2) the trial court had no authority to deny a final order SAPO based on the legal standard for an *ex parte* temporary SAPO.

There are only two circumstances, after the entry of *ex parte* relief, in which a subsequent judge has the authority to review the sufficiency of evidence supporting an *ex parte* temporary SAPO.

First, the basis for an *ex parte* temporary SAPO may be challenged in a hearing to renew a temporary SAPO. RCW 7.90.121. A petitioner may renew an *ex parte* temporary SAPO one or more times, as required. *Id.* If the motion for renewal is contested, the court shall order that a hearing be held no later than fourteen days from the date of the order, at which time the temporary relief may be renewed or terminated. RCW 7.90.121(4)(a). At the February 20 hearing, M.R. was not seeking a reissuance or renewal of the temporary order and made no such motion. She was seeking entry of a final order. Therefore, the court lacked this form of authority to adjudicate whether or not M.R. met the legal standard for a temporary order.

Prior to the February 20 hearing, M.D. did have two opportunities to contest the renewal of M.R.'s temporary order. His first opportunity was at the initial SAPO hearing on January 28, but

he declined to contest the sufficiency of M.R.'s evidentiary basis for temporary relief, and agreed to the reissuance with minor modifications. CP 14. His second opportunity was at the February 10 hearing, when he interrupted M.R.'s testimony to request a continuance. CP 32, VRP 37-39. Once again, he waived his right to object to the renewal of the temporary relief. *Id.*

In contrast, on February 20, the parties were present to continue with the hearing on the full SAPO petition. Neither party was requesting a continuance, or the renewal of temporary relief, so the adequacy of the basis for temporary relief was no longer an issue that the court had the authority to adjudicate.

Second, the court has the authority to review the sufficiency of the evidentiary basis for an *ex parte* temporary order if a respondent files a motion asking the court to "reopen the order." RCW 7.90.130(2)(e). The basis for such a motion to reopen the order must be based on the respondent: (1) not receiving actual prior notice of the hearing, and (2) asserting a meritorious defense to the order or a claim that the temporary remedy was not authorized by this statute. RCW 7.90.130(2)(e).

M.D. did not file a motion to reopen the temporary SAPO; he filed a motion to dismiss and deny a final order SAPO, which the

trial court granted at the February 20 hearing. VRP 78-79, CP 39-40, 42-43, 97-99. It is clear that this was not a motion to reopen, because the motion did not assert that he did not receive actual prior notice of the hearing. CP 39-43. Moreover, his argument was not that M.R. did not meet her burden for the *ex parte* order, but that the court should deny the final order based an erroneous interpretation of the petitioner's evidentiary burden for obtaining a final order, specifically that a final order should be denied based on M.R.'s allegedly inadequate basis for having a reasonable fear of future dangerous acts. CP 42-43. M.D. specifically argued that the burden was on the "petitioner having to prove that there was some type of reasonable fear of future dangerous acts from M.D. And they have to prove that in the petition, but they also have to prove that in this hearing." VRP 52-53. Therefore, there was no basis for the trial court to examine, at the February 20 hearing, the legal standard for an *ex parte* temporary order or the validity of the *ex parte* relief M.R. had been granted previously.

D. The Trial Court Erroneously Deprived M.R. of Her Right to a Full Hearing

The trial court erred when it denied M.R. a full hearing on her SAPO by cutting off her testimony at the February 10 hearing, and

refusing to allow her to finish at the February 20 hearing before granting M.D.'s motion to dismiss. Denial of a full hearing, despite the statute's unequivocal mandate to allow a full hearing, is an error of law that should be reviewed *de novo*.

