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NO. 65930-8-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

IN RE: DETENTION OF KAINE GILLESPIE

STATE OF WASHINGTON,

Respondent,

v.

KAINE GILLESPIE,

Appellant.

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

APPELLANT'S OPENING BRIEF

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COURT OF APPEALS
DIVISION ONE

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A. SUMMARY OF ARGUMENT.

In 1998, Kaine Gillespie stipulated to his civil commitment under RCW ch. 71.09 based on his agreement with the State that he was appropriate for a less restrictive alternative. Gillespie was 18 years old and had been convicted of a sex offense when he was 14.

The State later reneged on the stipulated agreement and Gillespie has remained under total confinement despite his successful placement in a less restrictive alternative for several years. In the meantime, scientific studies have shed new light on his likelihood for committing future offenses when his only offending conduct occurred as an adolescent. Recent evaluations by two qualified experts changed Gillespie's diagnosis. One expert opined that Gillespie had been misdiagnosed and no longer had any mental abnormality of the type required for civil commitment. Another expert diagnosed Gillespie with Asperger's syndrome, which explained Gillespie's modes of behaving and communicating that the State's experts had attributed to an unwillingness to be treated. Even the State's experts changed their diagnosis to disorders that do not demonstrate an ability to control behavior.

The trial court applied an unconstitutional standard in denying Gillespie's request for a full hearing on annual review and misapplied the law when denying his request to withdraw his stipulation.

B. ASSIGNMENT OF ERROR.

1. The court erred by refusing to allow Gillespie to withdraw his stipulation.

2. The State breached the terms of the stipulation, thus entitling Gillespie to withdraw it and have a commitment trial.

3. The court applied the wrong standard to find Gillespie's motion to withdraw his stipulation was untimely. CP 13 (Order Denying Motion to Withdraw Stipulation, Conclusion of Law 3, attached as Appendix A).

4. The court used unconstitutional criteria to deny Gillespie a full hearing on annual review.

5. The court improperly denied Gillespie's motion to reconsider his annual review hearing following a significant change in the law.

6. To the extent the court's conclusions of law are deemed to be findings of fact, the court improperly found Gillespie continues to meet the criteria for confinement and there is no less restrictive

alternative that would be in Gillespie's best interest. CP 10 (Show Cause Hearing, Conclusion of Law 2, attached as Appendix B).

7. If the court's conclusion of law is deemed a finding of fact, the record does not support the court's conclusion that Gillespie did not present prima facie evidence that his condition had so changed or that release would be in his best interest. CP 10 (Show Cause Hearing, Conclusion of Law 3).

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. A stipulation to agree to indefinite civil commitment is akin to a contract in which binds the parties. The State agreed that Gillespie should receive a less restrictive alternative (LRA) and need not prove the appropriateness of a LRA at a show cause hearing, in exchange for Gillespie agreeing to his commitment. Later, the law changed rendering unenforceable the stipulation's agreement that Gillespie need not submit to a show cause hearing before receiving a LRA. Did the change in the law invalidate the stipulation?

2. CR 60(b)(11) allows a party to challenge a judgment based on extraordinary circumstances. Civil commitments are annually reviewed and therefore the judgments do not carry an expectation of finality. Gillespie's case presents extraordinary

circumstances, as he could not have expected the State would renounce the stipulation for a LRA, that the science would change to undermine the validity of his initial risk assessment, or that he would receive multiple new diagnoses that do not prove the requisite mental abnormality. Do these numerous changes provide sufficient cause to let Gillespie withdraw his stipulation and have a commitment trial?

3. Under the annual review proceedings of RCW 71.09.090, as interpreted in the Supreme Court's recent ruling in In re Detention of McCuistion, 169 Wn.2d 633, 238 P.3d 1147 (2010), Gillespie was entitled to a full hearing on whether he meets the criteria for confinement if he presented prima facie evidence that he no longer met the criteria for commitment. Gillespie presented competent expert evidence that he did not have a mentally abnormality predisposing him to commit sexually violent offenses, and that the science of risk assessment had changed to show he did not present a likelihood of reoffense. Did Gillespie establish a prima facie case that he is entitled to a new trial on whether he should remain totally confined under RCW ch. 71.09?

D. STATEMENT OF THE CASE.

Kaine Gillespie stipulated to his commitment under RCW ch. 71.09 in 1998, based on sex offenses he committed when he was 14 years old. CP 17. He was 17 years old when the State filed its petition for commitment. CP 16.

The stipulated agreement provided that the State agreed Gillespie was appropriate for a less restrictive alternative placement (LRA), and could remain in one as long as he abided by certain conditions and the State approved of the placement facility.

3/30/98RP 4-5, 14-15; CP 516-17. At the time they entered the stipulation, the parties agreed that Gillespie would likely go to a facility in South Carolina called New Hope, where he had briefly stayed before the State sought to commit him. 3/30/98RP 9. The parties agreed that if the South Carolina facility did not work out, Gillespie could be placed in a Washington LRA. 3/30/98RP 8.

The court signed the stipulated commitment, finding this agreement is “the best solution for this young man,” and “I hope South Carolina will work out.” 3/30/98RP 11. The court found that a LRA was in Gillespie’s best interest and adequately protected the community. CP 88; CP 456-7.

The stipulated agreement also provided that the State would waive the requirement of a show cause hearing, and the one-year predicate commitment period that usually applied to people seeking a LRA. CP 516.

