

NO. 70692-6-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

In re the Detention of
RICHARD ROY SCOTT

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STATE OF WASHINGTON
COURT OF APPEALS
DIVISION I
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STATE'S RESPONSE BRIEF

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I. INTRODUCTION

On November 6, 2007, the first day of his civil commitment trial, appellant Richard Roy Scott stipulated to civil commitment as a sexually violent predator. Scott acknowledged on the record that he was making the choice to accept the stipulation “after weighing the strategic benefits of proceeding versus the strategic benefits of entering into the stipulation.”

As a basis for his commitment Scott accepted the reports and diagnoses of two psychologists, Drs. Packard and Judd, both of whom diagnosed Scott as suffering from Pedophilia, while only one, Dr. Packard, also diagnosed Scott as suffering from Paraphilia Not Otherwise Specified (Hebephilia). Both psychologists also found that Scott suffered from a personality disorder. Scott admitted that these conditions, “together,” made him likely to commit predatory acts of sexual violence if not confined in a secure facility. Scott admitted that even while detained at the Special Commitment Center pending trial he had engaged in conduct that indicated his ongoing sexual interest in children as young as seven.

Nearly six years after his stipulation Scott filed a CR 60(b) motion claiming that rejection of the diagnosis of hebephilia for inclusion in the latest version of the DSM showed the diagnosis to be invalid, and that had he known hebephilia was not a valid diagnosis he would not have entered into the stipulation to commitment. The only evidence he presented to the

trial court in support of his proposition that hebephilia was an invalid diagnosis was a two-page article by Dr. Allen Frances published in Psychology Today. The trial court denied his motion.

The trial court did not abuse its discretion in denying Scott's CR 60(b) motion because the motion was untimely. Moreover, the fact that hebephilia was rejected for inclusion in the DSM-V as a specific diagnosis is of no legal significance. Washington State and Federal courts have frequently admitted in SVP proceedings expert testimony regarding Paraphilia Not Otherwise Specified (Hebephilia), just as these same courts have repeatedly admitted a similar diagnosis, Paraphilia Not Otherwise Specified (Rape), despite Paraphilic Coercive Disorder having been rejected for inclusion as a specific diagnosis in the DSM on several occasions. Finally, in his stipulation, Scott agreed that the diagnosis of pedophilia alone, as found by both psychologists, was a sufficient basis for his commitment.

II. ISSUES PRESENTED FOR REVIEW

Whether the trial court abused its discretion by denying Scott's CR 60(b) motion when Scott waived his right to challenge the State's experts by stipulating to commitment and when there has been no genuine change in law or science?

III. STATEMENT OF THE CASE

Facts Related to Scott's Offending and Diagnoses

The November 6, 2007, stipulation allows for consideration of the Petition and Certification for Probable Cause (with attached exhibits), the March 20, 2007, report of Dr. Richard Packard (CP 275), and the August 16, 2006, report of Dr. Judd (CP 302) to provide a factual basis and legal basis for the stipulation. CP 37. The stipulation is further supported by a series of pedophilic-themed materials authored or compiled by Scott while awaiting his civil commitment trial at the Special Commitment Center. CP 42-274. In the stipulation, Scott acknowledges that this document "indicate[s] an active and deviant sexual interest in relationships, including sexual contact, with boys ranging in age from 7-15." CP 36-37. These documents and others cited below constitute the record for this appeal.

Scott was born June 11, 1947.¹ His father was an alcoholic and the family was often in financial difficulty. They moved frequently. Mr. Scott was often ill as a child. He continues to have problems with real and imagined ailments. He has two older siblings, neither of whom has had problems with the law.

¹ The facts in this section are generally derived from the Certification for Determination of Probable Cause, which was an agreed factual basis for Scott's stipulation to commitment and is contained at CP 3-6.

He has consistently tested as having an average IQ, but never adapted to school. He dropped out of school during the 10th grade. He was drafted into the army in 1967, but was discharged less than six months later as “unable to adapt to military life.” Almost all of his sexual contact has been with other males. He has never married and never lived with anyone in a consensual adult relationship. His history shows he has difficulty maintaining stability in any aspect of his life and has difficulty adapting to new situations.

His work history has been spotty. He has held numerous jobs, mostly for short periods of time. He has often been fired for drinking, being late, and disagreeing with supervisors. At least three of his jobs (houseparent at a children’s home, counselor at an outdoor club, and used car sales) have provided him with access to young boys that he has sexually assaulted.