1. *The Trial Court had No Discretion to Deny a Full Hearing Before Dismissing the Final SAPO Order.*

The SAPO statute provides that "upon receipt of the petition, the court *shall* order a hearing which shall be held not later than fourteen days from the date of the order. The court *may* issue an *ex parte* temporary sexual assault order pending the hearing as provided in RCW 7.90.110." RCW 7.90.050 (emphasis added). The use of "shall" means that holding this hearing is not discretionary, irrespective of the status of any *ex parte* relief. *The Erection Co.*, 121 Wn.2d at 519. Similarly, the SAPO statute emphasizes the right to a full hearing when it requires that a full hearing must be set within fourteen days of the issuance of the temporary order. RCW 7.90.120(1)(a). Holding a full hearing, to determine if the Petitioner is entitled to a final SAPO order based on being a victim of nonconsensual sex or sexual conduct, is required in every SAPO case.

In this case, the trial court erred by denying M.P. a full

hearing. At the scheduled full hearing on February 10 2015, M.R. was in the process of testifying when the court allowed M.D. to cut her off, mid-testimony, to grant a continuance without allowing her to complete her testimony. CP 32, VRP 37-39. At the next hearing, on February 20, the trial judge did not allow M.R. to resume and complete her testimony, and instead granted the motion to dismiss with no further testimony. VRP 48-81; CP 97-99. There is no conceivable legal basis for this utterly irregular procedure, and it is a clear violation of the SAPO statute's mandate to hold a full hearing. RCW 7.90.050

2. *The Trial Court had No Lawful Procedural Basis for Entering a Denial Order Prior to a Full Hearing.*

The trial court's unusual divergence from standard and statutorily mandated procedure is clear from the trial court's own confusion in issuing the Denial Order. The Denial Order states that the hearing was on the full SAPO petition, yet states that the denial was based on the legal standard for a temporary order (finding that M.R. failed to "establish that she had any reasonable fear of future dangerous acts from the respondent and therefore the temporary order was invalid."). CP 98.

Based on the record, it is not even clear what sort of motion

the trial court thought it was granting. The court did not treat M.D.'s motion as a CR 12(b)(6) motion, because a 12(b)(6) motion to dismiss requires "Courts [to] presume the allegations of the complaint to be true for the purpose of such a motion." *Berst v. Snohomish County*,114 Wn.App. 245, 251, 57 P.3d 273 (2002). M.R.'s petition and partial-testimony alleged a sexual assault by M.D. that caused her to be reasonably afraid of future contact with him, so for the court to deny her order based on a lack of a reasonable fear of future dangerous acts means the court did not presume her allegations to be true.

Likewise, the court did not treat M.D.'s motion as a summary judgment motion, because he did not make any finding that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law," and clearly whether or not M.R. had a reasonable fear of the M.D. was a contested fact that the court did not view in the light most favorable to M.R.. CR 12(c); CR 56(c).

Finally, the trial court did not treat M.D.'s motion as a motion to dismiss based "on the ground that upon the facts and the law the plaintiff has shown no right to relief," because that motion is only properly before the court "After the plaintiff, in an action tried by the

court without a jury, has completed the presentation of the evidence." CR 43(b)(3). In this case the trial court cut M.R. off in the middle of her testimony on February 10, and on February 20 granted M.D.'s motion without allowing M.R. to finish her testimony, which would have included testimony regarding the reasonable basis for her fear of Delamn. Moreover, the trial court granted M.D.'s motion based in part on the premise that the passage of time undermined her reasonable fear, yet denied her attorney the opportunity to brief that issue:

> Counsel: Your Honor, based on the finding that the Court -- the Court's concern is how much time has passed, would the Court allow us to provide additional information related to the current case law that specifically indicates that a passage of time is not a basis for a denial of an order?
> Court: "...And so, you know, perhaps I'm wrong in interpreting the statute that way. But that's what -- you know, how I read the statute. And I just don't think we've got a statutory basis to proceed at this point. So if you want to prepare an order, Mr. Lindell, I'll sign the order.

VRP 78-79. However, the trial court provided no citation to any specific section of the Act indicating the passage of time is a relevant factor.