Gillespie entered into the stipulation, was committed, and went to the New Hope facility as he expected. CP 455-56. However, the New Hope facility only housed people under 21 years of age. CP 19. When Gillespie turned 21 in 2001, the State brought him back to Washington and placed him at the Special Commitment Center. CP 19.

Even though Gillespie had not violated the conditions of his release while serving the LRA, the State no longer abided by its agreement that Gillespie was qualified for a LRA. It objected to his placement outside total confinement. CP 19; CP 273. It agreed that it was not "unwilling" to consider a LRA but insisted Gillespie first locate an acceptable placement. CP 273. Gillespie has remained housed in total confinement since 2001. CP 19.

Dr. Theodore Donaldson evaluated Gillespie for purposes of assessing his current condition. CP 92, 99-100. He concluded that the State's diagnosis of pedophilia was clinically inapplicable and he did not meet the diagnostic criteria. CP 93. Donaldson further

concluded that Gillespie did not have any paraphilia, was not dangerous, and the State's prior evaluations were fundamentally flawed. CP 93, 96-98. In 2009, Dr. Steven Becker determined that Gillespie has Asperger's syndrome, which is a serious developmental disorder. CP 135-38. He opined that many of the behavioral characteristics that the State's experts use to diagnosis paraphilia are actually manifestations of undiagnosed and misunderstood Asperger's syndrome. CP 138. Becker concluded that "it is highly probable that Mr. Gillespie's offense was directly caused by his pervasive lack of understanding of socially appropriate behavior due to his Autism." CP 138.

In 2009, Gillespie filed a motion to withdraw his stipulation and seeking a new trial to determine whether he meets the criteria for civil commitment. CP 15-148. The trial court denied the motion, finding that the request to withdraw the stipulation was untimely and Gillespie had not shown a sufficient change in his condition to justify a new trial under the then-in-effect annual review criteria of RCW 71.09.090. CP 11-14. The court denied Gillespie's motion to reconsider its annual review finding when the Supreme Court found the criteria for annual review was unconstitutional. CP 9-10.

Pertinent facts are explained in further detail in the relevant argument sections below.

E. ARGUMENT.

1. WHERE GILLESPIE'S STIPULATION TO HIS CIVIL COMMITMENT WAS UNDERMINED BY CHANGES IN LAW AND WAS BREACHED BY THE STATE, THE STIPLUATION SHOULD BE WITHDRAWN

- a. Gillespie's stipulation to commitment was contingent on conditions that were undermined by changes in the law. Gillespie entered into a stipulation in which he agreed that he met the criteria for civil commitment under RCW ch. 71.09, in exchange for an agreement that a less restrictive alternative was in his best interest and he would not need to prove this best interest at a show cause hearing. CP 17, 81-82, 88. This stipulation provided that while Gillespie's LRA request would be subject to court oversight and approval, it would not require him to preliminarily prove the appropriateness of a LRA through a show cause hearing. CP 81.

In 2009, the Legislature changed the law governing a committed person's ability to obtain release to a less restrictive alternative. It modified RCW 71.09.090(2)(d) to require a show cause hearing in all cases, and barred the court from ordering a

LRA without first conducting a show cause hearing. The new portion of the statute provided:

The court may not find probable cause for a trial addressing less restrictive alternatives unless a proposed less restrictive alternative placement meeting the conditions of RCW 71.09.092 is presented to the court at the show cause hearing.

RCW 71.09.090(2)(d). This requirement did not exist before 2009 legislative enactment. Laws 2009, ch. 409, sec. 8 (effective May 7, 2009).

When Gillespie moved to withdraw his stipulation in 2010, the State emphasized this change in the statute as a ground for denying Gillespie's request and to show that he had not met the criteria for placement in a LRA. The State insisted that Gillespie must first offer a proposed LRA at a show cause hearing before the court could consider the appropriateness of release. This change in the law creates an obstacle to Gillespie's release to a LRA that is contrary to the terms of his stipulation.

b. The State breached the agreement upon which the stipulation was predicated, thus undermining the enforceability of the stipulation and entitling Gillespie to withdraw. The stipulation for Gillespie's commitment was predicated on his amenability for release, and the State agreed that Gillespie was appropriate for a

LRA. 3/30/98RP 14-15; CP 82 (“the parties agree that the Respondent is appropriate for a less restrictive alternative”). Pursuant to the stipulation, the only basis upon which Gillespie’s LRA would be revoked was if he was not complying with the conditions of release. CP 83. It did not provide that the State’s agreement to the appropriateness of an LRA was contingent upon anything other than the identification of a facility for Gillespie’s release. 3/30/98RP 14-15.

Gillespie’s LRA was not revoked due to his failure to comply with the conditions of release. The court entered a lengthy list of conditions and the State never alleged he violated those conditions. CP 444-54. The State returned him to total confinement at the SCC because his facility would not accept any person over 21 years old. CP 19. Once Gillespie turned 21, he was forced to leave his LRA based on his age. Id.

Upon his return to the SCC, the State reneged on its stipulated agreement that Gillespie would be appropriately treated and housed in a LRA. CP 270-73. Instead, it insisted that Gillespie did not meet the criteria for conditional release. Id. It pointed to no change in circumstances prompting this reversal. The State did not renege on its approval of a LRA on the basis that Gillespie was

now more dangerous. CP 276. Rather, it reversed its position on his amenability for a LRA because he was not presently housed in one and he did not propose another LRA. The State conceded it was “not unwilling” to agree to another LRA but Gillespie bore the burden of locating one. CP 272.