He has admitted to fondling seven to ten boys from 7 to 12 years of age while supervising them at the children’s home. Scott sexually abused his 13 or 14 year old foster brother when Scott was in his mid-20’s. He sexually assaulted a number of boys, ages 11 to 15, while a camp counselor. He used his job as a used-car salesman to sexually abuse young fellow employees. He has admitted to at least 20 young victims, which is likely a significant underestimate.

Scott's "predicate" SVP conviction is for five counts of Indecent Liberties against a child under 14. He was convicted in 1984 in King County No. 84-1-01467-5. The victims of these crimes were male, ranging from 7 to 13 years of age. Scott sexually assaulted them at his business and residence. Scott fondled the young boys' genitals (and forced them to fondle his), frequently exposed his genitals to the boys, showed them pornographic materials, and photographed the boys' genitals. Scott threatened one of the boys with a knife, forcing him to perform sexual acts. During the course of the investigation, several additional victims came forward, but additional charges were not filed.

Mr. Scott received a 10-year sentence for his 1984 convictions. This sentence was suspended on condition that he complete the Sexual Psychopathy Program at Western State Hospital. He was terminated from this program after only four months due to "nonamenability to treatment" and returned to prison to complete his sentence. He was repeatedly denied parole due to his refusal to participate in sexual offender treatment and his continued risk to re-offend. At times he has requested that he not be paroled early. He has complained of medical problems most of his life. He considers himself emotionally unstable.

Mr. Scott received no major infractions while incarcerated for the offenses, but often was housed in a segregation unit at his own request. He consistently refused any sexual deviancy treatment.

He has received several mental health evaluations. In September, 1984, William Satoran, a therapist who treated Mr. Scott for several months, diagnosed him as suffering from Paraphilia, Pedophilia (exclusively homosexual); Alcohol Dependence, chronic; Somatization Disorder; and rule-out diagnosis of Mixed Substance Abuse. He also diagnosed Mr. Scott as suffering from Mixed Personality Disorder with anti-social features.

In January, 1985, Gordon Hall, Ph.D., Maureen Saylor, M.A., Director at the Western State Hospital Sex Offender Program, and M. M. Vitols, M.D., Clinical Director, evaluated Mr. Scott for King County Superior Court Judge Holman. They diagnosed Mr. Scott with suffering from Paraphilia, Pedophilia and Mixed Personality Disorder with Dependent and Schizoid Features. They stressed that Mr. Scott was not safe to be released and that he continued to grossly minimize his sexual offenses. His MMPI profile showed him to harbor feelings of hostility and aggression, feelings of social inadequacy, distrust, isolation, and alienation. Many people with similar profiles lead a nomadic life with

poor work histories. They have minimal introspection abilities and have difficulty seeing the bad in their own behavior.

In November, 1992, Psychologist Dieter Burckhardt diagnosed Mr. Scott with Pedophilia (homosexual) and Narcissistic Personality Disorder with Strong Anti-Social Features. He expressed concern that Mr. Scott was exploitative in his social interactions, with difficulty recognizing objective realities.

Ten years of incarceration for his 1984 convictions did not diminish Scott's interest in young boys. In fact, Scott's interest appeared to intensify. After Scott's release into the community, he continued to sexually assault boys. Scott surrounded himself in the company of his victim pool - young, troubled boys. While living in Seattle, he was implicated in a sexual assault.

He then moved to the Long Beach Peninsula in Pacific County. Once in Long Beach, Scott owned a lawn mowing service and employed young boys to help him. He did not limit their duties to his professional business. He sexually abused one 15 year old boy in particular – D.H – and sexually assaulted non-adjudicated victims, as well.

In May 2001, while still in Long Beach, Scott's sexual assault of young boys again came to the attention of authorities. He was arrested and charged with Rape of a Child 3 (Pacific County No. 01-1-00082-7).

The facts of this offense are set out in the June 21, 2001,

Pre-Sentence Investigation:

The Victim [D.H] (dob 4-12-85) provided the following information to Child Protective Services with Officer S.W. Harman of the Long Beach Police Department on 5-10-01.

The Victim reported that from approximately April 2000 until recently, Richard Scott had been having anal, oral, and digital sex with him. (Richard Scott will turn fifty-four years old on June 11, 2001.) The Victim said that in the past five to six months he and Scott had engaged in sexual activities approximately 100 times. The Victim said that this sexual activity started shortly after the Victim's birthday in April of 2000, and stopped only during the time he was in another state.

The Victim said that he worked for Scott and had stayed the night at his residence on a couple of occasions. The Victim also said that he has observed Scott watching homosexual pornographic pictures on Scott's internet connection. The Victim said that these pictures appeared to be of underage boys engaging in sex. The Victim said he had seen Scott putting the victim's name and other juveniles' names into chat rooms for other pedophiles.