Although a SAPO is a special proceeding under CR 81 and allows more procedural flexibility than other civil cases, the trial court in this case radically diverged not only from the rules of civil

procedure, but from the SAPO statute's clear mandate of a ful hearing. Denying M.R. a meaningful opportunity to be heard, through these unprecedented procedural irregularities, had no conceivable legal basis, and contravened the legislature's clear intent to protect victims of sexual assault with a prompt and fair process in which to seek protection. RCW 7.90.050.

E. Denying a Final Order SAPO if the Petitioner Meets the Legal Burden Defined by the Statute is a Legal Error.

Among the most important principles of statutory interpretation is that "Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous." *Whatcom County v. City of Bellingham*, 128 Wn.2d 537, 546, 909 P.2d 1303(1996). The trial judge's denial of a final order SAPO was an error of law, because it was based on an inaccurate interpretation of a clear statute, and imposed legal burdens that had no textual basis in the statute, rendering the statute's mandate to grant relief meaningless. This is an error of law that should be reviewed *de novo*.

1. *The Statute's Legal Element and Mandate of Relief are Unequivocal.*

There is one and only one legal element required for entry of a final order in a SAPO case:

> If the court finds by a preponderance of the evidence that the petitioner has been a victim of nonconsensual sexual conduct or nonconsensual sexual penetration by the respondent, the court *shall* issue a sexual assault protection order; provided that the petitioner must also satisfy the requirements of RCW 7.90.110 for ex parte temporary orders or RCW 7.90.120 for final orders.

RCW 7.90.090(1)(a)(emphasis added). RCW 7.90.120 does not add any additional elements that must be proven at the hearing to obtain final orders, it merely specifies that final order SAPOs have a [M.D.]imum duration of two years. *Id.* Consequently, the only element that must be proven by a preponderance to obtain a final order is "that the petitioner has been a victim of nonconsensual sexual conduct or nonconsensual sexual penetration by the respondent." RCW 7.90.090(1)(a).

Through its use of "shall," this statute places a mandate on the court. *The Erection Co.*, 121 Wn.2d at 519. A trial judge lacks the discretion to deny a final order SAPO if the Petitioner meets the burden of proof regarding the sole legal element because "It is well settled that the word 'shall' in a statute is presumptively imperative

and operates to create a duty. The word 'shall' in a statute thus imposes a mandatory requirement unless a contrary legislative intent is apparent." *Id.* (internal citations omitted). The statute's distinction between the standard for a final order SAPO (which has only the one element) and an *ex parte* temporary SAPO (which has two elements) is perfectly clear.

However, even if there was any room to find any ambiguity, the aim of statutory interpretation must be "to give effect to the intent and purpose of the Legislature." *Heller*, 92 Wn.App. at 337. The SAPO statute's purpose is stated explicitly:

> Sexual assault is the most heinous crime against another person short of murder. Sexual assault inflicts humiliation, degradation, and terror on victims. Rape is recognized as the most underreported crime[...]. Victims [...] desire safety and protection from future interactions with the offender. Some cases in which the rape is reported are not prosecuted. In these situations, the victim should be able to seek a civil remedy requiring that the offender stay away from the victim....

RCW 7.90.005. Thus, the legislature expressed its specific intent to give victims of sexual assault a legal mechanism to enforce their desire to avoid any contact with their assailants; they did not express any legislative intent to limit this protection to those victims who can legally establish that their fear of the respondent is

objectively reasonable, or who can prove that the respondent is likely to commit additional acts of sexual or physical violence in the absence of legal restraints. *Id.*