Gillespie explained that the State bore the burden of providing LRA facilities. CP 280-81. Under In re Detention of Young, 122 Wn.2d 1, 47, 857 P.2d 989 (1993), consideration of a less restrictive alternative is an essential constitutional requirement of civil commitment. The constitutional requirement of considering a less restrictive alternative is illusory if the State avoids its application by refusing to offer any potential less restrictive placements. CP 281. The State agreed that Gillespie could be amenable to treatment at an LRA, but insisted that Gillespie must locate the facility and disavowed any responsibility for aiding Gillespie in his placement. CP 272.

During this same period of time that the State reneged on its promise the Gillespie was suitable for a LRA, and blamed Gillespie for failing to locate one, the State was under federal court oversight based on its lack of treatment, particularly the absence of LRA opportunities. From 1994 until 2007, the SCC was under federal

court mandate to create and employ a meaningful treatment program at the SCC. Sharp v. Weston, 233 F.3d 1166, 1168 (9th Cir. 2000);¹ Turay v. Richards, 2007 WL 983132 (W.D. WA 2007) (State's failure to develop a LRA by 2004 did not comply with minimum professional treatment as constitutionally required), aff'd, 2009 WL 229838 (9th Cir. 2009).²

The State failed to assist Gillespie locate a LRA and insisted that he must meet the criteria of a show cause hearing, even though the State had waived that requirement in the agreed stipulation that was the basis of Gillespie's commitment. The State disavowed and breached its stipulation that Gillespie met the criteria for a LRA without just cause.

c. Because the State breached the stipulation when it repeatedly and continual refused to aid or support the LRA contrary to its agreements, Gillespie's request to withdraw his stipulation is timely and should be granted. The court denied Gillespie's request to withdraw the stipulation as untimely under CR 60(b)(11), rather than based on its merits. CP 13. The court viewed the triggering event as the entry of the stipulation, and measured the timeliness

¹ The Ninth Circuit refused to dissolve the injunction in 2000, holding, "SCC still does not provide the type of treatment program that is constitutionally required for civilly-committed persons" Sharp, 233 F.3d at 1172.

from that point. CP 13. Yet a triggering event may arise well after the judgment that the party seeks to vacate. In re Marriage of Thurston, 92 Wn.App. 494, 500, 963 P.2d 947 (1998); see also Knies v. Knies, 96 Wn.App. 243, 247, 979 P.2d 484 (1999) (six year delay from judgment to motion to vacate).

The triggering event in Gillespie's case was not the entry of the stipulation, contrary to the court's assumption. Gillespie entered the stipulation with the understanding that the State would agree to and aid him with receiving placement at a LRA. CP 17-19. The State complied for several years with the bargain that it struck.

Once Gillespie was required to leave his original placement at the age of 21, the State no longer abided by the stipulation. CP 270-73. Despite the lack of changes in circumstances or violations of conditions of release, the State did not agree that Gillespie met the criteria for a LRA. However, the State held out hope to Gillespie, saying it was "not unwilling" to consider a LRA if Gillespie located one. CP 273. Gillespie was unable to locate an acceptable LRA without State assistance but the State refused to give assistance contrary to its earlier promise.

² Unpublished federal decisions may be cited. FRAP 32.1; GR 14.1.

Because the State initially claimed that it would consider a LRA upon Gillespie's return to Washington, Gillespie was not put on notice that the State would completely disavow the stipulation at first. It only became obvious to Gillespie as the years passed and the State reneged on any efforts to accommodate Gillespie with a less restrictive alternative and maintained its insistence that he did not qualify for a LRA. Then, the statute changed to mandate show cause hearings in all cases and undermined his ability to receive LRA placement without a show cause hearing as contemplated in the stipulation. Thus, the date when Gillespie was finally put on notice and understood that his stipulation had been illusory did not occur until many years after the stipulation was entered.

Furthermore, the purpose of the "reasonable time" requirement to challenge a judgment under CR 60(b)(11) is the interest of finality in enforcing such a judgment. See Flannagan v. Flannagan, 42 Wn.App. 214, 218, 709 P.2d 1247 (1985) ("final decrees may be reopened under CR 60(b)(11)" but "we emphasize the importance of finality and the limited nature of our deviation from the doctrine"). Judgments entered in RCW 71.09 cases involve very different expectations of finality than other matters. Unlike a money judgment in a negligence suit, a 71.09 judgment of

commitment is subject to annual review. RCW 71.09.070. Not only may the person change who has been subjected to confinement, but the sciences of psychiatry and risk assessment may change. See McCuiston, 169 Wn.2d at 640 n.2; In re Detention of Young, 120 Wn.App. 753, 763, 86 P.3d 810, rev. denied, 152 Wn.2d 1035 (2004) (“Because current risk assessment techniques suggest Young is not an SVP, denying him a hearing at this point raises due process concerns.”). Accordingly, the parties to a civil commitment do not maintain the same expectation of finality after a judgment as in other civil cases. The policy of finality that courts rely upon to prohibit challenges to prior judgments should not bear upon a later challenge to a judgment of civil commitment.

The interest of justice should prevail in Gillespie’s case to extend the “reasonable time” to ask to revoke his stipulation. Not only has the law changed such that the stipulation to avoid a show cause hearing may no longer be accommodated, Gillespie did not fully understand the illusory nature of his stipulation until significant time passed after he entered into it.