The Victim told the CPS interviewer that Richard Scott had "made me fuck him and hack him off." The Victim said this happened every time he spent the night at Scott's house and that he spent the night there about one night out of every three nights. The Victim said that Scott would threaten him "every once a while."

Ms. Connie Dufour reported that at the end of February or the beginning of March 2001 she and a juvenile entered Richard Scott's residence and observed him engaging in anal sex with the Victim. The Victim was 15 years old at the time. Ms. Dufour states that she observed the victim wearing only a T-shirt, as he was bent over a bed. Scott was standing behind the Victim. Scott was wearing only a

robe, and the robe was open. Ms. Dufour observed that Scott was wearing no clothes under the robe, and saw Scott's penis between the Victim's bottom cheeks. When Scott observed that Ms. Dufour and the juvenile were in the residence, he yelled at them to "get the hell out."

CP 22. The PSI further states that "Scott groomed the victim by bringing him into his home under false pretenses, and abused his position of authority to manipulate and abuse the victim sexually. CP 25. Scott admits taking persons into his house that he considered vulnerable due to homelessness, addiction to drugs/alcohol, had no food, or were out of work and ultimately engaging in sexual acts with them." CP 25.

Scott was convicted of Rape of a Child in the Third Degree for his assault of D.H. Numerous other allegations were made regarding Scott's extensive contact with young boys, but the plea agreement included the negotiated condition that the police department cease their investigation of other allegations of sexual assault and misconduct.

The State initiated sexually violent predator proceedings upon Scott's release on May 19, 2003. After a probable cause hearing, he was transferred to the Special Commitment Center (SCC). While at the SCC, Scott continued to show a strong pedophilic interest in young boys. Apart from his extensive actions as a pro se litigant in federal, state and appellate courts, he also managed to compile a 234 page pedophile manifesto, which he entitled "Paedophile Information Exchange (P.I.E.), Societies

Monsters?” CP 42-274. The writings include references, for example, about loving boys, a poll that the age of sexual consent should be as low as 10 years old (but that boys should be free to choose at any age), and that adult male sexual relations with boys are not harmful to boys. It is illustrated with photos of young boys. Despite access to a treatment program for sex offenders, Scott continued to defiantly promote his permissive and celebratory views of pedophilia.

For SVP commitment purposes, Mr. Scott was evaluated by two experts, Dr. Brian Judd and Dr. Richard Packard, who are both members of the Joint Forensic Unit. Relying on the above history, along with volumes of additional information, both mental health professionals determined that Scott suffered from Pedophilia, Attracted to Males, Nonexclusive Type (302.2). As Dr. Judd details in his evaluation:

Cumulatively, the balance of the evidence supports a lengthy history of sexual arousal to minor males. In light of Mr. Scott’s 39 year history of non-adjudicated and adjudicated offending against minor males, I believe he clearly meets criteria for a diagnosis of Pedophilia... The persistence of Mr. Scott’s pedophilic arousal and continued use of paraphilic outlets despite sanctioning, and extensive involvement in chat rooms and websites devoted to “boylovers” clearly indicates that Mr. Scott’s paraphilic arousal is durable, ingrained, and robust, and substantially attenuates his volitional control. As a result of his paraphilic disorder, Mr. Scott is predisposed to endanger the health and safety of minor males. As such, I believe

Mr. Scott's Pedophilia meets the statutory criteria for a "mental abnormality" as defined in RCW 71.09.

CP 329.

The records also supported additional diagnoses. Dr. Judd's diagnoses of Scott include Anti-Social Personality Disorder, Not Otherwise Specified, With Anti-Social and Narcissistic Traits (301.9) and Alcohol Abuse (by history) (305.00). Scott's pervasive disregard for the rights of others, his deceitfulness, manipulation, and grandiose sense of self and entitlement, and lack of victim empathy combined with several other flawed personality characteristics support the diagnosis under the DSM-IV-R. *See generally* CP 302-36.

Like Dr. Judd, Dr. Packard diagnosed Scott with Pedophilia. CP 297. Additionally, Dr. Packard found that Scott suffered from Paraphilia Not Otherwise Specified (Hebephilia). CP 297. Regarding Scott's personality disorder, Dr. Packard based his diagnosis on similar characteristics identified by Dr. Judd but defined it as "Personality Disorder, Not Otherwise Specified, with Antisocial, Narcissistic, and Histrionic features." CP 296. Dr. Packard also agreed that Scott's Alcohol Abuse is by history, but further opines that Scott meets the criteria for Bipolar I Disorder Most Recent Episode Unspecified, Without

Interepisode Recover (206.6), Somatization Disorder (300.81), and Malingering (V65.2). CP 298.