2. *M.R. Met her Legal Burden Using Uncontested Evidence.*

In general, trial courts are granted broad discretion in admitting and weighing evidence, and in the absence of a clear abuse of discretion, appellate courts will not disturb a trial court's decision. *Hecker v. Cortinas,* 110 Wn.App. 865, 869, 43 P.3d 50 (2002). However, in the absence of evidence disputing the petitioner's claim, a jurisdictional problem, or a failure to state a claim upon which relief may be granted, a judge is no longer acting as an arbiter of contested facts, and is limited to applying the law to the petitioner's undisputed evidence. *Heller,* 92 Wn.App. at 337. Even in a non-default, when a respondent does not dispute the petitioner's assertion of the relevant facts, the judge's authority is merely to apply the law to the uncontested evidence. *Id.* Therefore, if a trial judge denies a final order to a petitioner who presents uncontested evidence that meets the legal burden defined in RCW 7.90.090(1)(a), the judge has committed an abuse of discretion and should be reversed on appeal.

M.R. provided sufficient evidence to prove that she had been

a victim of nonconsensual sexual conduct. She filed a detailed statement in her petition about multiple specific acts that met the definition of nonconsensual sexual conduct or penetration, and she also provided oral testimony regarding the details of the sexual assault and how she made it clear to M.D. that she was not consenting, stating that she "said no in multiple -- in multiple ways. No directly and stop. And I tried to cover myself and explain myself, like, why I didn't want to go that far and -- yeah, tried to push him away from me." VRP 21. This detailed, undisputed testimony about multiple specific acts of sexual assaults by M.D. unquestionably met the definition of nonconsensual sexual penetration and conduct. RCW 7.90.010 (defining sexual penetration as "any contact [or "intrusion"], however slight, between the sex organ or anus of one person by an object, the sex organ, mouth, or anus of another person....").

In addition to her own testimony, M.R. provided extensive corroborating evidence, though circumstantial, that she had been a victim of nonconsensual sexual conduct. She provided a witness affidavit from Mark Kho who saw both her and M.D. minutes after the assault, where M.R. appeared to be upset and crying. CP 28-29. Additionally, witness Angelina Caplanis's affidavit stated:

> At approximately 2 am [M.R.] came into the lounge. She wouldn't tell me what happened, and she was crying. I continued to ask if he had hurt her, and she would not answer...[the next day] she said when she met [M.D.]...he tried to go further than she was willing to go...She told me she covered herself and repeatedly told him to stop, but that he ignored her and continued to try to penetrate her...[M.D.] took off her underwear...he forced his fingers and mouth on her in that area, and even bit her at one point.

CP 18. Furthermore, witness Jasmine Correra's affidavit stated:

> The night [M.R.] was sexually assaulted was the night before her birthday. I was in the common lounge of Alder dorm building watching a movie with Angie Caplanis and Mark Kho when [M.R.] came in alone around midnight. She was extremely distraught: upset, crying, frustrated, and confused.

CP 26. During the trial, M.D. did not provice evidence dispute M.R.'s description of the sexual assault, and he did not rebut her corroborating witness evidence.

3. *The Respondent's Evidence Did Not Relate to Factors the Court had the Authority to Consider.*

Instead of refuting her description of the sexual assault, M.D. provided statements related to his character (CP 61-69), related to how much time had elapsed since he had last seen M.R. (CP 9-11), and related to his claimed intention to not communicate with or contact her in the future. CP 10, 35. Given the statutory mandate to grant a final order SAPO if the petitioner establishes nonconsensual sexual conduct, when a respondent does not

provide evidence to refute the evidence of nonconsensual sexual conduct, it is an error of law for the court to deny a final order SAPO based on other factors such as the respondent's character, the passage of time, or his intentions regarding future contact with the petitioner.

M.D. did also argue that M.R.'s memory of the sexual assault was not credible as she had received counseling during the intervening months. CP 49-50, 57-60. This argument has no persuasive value, given the undisputed witness statements proving that M.R. disclosed details of her assault immediately after its occurrence, before she pursued counseling. CP 18, 26. Moreover the record does not reflect that the trial judge gave any weight to this attack on M.R.'s credibility, and in fact the record does not reflect that the trial court had any doubt that the nonconsensual sexual conduct or penetration did in fact occur. Instead, the record shows that the trial court denied M.R. a final order based on factual considerations not permitted by the SAPO statute specifically that she did not file the SAPO quickly enough and that the court did not believe she had a reasonable fear of future dangerous acts by M.D..