Moreover, the stipulation contains significant flaws. When the court entered the stipulated commitment order, it merely found

Gillespie had “a mental abnormality,”: without specifying what it was. CP 88. The diagnosis used by the State’s expert is no longer endorsed by the State’s evaluators. CP 92, 95. In fact, Gillespie has a serious developmental disability that was not diagnosed until recently. CP 137-38. This disability has colored his understanding the proceedings from the inception, as well as the State’s experts’ interpretation of his behavior. Even the State’s treatment programs do not suit his needs. 8/6/10RP 46, 48.

Gillespie stipulated to his commitment because the State agreed that he was suitable for commitment in a LRA, without needing to prove that amenability at a show cause hearing. 3/30/98RP 14-15. The State breached this agreement after the first LRA could no longer house Gillespie due to his age. The statute no longer accommodates the terms of the stipulation. Gillespie is entitled to a new commitment trial and should receive one, both because the State breached the bargain it struck when Gillespie agreed to stipulate to commitment and due to the changed circumstances addressed below.

2. THE COURT IMPERMISSIBLY DENIED GILLESPIE A SHOW CAUSE HEARING WHEN HE PRESENTED EVIDENCE THAT HE NO LONGER MET THE CRITERIA FOR CONFINEMENT

a. The court improperly refused to reconsider its

annual review ruling after a fundamental change in the law. In August 2010, the court denied Gillespie's motion for a new trial pursuant to the annual review scheme set forth in RCW 71.09.090. CP 9-10. The court denied the motion under the scheme in effect in 2010. Shortly thereafter, the Supreme Court ruled that the annual review scheme set forth in 71.09.090 was unconstitutional, and Gillespie filed a motion for reconsideration based on the change in the law. In re Detention of McCuiston, 169 Wn.2d 633, 238 P.3d 1147 (2010). The court refused to reconsider despite the material change in the law. Supp. CP __, sub. no. 246.

Although the trial court did not give a reason for refusing to apply the new legal standard, the State based its objection to Gillespie's motion to reconsider on purely procedural grounds. Supp. CP __, sub. no. 244, p.3. The State claimed that the motion for reconsideration was untimely because it was not filed within 10 days of the court's original decision. The State ignored the obvious change in the law in its motion opposing reconsideration, even

though it had predicated its opposition to Gillespie's request for a shoe cause hearing based on the unconstitutional portion of the annual review statute, insisting the treatment success was the only available method for attaining release through annual review.

8/6/10RP 42-46; see McCuiestion, 169 Wn.2d at 644.

Under CR 60(b)(11), a substantial change in the law is reason to reconsider a ruling. See In re Marriage of Michael, 145 Wn.App. 854, 861, 188 P.3d 529 (2008). There is no doubt that McCuiestion represented a substantial change in the law. It struck the annual review criteria in effect at the time of Gillespie's hearing as unconstitutional and overruled contrary Court of Appeals decisions. McCuiestion, 169 Wn.2d at 644.³ In the interest of justice and judicial economy, the material change in the law should have been cause for the trial court to reconsider its recently entered decision denying Gillespie's request for new trial, when the court based its decision on invalidated annual review criteria. McCuiestion, 169 Wn.2d at 644.

³ McCuiestion overruled a contrary decision that the trial court relied on in its decision, In re Detention of Reimer, 146 Wn.App. 179, 184, 190 P.3d 74 (2008). CP 10.

b. Gillespie should receive a new trial based on the change in his condition showing he no longer meets the criteria for commitment. Even where an initial commitment is proper, the State violates due process when it continues to confine a person who is no longer both mentally ill and dangerous. Foucha v. Louisiana, 504 U.S. 71, 77, 112 S.Ct. 1780, 118 L.Ed.2d 437 (1992) (reversing where individual was dangerous but no longer suffered from psychosis); U.S. Const. amend. 14; Wash. Const. art. I, § 3. “Because commitment” under RCW 71.09 “is indefinite in nature, the due process requirement that [a committed person] be mentally ill and dangerous is ongoing.” McCouston, 169 Wn.2d at 638.

“Periodic review of the patient’s suitability for release” is required to render commitment constitutional. Jones v. United States, 463 U.S. 354, 368, 103 S.Ct. 3043, 77 L.Ed.2d 3043 (1984). Due process mandates that the State release a committed person “when the basis for holding him or her in the psychiatric facility disappears.” State v. Sommerville, 86 Wn. App. 700, 710, 937 P.2d 1317 (1997) (reversing and remanding for conditional release due to insufficient evidence of mental illness, even though State’s psychiatrist reported defendant currently suffered from

“impulse control disorder not otherwise specified, in partial remission”).

By statute in Washington, involuntarily committed individuals have a right to an annual examination to determine whether they remain mentally ill and dangerous. RCW 71.09.070. Each individual also has the right to an annual show cause hearing at which the court decides whether probable cause exists to warrant a full trial on whether the individual continues to meet the criteria for commitment. RCW 71.09.090. The State bears the burden of proof at the show cause hearing. State v. Petersen, 145 Wn.2d 789, 795, 42 P.3d 952 (2002).

A full trial must be granted if either (1) the State fails to present prima facie evidence that the committed person continues to meet the definition of an SVP, or (2) probable cause exists to believe that the person’s condition has so changed that he no longer meets the definition of a person who may be committed. RCW 71.09.090(2)(c).