At trial, both experts were prepared to opine to a reasonable degree of psychological certainty that Scott is more likely than not to engage in predatory acts of sexual violence if not confined to a secure facility. The experts' opinions are based on sound actuarial and risk assessment analysis, both of whom considered Scott's age, months remaining on supervision, as well as his lack of sexual deviancy treatment -- among other factors. In short, the expert testimony and surrounding facts provided strong support for the conclusion that Scott should be civilly committed as a sexually violent predator.

Facts Relating to the Stipulation and CR 60(b) Motion

On November 6, 2007, the first day of his scheduled SVP trial, Scott stipulated to civil commitment.² In the course of this stipulation, he negotiated several important provisions from the State and acknowledged that his entry of the stipulation was knowing, intelligent and voluntary. The prosecutor went over the stipulation line-by-line with Scott. Scott understood that the result of the stipulation was to civilly commit him as a sexually violent predator and that he had no unanswered questions about the

² A verbatim report of proceedings for the November 6, 2007, stipulation hearing was produced for Scott's appeal of issues he reserved at the time of his stipulation. Scott's appeal was denied at *In re Detention of Scott*, 150 Wn. App. 414 (2009). The VRP is cited herein and attached to this filing.

stipulation. VRP at 27-28. Scott readily acknowledged the various rights that he was waiving by entering into the stipulation. *Id.* at 28-30. In particular, Scott understood that he was waiving his right to appeal with the exception of the reserved issues on page 2(a). *Id.* at 30. Scott then initialed the portion of the stipulation indicating (in bold print) that “[t]he respondent understands that by entering into this Stipulation he is knowingly, voluntarily and intelligently waiving these rights.” CP 34.

The State asked Scott to “verify that you have not been threatened or coerced into entering this stipulation, nor have you received any promises causing you to enter into this stipulation.” VRP 11/06/07 at 32. Scott responded, “That’s correct.” *Id.* Scott unambiguously indicated that he understood the nature of the civil commitment. *Id.* Scott freely admitted that he suffered from a personality disorder and mental abnormality, and that he was more likely than not to commit further predatory acts of sexual violence if not confined in a secure facility. *Id.* at 33. Scott acknowledged that his act of compiling the “Societies Monsters” document (attached to the stipulation) while at the SCC indicated an active and deviant sexual interest in relationships, including sexual contact, with boys ranging from ages 7 to 15. *Id.* at 33. Scott acknowledged on the record that he was making the choice to accept the stipulation “after weighing the strategic benefits of

proceeding versus the strategic benefits of entering into the stipulation.”

Id. at 66.

Where Scott disagreed with portions of the stipulation, he obtained the State’s agreement to strike them. *Id.* at 31. For example, he insisted that the State strike a provision from page 4 of the stipulation indicating that he had committed a recent overt act. CP 37.

The court also engaged in an extensive colloquy with Scott, providing Scott with a second extended opportunity to voice any concerns. The court used the same method that would be used when taking a guilty plea in a criminal case. The court confirmed that Scott was making his decision “freely and voluntarily,” to which Scott answered “correct.” VRP at 41.

As agreed by Scott, the factual basis for the stipulation was supplied by the Petition and Certification for Probable Cause (with exhibits) and the reports of Dr. Richard Packard and Dr. Brian Judd. CP 37. Scott agreed that he suffered from a number of mental abnormalities and personality disorders: Paraphilia Pedophilia, Paraphilia Not Otherwise Specified (Hebephilia), and Personality Disorder, Not Otherwise Specified, with antisocial, narcissistic, and histrionic features. CP 36. He agreed that these mental abnormalities and personality disorders, “together or separately,” make it seriously difficult for him to control his behavior, and that he is more

likely than not to commit acts of predatory sexual violence if not confined in a secure facility. *Id.*

On June 5, 2013, nearly six years after stipulating to commitment, Scott filed his “60B Motion for Release Order.” CP 343-45. Scott argued that a “change in science” supported his motion because the newly published DSM-V had rejected a proposal to include hebephilia as a mental disorder. CP 344. The only “evidence” supplied by Scott to the trial court in support of his claim of a change in science was a two-page apparent copy of an article authored by Allen Frances, M.D., published in the on-line edition of Psychology Today in February, 2013. CP 385-86. The trial court denied Scott’s motion. CP 399-400.

IV. ARGUMENT

A. STANDARD OF REVIEW.

This Court reviews a trial court’s decision on a CR 60(b) motion for a manifest abuse of discretion. *In re Detention of Mitchell*, 160 Wn. App. 669, 675, 249 P.3d 662 (2011) (citing *Haley v. Highland*, 142 Wn.2d 135, 156, 12 P.3d 119 (2000)). A trial court abuses its discretion “only if there is a clear showing that the exercise of discretion was manifestly unreasonable, based on untenable grounds, or based on

untenable reasons.” *Id.* (quoting *Moreman v. Butcher*, 126 Wn.2d 36, 40, 891 P.2d 725 (1995)).