4. *The Passage of Time After a Sexual Assault is Not a Legal Basis for Denying a Final Order SAPO.*

The SAPO statute has no statute of limitations within which a petitioner must seek relief, but in this case the trial court held that M.R.'s petition was filed too long after the assault to allow for entry of a final order:

> [B]ased on the unique facts of the situation, which is a situation in which the petition is filed about eight months after the time of the alleged assault. And I don't know that I would necessarily do so -- if we were here a few weeks or a month afterwards, I don't know that I would do so, because under those circumstances I don't know there would be any basis for M.R., based upon the facts that she's got here, to be able to address the issue of reasonable fear of future dangerous acts... I recognize that that could cause a problem in some cases. But under the peculiar facts of this case, where eight months had gone by before this petition was filed, I just don't think we've got a statutory basis for the procedure here

VRP 77-78. The imposition of this ambiguous and arbitrary statute of limitations, without any basis in the statute is a legal error.

Washington courts have consistently found that recent acts of violence are not required in order to obtain or renew protection orders. Case law on civil protection orders is limited, and case law on SAPOs is virtually nonexistent, so fact finders routinely look to case law on domestic violence protection orders under RCW 26.50 for guidance in interpreting the SAPO statute.

Unlike the SAPO statute (which requires only proof of a

sexual assault), the DVPO statute requires the petitioner to show present fear of harm based on past violence or threats. *Spence v. Kaminski*, 103 Wn. App. 325, 334, 12 P.3d 1039 (2000); *Muma v. Muma*, 115 Wn. App. 1, 6-7, 60 P. 3d 592 (2002); *Barber v. Barber*, 136 Wn. App 512, 516, 150 P.3d 124 (2007). However, even when a current fear is required, as in the DVPO statute, there is no requirement that the actions inspiring that fear occurred recently. *Id.*

In *Spence*, a petitioner testified she feared the respondent but there was no recent act of abuse and "most" of petitioner's "testimony rehashed violence that had occurred during their marriage and dissolution proceedings five years earlier." 103 Wn.App.at 329. Nevertheless, the Washington Supreme Court gave the petitioner's expression of fear great deference and rejected the respondent's argument that the statute required recent violence, stating "we decline to read into these statutes a requirement of a recent violent act." *Id.* at 334. The court held that "neither the United States Constitution nor the relevant state statutes require a recent act of domestic violence." *Id.* at 328.

Likewise, in *Muma* the Court found no recent acts of violence, but concluded that recent violence was not required because: "the Legislature has made it clear that the intent of

chapter 26.50 RCW is to prevent acts of domestic violence. We refuse to construe the law so as to require that [petitioner] wait until [respondent] commits further acts of violence against her or their children in order to seek an order for protection." 115 Wn. App. at 7; *accord Spence*, 103 Wn. App. at 334.

In this case, the trial court weighed the fact that M.R. waited eight months to file the SAPO petition against her. VRP at 77. In its oral decision, the trial court stated that "I'm rather basing my decision on the fact that the order itself is sought ... eight months later..." VRP 78-79. This was a clear error of law, because RCW 7.90 sets no time limitation on when a SAPO petitioner must seek relief.

In fact, the SAPO renewal statute demonstrates definitively that a recent sexual assault is not required for relief. The statute allows for renewal of a SAPO when it is nearing expiration (typically two years after the hearing), and provides no limitation on the number of renewals that can be granted. RCW 7.90.121. By authorizing renewals into perpetuity, the Legislature made it abundantly clear that it is a legal error to deny relief merely based on the passage of a mere eight months.