This Court reviews a trial court’s decision following a show cause hearing de novo. Petersen, 145 Wn.2d at 799. The question on review is “whether the evidence, or lack thereof, suffices to establish probable cause for an evidentiary hearing.” In

re Detention of Elmore, 162 Wn.2d 27, 37, 168 P.3d 1285 (2007).

At the annual review hearing, “[i]f the committed individual produced prima facie evidence showing, for any reason, that he was not an SVP, he was entitled to a jury trial at which the State would have to prove his continued SVP status beyond a reasonable doubt.” McCouston, 169 Wn.2d at 643. *Prima facie* evidence is “a very low standard” that bars the court from weighing the evidence. Petersen, 145 Wn.2d at 797, 803. Gillespie did not need to convince the court that expert opinion that he did not meet the criteria for commitment was correct, or even that it was as credible as the opinions offered by the State. Gillespie simply bore the burden of presenting some evidence that, if believed, would show he did not meet the criteria for SVP commitment. Petersen, 145 Wn.2d at 803; Young, 120 Wn.App. at 759.

i. There is prima facie evidence of change reducing Gillespie’s risk of future dangerousness. New scientific studies and literature demonstrates Gillespie’s reduced risk of reoffense. Gillespie was committed in 1998 based on a conviction that occurred when he was a juvenile, and based on acts he engaged in as a juvenile. CP 16, 93. In the time since he was committed in 1998, scientific evidence has changed, and current

evidence discounts research on risk assessments for people who commit their sex offenses as juveniles. 8/6/10RP 6-8, 11; CP 24-25; CP 97-98.

A change in the scientific assessment of a person's dangerousness may qualify as a basis to find probable cause that a person's condition has changed and a meets the requirements for a new trial. See McCuiston, 169 Wn.2d at 640 n.2 (noting significance of demographic changes in reducing statistical likelihood of reoffense and providing probable cause to full hearing on annual review). A reduced risk of recidivism may sufficiently establish prima facie evidence that a person no longer meets the commitment criteria. Id. at 643.

As Gillespie explained, experts in the field now recognize that risk assessments used to commit Gillespie are not created to predict the risk for juvenile offenders and do not accurately predict their risk of reoffending. 8/6/10RP 6-11. Gillespie pointed to recent studies in which researchers found that juvenile sexual offenders do not reoffend in the same manner as adults. CP 24.⁴ Instead,

⁴ Caldwell, Michael, "Sexual Offense Adjudication and Sexual Recidivism Among Juvenile Offenders," Sexual Abuse, 19:107-113 (2007); Vandiver, Donna, "A Prospective Analysis of Juvenile Male Offenders: Characteristics and Recidivism Rates as Adults," Journal of Interpersonal Violence, Vol. 21 no. 5, 673-88 (May 2006).

the majority of sexual offenses committed by teenagers is not due to a mental abnormality. Caldwell, at 107-13. The cause of a juvenile sex offense is most likely due to “external or other unstable forces, including developmental factors,” rather than deviant sexual interests. Id. Juvenile sex offenders who reoffend as adults tend to commit “nonsexual and nonassaultive” offenses, rather than commit future sexual offenses as an adult. Vandiver, at 673-88. As a 2010 study evaluating the current scientific understanding of predicting future dangerousness for juvenile offenders noted, “risk prediction methods used for adult sex offenders are not appropriate for adolescent populations.” Soothill, Keith, “Sex Offender Recidivism,” 39 Crime and Justice 145, 173 (2010). The same study also found the recent studies show, “Quite simply, most juvenile sex offenders may not be the future threat that many might have expected.” Id. at 165.

Thus, current scientific studies demonstrate that the adult actuarial tests that were used to support Gillespie’s commitment falsely represent his risk of committing future sexually violent acts. 8/6/10RP 8-10. This reduced risk assessment provides *prima facie* evidence that Gillespie no longer meets the criteria for commitment and justifies a full hearing. McCustion, 169 Wn.2d at 643.

ii. There is cause to grant a new hearing based on the significant change in Gillespie's diagnosis. In addition to the change in Gillespie's risk assessment since his confinement, he presented evidence of a change in his diagnosis that demonstrated he no longer had the mental abnormality causing him to be sexually predatory, as required for continued commitment.

Dr. Theodore Donaldson, whose area of expertise is assessing sex offenders, did not diagnosis Gillespie with any paraphilia or pedophilia, and concluded that Gillespie is not a sexually violent predator. CP 28, 93, 99-100. Donaldson's diagnosis alone sufficiently establishes Gillespie's right to a further hearing on annual review. McCouston, 169 Wn.2d at 642-43.

Donaldson explained that the pedophilia the State's experts had diagnosed was fundamentally flawed. CP 93. Because Gillespie did not have a child victim after he was over the age of 16, pedophilia "cannot" be diagnosed. Id. And Gillespie had not exhibited further signs of symptoms of pedophilia "in any of the annual reviews." Id.; see also CP 96 ("A diagnosis of pedophilia in Mr. Gillespie's case seems impossible to support."); CP 97 ("there appears to be a total lack of evidence of current signs and

symptoms of Pedophilia, and one must conclude that, if he ever had the diagnosis, it is now in full remission.”).

Donaldson did not find evidence of any mental abnormality required under RCW 71.09. He concluded that his behavior was “part of his overall acting out.” CP 97. His behavior “was far more opportunistic than behavior driven by a specific sexual psychopathy.” Id. Donaldson concluded that there is a “total lack of evidence” that Gillespie “has any difficulty controlling his sexually dangerous behavior.” Id.; see also CP 93 (“in my opinion, Mr. Gillespie no longer suffers from Paraphilia, NOS, for rape” if he ever did).