Unlike an appeal, a CR 60(b) motion is not a means of correcting errors of law. *Burlingame v. Consol Mines & Smelting Co.*, 106 Wn.2d 328, 336, 772 P.2d 67 (1986). Accordingly, when a party appeals the trial court’s denial of a CR 60(b) motion, we review only the trial court’s decision to deny the motion -- not the underlying order that the party seeks to vacate. *Bjurstrom v. Campbell*, 27 Wn. App. 449, 450-51, 618 P.2d 533 (1980). “An appeal from denial of a CR 60(b) motion is limited to the propriety of the denial not the impropriety of the underlying judgment.” *Id.*, citing *Browder v. Director, Dept. of Corrections*, 434 U.S. 257, 263, 98 S. Ct. 556, 560, 54 L. Ed. 2d 521, 530, n.7 (1978) (Supreme Court holding that an appeal from an order denying a Rule 60(b) motion brings up for review only the correctness of that denial and does not bring up for review the final judgment.).

B. THE STIPULATION IS A BINDING AGREEMENT AND WAIVES APPEAL ON ALL OTHER ISSUES.

As discussed above, Scott reserved only three specific issues for possible appeal from the Order of Commitment. In the stipulation, Scott indicates that he is “knowingly, voluntarily, and intelligently waiving” his

right to appeal “with the exception of the items listed on page 2A of this stipulation.” CP 32-33. In the referenced section, it states that:

By entering into this stipulation, Mr. Scott reserves the right to appeal the following rulings *only*:

1. The trial court’s ruling denying his motion to dismiss re the circumstances under which the petition was filed, including the question of whether he was lawfully confined;
2. The trial court’s order denying Scott’s motion to dismiss for work product violations;
3. The trial court’s ruling determining that Mr. Scott’s conviction for ROC 3 in 2001 in Pacific County is [a] recent overt act under RCW 71.09.020.

CP 33 (emphasis added).

Washington law is clear that a defendant “may waive his or her right to appeal a conviction as long as the waiver is done intelligently, voluntarily and with an understanding of the consequences.” *State v. Perkins*, 108 Wn.2d 212, 215, 737 P.2d 250 (1987). There is “a strong public interest” in enforcing the terms of such plea agreements. *Id.* at 216. A defendant “cannot challenge the appeal waiver without challenging the validity of the entire agreement.” *State v. Ermels*, 156 Wn.2d 528, 541-42, 131 P.3d 299, 304-05 (2006). This court should decline to review Scott’s CR 60(b) claim because his stipulation to civil commitment is binding.

C. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY DENYING SCOTT'S CR 60(b) MOTION BECAUSE IT WAS TIME-BARRED.

The trial court did not abuse its discretion when it denied Scott's CR 60(b) motion because the motion was not brought within statutory time limits. CR 60(b) provides, in pertinent part:

The motion shall be made within a reasonable time and for reasons (1), (2) or (3) not more than 1 year after the judgment, order, or proceeding was entered or taken.

CR 60(b) provides that the time period begins "after the judgment, order, or proceeding was entered or taken." Thus, the relevant time period is "the period between when the moving party became aware of the judgment and the filing of the motion." *Luckett v. Boeing Co.*, 98 Wn. App. 307, 312-13, 989 P.2d 1144, 1147 (1999). Scott's motion cited only CR 60(b) without identifying any subsections, but since his motion argued only "change in science" it can only reasonably be interpreted as a motion pursuant to CR 60(b)(3), relating to newly discovered evidence, which must be filed within one year of the entry of judgment.

In his appeal, Scott cites CR 60(b)(11), a catch-all provision which allows a motion for relief from judgment to be brought "within a reasonable time" and not limited to one-year after judgment as is a motion based on newly discovered evidence. This must be rejected as a

bald-faced attempt to circumvent that one-year limitation. *See Friebe v. Supancheck*, 98 Wn. App. 260, 267, 992 P.2d 1014 (1999) (“CR 60(b)(11) cannot be used to circumvent the one-year time limit applicable to CR 60(b)(1).”).