Furthermore, even if the court did have the discretion to consider the time between the assault and filing date, this factor was arbitrarily and unreasonably applied in this case. The SAPO statute anticipates that a petitioner may pursue protection through other methods, such filing a police report and seeking a criminal SAPO, and it anticipates that the petitioner may seek other civil remedies by noting that a civil SAPO is available "regardless of whether or not there is pending lawsuit, complaint, petition, or other action between the parties." RCW 7.90.020(2). The process of reporting a crime, the police investigation, prosecutorial review, filing charges, and obtaining a criminal SAPO may take many months, as may the process of hiring a tort attorney to pursue a lawsuit for damages. The statute anticipates that a petitioner may pursue all of these avenues before filing a SAPO petition, so the statue clearly allows for delays of at least a few months.

A victim of sexual assault may also need to pursue other extra-legal assistance prior to seeking civil relief from the courts. For example, a victim may seek protection by other means (such as reporting to law enforcement or to the parties' school), obtaining medical treatment or counseling to address the trauma, etc. The fact that not all victims are immediately ready to pursue legal

options is one reason, for example, RCW 9A.04.080(1)(c) allows the prosecution of a sex crime committed against a victim under the age of eighteen up to the victim's thirtieth birthday. Some victims need to recover to some degree before initiating legal action.

M.R. engaged in precisely these sorts of activities (seeking counseling, reporting to law enforcement and seeking on-campus relief) before seeking relief from the court. For example, a witness for M.R. submitted an affidavit describing why M.R. waited to report the sexual assault in September, once she was back on campus after the summer break:

> The next day [after the assault] [M.R.] told me that when she woke up she was bleeding vaginally...[M.R.] said that he forced his fingers and mouth on her in that area, and even bit her at one point. The result of his continuous violation was a puddle of blood on the floor of the bathroom. She said she couldn't cross her legs, and that it sometimes hurt to sit in a certain position. I told [M.R.] that she should probably see a doctor, but we never thought to report what had happened...I don't remember talking with her much about it the rest of that school year until the summer when she started going to therapy. [M.R.] would text me that she was going through EMDR therapy and remember the events a lot more vividly, and it was then that she decided that she would report the assault...when we got back to Seattle after summer vacation...I went with [M.R.] to UWPD to talk to the police officer.

CP 18. Similarly, in her petition, M.R. explained that she had already gone through the process of securing a University of

Washington no-contact order, but her repeated chance encounters with M.D. led her to seek a SAPO. CP 3-5. She also explained to the *ex parte* court that she was seeking the SAPO due to delays in the UW disciplinary process, as those delays had allowed M.D. to remain at UW despite the campus no-contact order:

> COURT: And has this matter been reported to the police?
> COUNSEL: It has.
> COURT: Okay.
> COUNSEL: And it's also going through the UDub's Student Conduct process.
> COURT: Okay.
> COUNSEL: But it's been taking several months which is the reason for the protection order.
> COURT: Sure.

VRP 4-5. Furthermore, her timing in filing for a SAPO resulted from her learning that the no-contact order issued by her school has no enforcement mechanism for off-campus violations. CP 4.

Pursuing other avenues of protection prior to filing for a SAPO was M.R.'s right, and her decision to exercise that right did not disqualify her from requesting a SAPO, regardless of how much time had passed. M.R.'s timing should not be considered a prejudicial factor, but should be recognized as an appropriate process of recovery. It was a clear legal error for the court to impose an arbitrary rule, with no statutory authority, that waiting eight months made her ineligible for a SAPO.

5. *It was a Legal Error to Deny M.R.'s Final Order SAPO Based on Skepticism Regarding the Risk of Additional Violence by the Respondent.*

Entry of a final order SAPO is mandatory if a petitioner proves nonconsensual sexual conduct or penetration by preponderance of the evidence, so it is a clear legal error to also require her to prove the additional element of a reasonable fear of future dangerous acts in order to get final relief. See supra section E(1).