In addition, Dr. Stephen Becker evaluated Gillespie in April 2010 and found “ample evidence” that Gillespie has Asperger’s Syndrome, also known as high-functioning autism. CP 137.⁵ He explained that this “is a serious developmental disability that affects the person’s ability to understand complex social situations.” Id. The State’s expert Dr. Mark McClung agreed with this change in Gillespie’s diagnosis, and also agreed that Asperger’s explains much of Gillespie’s communication and behavioral difficulties, which had in the past been interpreted as a reluctance to succeed

in treatment or a fixation on certain aspects of sexuality. CP 138; CP 104-05. Asperger's can create rigid attention and an inability to verbally communicate. CP 32.

Becker concluded that "it is highly probable that Mr. Gillespie offense was directly caused by his pervasive lack of understanding of socially appropriate behavior due to his Autism." CP 138. Becker's diagnosis calls into question many of the assumptions about Gillespie's behavior, which the State had interpreted as showing sexual deviance, but which Becker explains is a function of this developmental disability.

Furthermore, even the State's experts have changed their diagnosis for Gillespie, and the current diagnosis does not establish a mental abnormality that causes a lack of volitional control over committing sexually violent acts. The change in diagnosis provides probable cause to believe Gillespie does not have the necessary mental abnormality predisposing him to commit sexually violent acts in a predatory fashion.

At the time of his original commitment, Gillespie was not specifically diagnosed. CP 88. The findings of fact entered as part of the commitment order simply said that Gillespie "suffers from a

⁵ Becker has a Ph.D. in abnormal psychology and special education.

mental abnormality as defined in RCW 71.09.020,” without finding what mental abnormality had been proved. CP 88 (Finding of Fact V). The court’s inability to find a specifically diagnosed mental abnormality calls into question the predicate for Gillespie’s commitment.

Once committed, the State’s experts claimed Gillespie had pedophilia. CP 93. Recent evaluators have discounted the pedophilia diagnosis, finding insufficient evidence for it. CP 29. The change in diagnosis itself calls into question its reliability, and Donaldson’s two evaluations sharply criticize the State’s evaluation methods and conclusions.

Recently, the State’s expert McClung agreed with Becker that Asperger’s was a likely explanation for Gillespie’s behavior that had not previously been diagnosed. CP 103. Yet McClung claimed Gillespie also had a mental abnormality: paraphilia NOS, with the specifiers of fetishism, partialism, and a pattern of pedophilic behavior. Id. There is probable cause to doubt the validity and reliability of this diagnosis and whether it established the requisite mental abnormality for commitment under RCW ch. 71.09.

A paraphilia with a “pattern of pedophilic behavior” is not the same as pedophilia. CP 29. If Gillespie had that disorder, he would be diagnosed with it. Instead, McClung contended that Gillespie had exhibited pedophilic behavior. This “pattern of behavior” diagnosis is merely a description of his past behavior. If it was a diagnosis for current intense arousal of children, it would be diagnosed as pedophilia. A description of past behavior does not mean a present likelihood to commit such offenses or a current inability to control such behavior, which is required for a 71.09 civil commitment. CP 29.

McClung’s two other “descriptors” of paraphilia are even more problematic in terms of establishing a mental abnormality that predisposes Gillespie to commit sexually violent acts. Both fetishism and partialism are related, one focusing on non-living objects and the other as arousal to particular body parts. CP 30. McClung claimed Gillespie’s partialism involved his focus on the female breast or vagina, but the diagnostic criteria for partialism excludes any genital part. CP 31. Even if the fetishism and partialism are true, they are not clinically linked to committing sexually violent offenses. CP 31. Moreover, these diagnoses do not describe Gillespie’s past behavior. CP 31.

c. Gillespie should receive a full hearing because he presented evidence that his condition had changed and he no longer met the criteria for confinement. Gillespie presented evidence from authoritative sources, including qualified experts with undisputed credentials who evaluated Gillespie and recent scientific studies showing that he was neither dangerous nor mentally ill. He does not have pedophilia, or a paraphilia that renders him dangerous beyond his control. In addition, changes in scientific understanding of juvenile sex offenders have demonstrate that he does not present a risk of re-offense. Even if the State's expert is believed, Gillespie has shown that the diagnosis given is not the type of serious mental illness necessary for continued lawful commitment under 71.09.

In Kansas v. Hendricks, 521 U.S. 346, 360, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997), Justice Kennedy warned, if "civil confinement were to become a mechanism for retribution or general deterrence, or if it were shown that mental abnormality is too imprecise a category to offer a solid basis for concluding that civil detention is justified, our precedents would not suffice to validate it." Id. at 373 (Kennedy, J., concurring). A majority of the Court in Crane agreed that "the nature of the psychiatric diagnosis,

and the severity of the mental abnormality itself, must be sufficient to distinguish the dangerous sexual offender whose serious mental illness, abnormality, or disorder subjects him to civil commitment from the dangerous but typical recidivist convicted in an ordinary criminal case.” Kansas v. Crane, 534 U.S. 407, 413, 122 S.Ct. 867, 151 L.Ed.2d 856 (2002). Not just any mental disease or defect is sufficient to justify continued custody. State v. Klein, 156 Wn.2d 103, 119, 124 P.3d 644 (2005).