Scott, on appeal, erroneously characterizes Scott’s argument before the trial court: “... Mr. Scott contests his initial commitment order based on newly discovered evidence and a change in the law and science. CR 60(b)(3), (11).” Appellant’s brief at 6. In fact, as stated above, Scott’s motion before the trial court did not specify any subsections of CR 60(b) and cited only “change in science,” not a change in law. Scott’s claimed change in science is an evidentiary matter and is governed by CR 60(b)(3) with its one-year time limit. Scott attempts to shoehorn his argument into CR 60(b)(11) by claiming a “change in law” and citing *In re Detention of Ward*, 125 Wn. App. 374, 104 P.3d 751 (2005). *Ward*, which was analyzed under CR 60(b)(11), is inapposite because it concerned a genuine change in law: the supreme court’s requirement from *In re Detention of Young*, 122 Wn.2d 1, 857 P.2d 989 (1993), that the State prove a recent overt act if the alleged SVP had not been in confinement at the time of the filing of the petition for commitment. In the case at bar, Scott claims that a change in law allows the more generous filing period under CR 60(b)(11), but nowhere in his brief does he tell us what that change in

law is. Clearly, there is no change in the law, as had been the case in *Ward*, and Scott's CR 60(b) motion must be limited to the one-year filing period pursuant to subsection (b)(3).

Even if this reviewing court were to consider Scott's motion under CR 60(b)(11) and not hold him to the strict one-year limit for a motion based on new evidence, Scott's motion must still be rejected as untimely. Scott's motion is untimely because the same motion, in which he simply argues that hebephilia is not a valid diagnosis, could have been filed at any time. As argued below, the "new rejection" of hebephilia for the DSM-V is no change at all and is not a triggering event that justifies a CR 60(b) motion. Scott's CR 60(b) motion was filed on June 5, 2013 – more than five and one-half years after the commitment order was entered. CP at 343. That is not a reasonable period of time.

D. THE REJECTION OF HEBEPHILIA AS A SPECIFIC PARAPHILIA DIAGNOSIS IN THE DSM-V DOES NOT CONSTITUTE EXTRAORDINARY CIRCUMSTANCES THAT WOULD WARRANT RELIEF UNDER CR 60(b)(11).

Because the basis of Scott's motion was evidentiary and implicates CR 60(b)(3), application of CR 60(b)(11) is inappropriate since that subsection is "confined to situations involving extraordinary circumstances not covered by any other section of the rule."

In re Marriage of Yearout, 41 Wn. App. 897, 902, 707 P.2d 1367 (1985)

(quoting *State v. Keller*, 32 Wn. App. 135, 140, 647 P.2d 35 (1982)).

These extraordinary circumstances must relate to “irregularities extraneous to the action of the court.” *Yearout*, 41 Wn. App. at 902;

Barr v. MacGugan, 119 Wn. App. 43, 48, 78 P.3d 660 (2003).

Even if Scott were not limited to CR 60(b)(3), his appeal must be rejected because Scott fails to establish extraordinary circumstances that would afford him relief pursuant to CR 60(b)(11). The event cited by Scott is actually a non-event: the “rejection” of hebephilia for inclusion as a separate formal diagnosis in the latest version of the DSM. As Scott must acknowledge, hebephilia was not included in the DSM-IV-R in 2007 when he waived his right to trial of contested issues by stipulating to commitment, just as it is not part of the latest version of the manual. The status of hebephilia as a formal diagnosis under the DSM has not changed.

Moreover, Scott fails to recognize that his appeal is limited to review of the trial court’s denial of his motion and is not a mechanism to attack his underlying commitment. *Bjurstrom v. Campbell*, 27 Wn. App. 449, 450-51, 618 P.2d 533 (1980). Rather than limiting his argument to whether the trial court abused its discretion by denying the motion that was presented by Scott, the supporting record of which consisted solely of a two-page article from Psychology Today, Scott in this appeal attempts

an ad hoc *Frye* hearing by presenting citations to other sources that were never before the trial court.³ In fact, the only article actually presented to the trial court, from *Psychology Today*, defeats the entire premise of Scott's appellate argument – that “rejection” of hebephilia by the DSM-V is of any legal significance at all. In the article, its author, Dr. Allen Frances, writes that not only hebephilia was rejected for inclusion in DSM-V, so was “coercive paraphilia.” CP 386. Significantly, he writes that coercive paraphilia was repeatedly rejected for inclusion in previous iterations of the DSM.

The proposal to create a mental disorder diagnosis for rapists has been raised and unequivocally rejected 5 times in the past 35 years – in 1976 for DSM III; in 1986 for DSM IIIR; in the early 1990s for DSM IV; in 1998 for an APA Task Force report; and now for DSM 5.

These repeated repudiations haven't prevented poorly trained psychologists testifying as alleged experts in SVP cases from inventing the fake diagnosis – “Paraphilia Not Otherwise Specified, Nonconsent” – and using it as an excuse to justify what are in fact unjustifiable psychiatric commitments in SVP cases.