In this case, the trial court seems to have been confused by the fact that the statute requires that the petition must include "specific statements or actions made at the same time of the sexual assault or subsequently thereafter, which give rise to a reasonable fear of future dangerous acts, for which relief is sought," and the fact that a lack of good cause to believe that the "harm which that remedy is intended to prevent would be likely to occur if the respondent were given any prior notice" may be a basis for denying *ex parte* temporary relief RCW 7.90.020(1). Mixing up the standards for a sufficient petition, for *ex parte* relief, and for a final order, is a clear error of law.

However, even if the trial court did have the authority to consider this factor, it erred by disregarding M.R.'s evidence of a

reasonable fear, instead giving greater weight to the character references provided by M.D.'s friends and family. M.R. provided extensive, unrebutted evidence that she was in fact frightened of the respondent. In her petition, M.R. stated that the M.D. bit her, sexually assaulted her orally and vaginally, and assaulted her so violently that she bled severely from her vagina which finally caused M.D. to stop sexually assaulting her. CP 4. M.R. went further, providing witness declarations attesting to the visible fear and trauma she suffered when ending up in the same places as the M.D., as observed by witness Valerie Shmigol:

> When she told me what [M.D.] well had done, it was clear to me that the situation still haunted her. In fact, we were sitting in the Husky Union Building and she kept looking over her shoulder in fear that he would be in the same area. . .I was with [M.R.] twice on campus when she had run into [M.D.] well. Both times it was in the quad/Red Square area. Both times she completely froze, unable to process any emotions. By the time I was able to gather what was going on, he had passed, and she began to shake....

CP 30. Likewise, Angelina Caplanis stated:

> [M.R.] is afraid to walk on campus in fear that she will run into [M.D.] and he will recognize her. She has, in fact, walked past [M.D.] multiple times while on campus, and she usually texts me when this happens. On one occasion she said she had to sit down for several minutes because she was shaking so badly. Now the fear has escalated to the point that her heart pounds and she is afraid every time she walks past a white male with dark hair and glasses.

CP 18. Moreover, as M.R. stated in her petition, "We have mutual friends and can end up in the same places and similar areas of campus. I did not know the Respondent before the night he raped me and do not know what he is capable of." CP 4. In fact, M.R.'s lack of any personal knowledge about M.D., other than his rape of her, arguably makes her fear of his potential future actions even more reasonable than a petitioner who has known the respondent for a longer period of time and has observed him engaging in ordinary, non-assaultive behavior.

Despite all this undisputed evidence the Court failed to find M.R.'s fear reasonable or sufficient:

> Because this is a statutory procedure, the Court's basis for going forward is based upon what the legislature's provided in statute. And it says, 'the petition for relief shall be accompanied by an affidavit, that there were statements or actions made at the same time of the sexual assault, or subsequently thereafter, which give rise to a reasonable fear or future dangerous acts for which relief is sought.' And I'm not seeing anything in the petition about future dangerous acts. Yes, there is material in the petition that indicates why M.R. would have reason to think that she may run into M.D. in the future, because, you know, they're both attending the UW. But there's nothing about future dangerous acts. And I'm trying to figure out whether I've got a basis to go forward at this point, if I don't have a petition that complies with the statute.

VRP 64-65. Later the Court acknowledged M.R.'s evidence that she was placed in fear, but concluded: "While M.R. has said that

she has seen M.D. and been placed in fear by doing so, that doesn't constitute a reasonable fear of future dangerous acts.' VRP 77. In other words, the trial court held that not only was M.R. required to prove she was afraid of M.D., and that her fear was reasonable, the trial court also required that she prove M.D. was actually likely to use sexual or physical violence against her in the future. This is a grossly inappropriate interpretation of the SAPO statute's wording and purpose.