Qualified experts have diagnosed Gillespie as not suffering from any mental abnormality and explained his behavior is due to his previously undiagnosed Asperger’s syndrome. The risk assessment tools are used to commit him are unreliable and invalid for a person whose last offense was committed as a juvenile. At a minimum, the State’s change in diagnosis to the imprecise and far more benign “fetishism, partialism, and pattern of pedophilic behavior,” provides probable cause to warrant a full trial on the merits of Gillespie’s continued confinement.

Civil commitment may not continue unless a serious mental disorder causes the committed individual to be dangerous. RCW 71.09.020(18). Recent evidence discounts the likelihood of Gillespie’s current dangerousness and is certainly sufficient to

create probable cause to question whether he continues to meet the criteria for commitment. 8/6/10RP 6-11; RCW 71.09.020(18); Foucha v. Louisiana, 504 U.S. 71, 82-83, 112 S. Ct. 1780, 1785, 118 L. Ed. 2d 434 (1992).

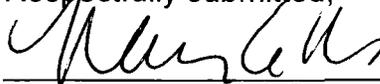
This Court should grant review, reverse the superior court, and order a full trial on whether Gillespie continues to meet the requirements for commitment under RCW ch. 71.09. McCuiation, 169 Wn.2d at 644; Petersen, 145 Wn.2d at 803.

F. CONCLUSION.

For the reasons stated above, Kaine Gillespie respectfully asks this Court to reverse the trial court's ruling and order he receive a new trial based on the invalidity of the stipulation and because there is probable cause to believe he no longer meets the criteria for commitment.

DATED this 31st day of January 2011.

Respectfully submitted,



NANCY P. COLLINS (WSBA 28806)
Washington Appellate Project (91052)
Attorneys for Appellant

APPENDIX A

FILED

S. Hill

August 20, 10

SONYA KRASKI
COUNTY CLERK
SNOHOMISH CO. WASH.



**STATE OF WASHINGTON
SNOHOMISH COUNTY SUPERIOR COURT**

In re the Detention of:

KAINE GILLESPIE,

Respondent.

NO. 97-2-08555-0

ORDER DENYING MOTION
TO WITHDRAW STIPULATION
AND MOTION FOR NEW TRIAL

THIS MATTER came before the Court on August 6, 2010, for hearing on Respondent's Motion to Withdraw Stipulation, which included a motion for new trial. At the hearing, the State was represented by Assistant Attorney General GRADY LEUPOLD. Respondent was present by telephone and represented by his counsel, MARTIN MOONEY. In reaching a decision in this matter, the Court considered the pleadings and records in this matter, including but not limited to Respondent's Motion to Withdraw Stipulation and the Memorandum in Response to Respondent's Motion to Withdraw Stipulation and For a New Trial along with the exhibits attached to each and the argument of counsel. Based upon all of this, the Court enters the following Findings of Fact, Conclusions of Law, and Order:

FINDINGS OF FACT

1. Respondent entered a Stipulation to Civil Commitment as a Sexually Violent Predator with Findings of Fact and Conclusions of Law on March 30, 1998. Mr. Gillespie was represented by counsel at the time and the court accepted his stipulation at a hearing in which the court determined that he understood what he was doing and his decision to stipulate was made knowingly, voluntarily and intelligently. This stipulation included the finding that "treatment in a facility less restrictive than total confinement at the Special Commitment Center is in the best

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1 interests of the respondent" and allowed the respondent to file a petition for release to a less
2 restrictive alternative. The respondent was still required to establish that a less restrictive
3 alternative would adequately protect the community and comply with the requirements of RCW
4 71.09.

5 2. Mr. Gillespie has been civilly committed as a sexually violent predator since he
6 entered the stipulation. He remained at the Special Commitment Center in Steilacoom,
7 Washington until approximately June 11, 1998 when he was transferred to New Hope Carolinas, a
8 treatment facility in South Carolina. This transfer was made pursuant to the court entering
9 Findings of Fact and an Order of Conditional Release to Less Restrictive Alternative on June 24,
10 1998, after a hearing on the Respondent's petition for less restrictive alternative. He remained at
11 New Hope Carolinas until December 2001 on a less restrictive alternative.

12 3. New Hope Carolinas had an age limit of 21 years. As a result, on Mr. Gillespie's
13 21st birthday (December 31, 2001), he was transferred back to the SCC where he has remained
14 until the present. The transfer back to the SCC was consistent with the provisions of the Order of
15 Conditional Release to a Less Restrictive Alternative which required Mr. Gillespie to be
16 transported back to Washington State to remain in a secure facility until a hearing could be
17 scheduled to determine whether an amended less restrictive alternative would be in the best
18 interests of the respondent and would adequately protect the community.

19 4. A hearing was held before Respondent's return from South Carolina on his petition
20 to be released to a less restrictive alternative than the SCC upon his return to Washington. This
21 petition was denied by the court because there was no proposed release plan.

22 5. Since Respondent's return in 2001, the SCC has completed annual evaluations for
23 Mr. Gillespie as required by RCW 71.09.070, including evaluations dated September 23, 2009 and
24 February 24, 2010. The evaluators have concluded each year that Mr. Gillespie continues to meet
25 the definition of a sexually violent predator and that a less restrictive alternative is not in his best
26 interests and would not adequately protect the community. In addition, the two most recent
evaluations conclude that Mr. Gillespie may suffer from autism which requires further assessment

1 and that a diagnosis of pedophilia cannot be given with certainty but he does meet the criteria for a
2 diagnosis of paraphilia NOS with fetishism, partialism and a pattern of pedophilic behavior.