CP 386.

Despite the fact that coercive paraphilia is not in the DSM and has been rejected for inclusion on numerous occasions, it is well established that expert testimony that includes the diagnosis of Paraphilia Not

³ Scott would have this court log on and read internet blogs and Wikipedia entries. See appellant's brief at 11-14.

Otherwise Specified (Rape) is admissible in SVP cases.⁴ The acceptance of this testimony dates to the seminal case upholding the Sexually Violent Predator Act, *In re Detention of Young*, 122 Wn.2d 1, 28, 857 P.2d 989 (1993). Recognizing the DSM's limitations and the political nature of some of the debate surrounding certain diagnoses, the Washington Supreme Court rejected an identical challenge to the diagnosis of Paraphilia NOS (rape), which is sometimes assigned to serial rapists in SVP cases:

The fact that pathologically driven rape, for example, is not yet listed in the *DSM-III-R* does not invalidate such a diagnosis. The *DSM* is, after all, an evolving and imperfect document. Nor is it sacrosanct. Furthermore, it is in some areas a political document whose diagnoses are based, in some cases, on what American Psychiatric Association ("APA") leaders consider to be practical realities.

Young, 122 Wn.2d at 28 (quoting Alexander D. Brooks, *The Constitutionality and Morality of Civilly Committing Violent Sexual Predators*, 15 U. Puget Sound L.Rev. 709, 733 (1992)). In rejecting the challenge to the paraphilic rape diagnosis, the *Young* court also noted that the "specific diagnosis" was Paraphilia NOS:

The specific diagnosis offered by the State's experts at each commitment trial was "paraphilia not otherwise specified." This is a residual category in the *DSM-III-R* which encompasses both less commonly encountered paraphilias

⁴ The diagnosis is also referred to as Paraphilia Not Otherwise Specified (Nonconsent) and Paraphilia Not Otherwise Specified (Coercive Disorder).

and those not yet sufficiently described to merit formal inclusion in the *DSM-III-R*. *DSM-III-R*, at 280. . . .

Young, 122 Wn.2d at 29. Washington courts have repeatedly upheld sexually violent predator commitments based on the paraphilia NOS nonconsent/rape diagnosis. *In re Detention of Post*, 145 Wn. App. 728, 756-57 n.18, 187 P.3d 803 (2008), *aff'd*, 170 Wn.2d 302, 241 P.3d 1234 (2010). Likewise, the diagnosis of Paraphilia Not Otherwise Specified (Hebephilia) is admissible despite the fact that hebephilia has been rejected by the DSM-V for inclusion as a specific paraphilia.

It also must be recognized that the single item of “evidence” relied on by Scott at the trial court is nothing more than an opinion piece by a commentator who is clearly antagonistic toward sexually violent predator civil commitment laws and who disregards even United States Supreme Court precedents upholding these laws against due process challenges.

Dr. Frances writes:

The constitution says that when criminals do their time, they have the right to be released from prison. Making up a fake diagnosis to facilitate otherwise unconstitutional preventive detention is a clear violation of the individual’s civil rights and creates a very slippery and dangerous slope for our society. Unjustified psychiatric preventive detention was a convenient tool of political repression in the former Soviet Union and is reportedly also used today to quell economic complaints in China.

CP 387. Frances' commentary is an unserious political diatribe premised on arguments long ago rejected in *Young* as well as *Kansas v. Hendricks*, 521 U.S. 346, 117 S. Ct. 2072, 138 L. Ed. 2d 501 (1997).

That hebephilia was rejected for inclusion as a specific diagnosis in the DSM-V is of no legal significance and does not constitute extraordinary circumstances that would afford Scott relief pursuant to CR 60(b)(11).

E. WASHINGTON STATE HAS THE AUTHORITY TO DEFINE THE MENTAL CONDITIONS RELEVANT TO COMMITMENT UNDER THE SVPA.

Scott argues that a mental condition is invalid as a basis for civil commitment under the SVPA unless it is specifically identified in the DSM. The Supreme Courts of the United States and Washington State have rejected the same argument.

The U.S. Supreme Court rejected the argument that due process requires states to define "mental disorder" or similar terms in their civil commitment statutes in such a way that they are consistent with the standards of the mental health community. *Hendricks*, 521 U.S. 346, 358-59, 117 S. Ct. 2072, 138 L. Ed. 2d 501 (1997). *Hendricks* had challenged his civil commitment under Kansas' SVPA, which was modeled after the Washington SVPA. The Kansas SVPA also permits

civil commitment of persons who, due to a “‘mental abnormality’ or a ‘personality disorder’ are likely to engage in ‘predatory acts of sexual violence.’” *Hendricks*, 521 U.S. at 350 (quoting Kan. Stat. Annot. § 59-29a01 et seq. (1994)). The Court concluded the Kansas SVPA was constitutional because it complied with earlier cases upholding civil commitment statutes requiring both a finding of dangerousness and the presence of mental illness. *Id.* at 358.