The term "future dangerous acts" is not defined by the SAPO statue. RCW 7.90.010. Therefore, it is appropriate to look to the relief available in the SAPO (to restrict the respondent from communicating with the petitioner or going near places she is likely to be) and its legislative intent (to provide "safety and protection from future interactions with the offender"). RCW 7.90.050,.090. If the relief available in a SAPO was merely a restraint against future assaults, then the "dangerous acts" for which relief could be sought might be limited to dangerous assaults, but that is not the case. *Id.* The danger "for which relief is sought" is not solely the possibility of being raped or assaulted again, but includes the danger to the victim's psychological well-being that would result from having any "interaction" with a person responsible for already inflicting

"humiliation, degradation, and terror" on the Petitioner. *Id;* RCW 7.90.005.

Moreover, many of the forms of nonconsensual sexual conduct defined under the Act are not physically dangerous. For example, the standard imposed by the trial judge would mean that if a man repeatedly exposed himself to a woman for purposes of his sexual gratification but he had no apparent propensity for "dangerous" violent acts, the indecent exposure victim would not be able to get a final order SAPO even though this sort of sexual exhibitionism is specific type of nonconsensual sexual conduct included in the statute. RCW 7.90.010(4)(b).

There is no basis for interpreting the SAPO statute to require the petitioner to predict and prove the respondent's likely future behavior. In fact, such a requirement would be nonsensical given the relationship between the DVPO and SAPO statutes. When a petitioner has a long-term, extensive relationship with a respondent (such as a parent/child or marital relationship), the petitioner might have some chance of predicting what future actions a respondent might engage in, but these petitioners are eligible for DVPOs, not SAPOs. RCW 7.90.010; RCW 26.50. In the vast majority of SAPO cases, the parties are strangers or mere acquaintances, so it would

be impossible for the petitioner to have sufficient knowledge of the respondent to be able to prove his likely future behavior.

Furthermore, without this sort of close long-term relationship (which would require the case to be filed as a DVPO), it is extremely rare for a rapist to rape the same victim on multiple occasions over time. Consequently, if this Court allows the imposition of an evidentiary burden of proving the likelihood of future sexual or physical violence by the respondent against the petitioner, it is difficult to imagine almost any petitioner being able to meet the evidentiary burden for a SAPO. This clear contravention of the legislative intent by the trial court should be reversed on appeal.

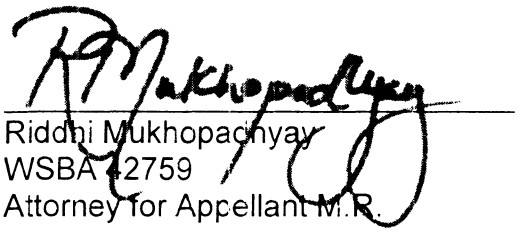
V. CONCLUSION

M.R. presented undisputed testimony that M.D. engaged in nonconsensual sexual conduct and sexual penetration of her vagina and mouth on the night of May 9th, 2014. She presented testimony that was corroborated by several witnesses, demonstrating that her interaction with M.D. that night culminated in an assault that left her traumatized and fearful when she saw him on future occasions. The trial court erroneously confused the legal

standards for a sufficient petition, *ex parte* temporary relief, and a final order. The trial court also erroneously added additional elements and burdens on M.R. beyond the requirements of RCW 7.90.050, such as the court's holding that she waited to long to file the case and failed to prove that M.D. would likely violently assault her again in the future. Affirming the trial court's reading of RCW 7.90 would guarantee that virtually no victims of a sexual assault could qualify for a SAPO. Therefore, M.R. respectfully requests that this court reverse the denial of her Sexual Assault Protection Order against M.D. and remand for a full hearing on her request for a final order SAPO.

Dated this 17th of August, 2015.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on the date listed below I served one copy of this brief on the Respondent's attorney by email, pursuant to our agreement to accept service by email:

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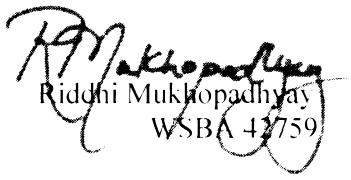
Dated this August 17, 2015.



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