3 6. Respondent submitted an evaluation by Dr. Stephen Becker which concludes that
4 he does suffer from high functioning autism, also referred to as Asperger's Disorder. In addition,
5 Dr. Becker opines that Respondent's sexual offenses as a juvenile were a result of his limited social
6 functioning due to Asperger's Disorder. Dr. Becker also states that there is no evidence from his
7 evaluation that Mr. Gillespie would now exhibit behavior of a pedophile. This is stronger language
8 than the SCC evaluators but not inconsistent with their statements that pedophilia cannot be
9 diagnosed with certainty.

10 6. Mr. Gillespie now claims that his stipulation to civil commitment was not supported by
11 sufficient consideration because the state's agreement that he could have a hearing pursuant to
12 RCW 71.09.00 to determine his release to a less restrictive alternative without first having to
13 prevail at a show cause hearing was illusory. This argument is based on the statutory provisions
14 regarding show cause hearings and less restrictive alternatives that were in effect at the time of the
15 stipulation and the language of the stipulation itself.

16 CONCLUSIONS OF LAW

17 1. This Court has jurisdiction over the parties and subject matter herein.

18 2. Mr. Gillespie's challenge to his stipulation is untimely in that twelve years have
19 passed since he entered into the stipulation and the reasons he raises in support of his request to
20 withdraw his stipulation have been known to him since the time he entered into the stipulation.

21 3. With regard to his motion for new trial, Mr. Gillespie has not established any basis
22 sufficient under CR 60 to warrant the grant of a new trial. In particular, he has not presented newly
23 discovered evidence sufficient to establish probable cause that he no longer meets the definition of
24 a sexually violent predator.
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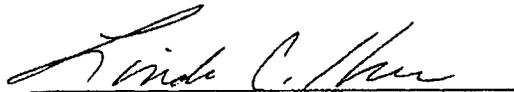
1 Based on the foregoing Findings of Fact and Conclusions of Law, the Court now enters the
2 following:

3 **ORDER**

4 IT IS HEREBY ORDERED:

- 5 1. That Respondent's Motion to Withdraw Stipulation is denied.
6 2. That Respondent's Motion for New Trial is denied.

7 DATED this 20th day of August, 2010.
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10 THE HONORABLE LINDA KRESE
11 Judge of the Superior Court
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APPENDIX B

FILED

S. Nici
August 20, 10
SONYA KRASKI
COUNTY CLERK
SNOHOMISH CO. WASH.



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STATE OF WASHINGTON
SNOHOMISH COUNTY SUPERIOR COURT

In re the Detention of:

NO. 97-2-08555-0

KAINE GILLESPIE,

ORDER ON SHOW CAUSE
HEARING

Respondent.

THIS MATTER came before the Court on August 6, 2010, to determine whether Respondent is entitled to a trial to determine whether he should be unconditionally released or released to a less restrictive alternative pursuant to RCW 71.09.090. At the hearing, the State was represented by Assistant Attorney General GRADY LEUPOLD. Respondent was present by telephone and represented by his counsel, MARTIN MOONEY. In reaching a decision in this matter, the Court considered the pleadings filed in this matter, the evidence presented at the show cause hearing, and the argument of counsel. Based upon all of this, the Court enters the following Findings of Fact, Conclusions of Law, and Order:

FINDINGS OF FACT

1. Respondent was committed to the care and custody of the Department of Social and Health Services (DSHS) as a sexually violent predator on March 30, 1998.
2. On September 23, 2009 and February 24, 2010, DSHS submitted written annual reviews of Respondent's mental condition to this Court.

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1 **CONCLUSIONS OF LAW**

2 1. This Court has jurisdiction over the parties and subject matter herein.

3 2. DSHS's annual reviews of Respondent's mental condition provide prima facie
4 evidence of the following:

5 a. Respondent's condition remains such that he continues to meet the
6 statutory definition of a sexually violent predator; and

7 b. Any proposed less restrictive alternative placement is not in the best
8 interest of Respondent, nor can conditions be imposed that would adequately
9 protect the community.

10 3. Pursuant to *Detention of Reimer*, 146 Wn.App. 179, 190 P.3d 74 (Div. II, 2008)
11 and *Detention of Petersen v. State*, 145 Wn.2d 789, 42 P.3d 952, 958 (2002), Respondent did not
12 present prima facie evidence that his condition has so changed that:

13 a. He no longer meets the definition of a sexually violent predator; or

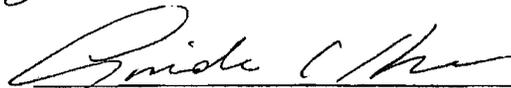
14 b. Release to a proposed less restrictive alternative would be in his best interest,
15 and conditions can be imposed that would adequately protect the community.

16 Based on the foregoing Findings of Fact and Conclusions of Law, the Court now enters
17 the following:

18 **ORDER**

19 IT IS HEREBY ORDERED: That this Court's order civilly committing the
20 Respondent to the custody of DSHS as a sexually violent predator shall continue until further
21 order of the Court.

22 DATED this 20th day of Aug, 2010.

23 

24 THE HONORABLE LINDA KRESE
25 Judge of the Superior Court
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