The Court specifically rejected the argument that the use of the term “mental abnormality” by the Kansas SVPA did not comport with earlier cases requiring a finding of “mental illness,” because “mental abnormality” is a term adopted by the Kansas Legislature and not the psychiatric community. *Id.* at 358-59. The Court found that “the term ‘mental illness’ is devoid of any talismanic significance.” *Id.* at 359. It further noted that “‘psychiatrists disagree widely and frequently on what constitutes mental illness’” and that the Court itself had never used consistent terms in its cases involving civil commitments. *Id.* (quoted source omitted). The Court noted that:

Legal definitions, however, which must “take into account such issues as individual responsibility . . . and competency,” need not mirror those advanced by the medical profession.

Id. See also *Kansas v. Crane*, 534 U.S. 407, 413-14, 122 S. Ct. 867, 151 L. Ed. 2d 856 (2002) (reaffirming that psychiatric and legal standards do not and need not be identical).

Washington's definition of "mental abnormality" meets constitutional requirements and does not place the limitations on acceptable diagnoses that Scott would have this Court impose. It defines a "sexually violent predator" as "any person who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility." RCW 71.09.020(18). The SVPA then defines "mental abnormality" in a way that distinguishes mentally ill offenders from non-mentally ill recidivists:

"Mental abnormality" means a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to the commission of criminal sexual acts in a degree constituting such person a menace to the health and safety of others.

RCW 71.09.020(8).

Recognizing the DSM's limitations and the political nature of some of the debate surrounding certain diagnoses, the Washington Supreme Court rejected an identical challenge to the diagnosis of Paraphilia NOS (rape), which is sometimes assigned to serial rapists in

SVP cases. *Young*, 122 Wn.2d at 28. Scott's current argument must likewise be rejected.

F. THE DIAGNOSIS OF PARAPHILIA NOT OTHERWISE SPECIFIED (HEBEPHILIA) IS NOT SUBJECT TO *FRYE* BECAUSE IT DOES NOT EMPLOY NOVEL SCIENTIFIC METHODS.

Scott argues that he is entitled to relief from judgment under CR 60(b) because he entered the stipulation "with the mistaken belief that the diagnoses given to Scott were valid and would meet the requirements of *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923)." Appellant's brief at 3. Scott then refers to a number of source materials that were not presented to the trial court. Aside from this procedural irregularity, this Court should reject his argument because the diagnosis of Paraphilia Not Otherwise Specified (Hebephilia) is not subject to *Frye*.

In Washington, the standard for assessing allegedly novel scientific procedures is found in *Frye*, 293 F. at 1014. *In re Detention of Thorell*, 149 Wn.2d 724, 754, 72 P.3d 708 (2003). Pursuant to *Frye*, the trial court determines whether a scientific theory or principle is generally accepted within the relevant scientific community. *Thorell*, 149 Wn.2d at 754. "*Frye* requires only general acceptance, not *full* acceptance, of novel

scientific methods.” *State v. Russell*, 125 Wn.2d 24, 41, 882 P.2d 747 (1994). If the methodology is generally accepted, the possibility of error in the expert opinions can be argued to the jury. *Id.*

Dr. Packard’s diagnosis of Paraphilia Not Otherwise Specified (Hebephilia), which he found to be present in Scott in addition to pedophilia, is not based on novel science and *Frye* does not apply. *In re Detention of Berry*, 160 Wn. App. 374, 379, 248 P.3d 592, *review denied*, 172 Wn.2d 1005 (2011) (*Frye* inapplicable to Paraphilia NOS diagnosis because “the science at issue is standard psychological analysis.”). *Berry* is consistent with Supreme Court reasoning from nearly 20 years ago:

The sciences of psychology and psychiatry are not novel; they have been an integral part of the American legal system since its inception. Although testimony relating to mental illnesses and disorders is not amenable to the types of precise and verifiable cause and effect relation petitioners seek, the level of acceptance is sufficient to merit consideration at trial.”

Berry, 160 Wn. App. at 379 (quoting *In re Pers. Restraint of Young*, 122 Wn.2d 1, 57, 857 P.2d 989 (1993)).⁵ Scott’s arguments go to the weight

⁵ Persuasive authority is in accord. See, e.g., *Logerquist v. McVey*, 1 P.3d 113, 123 (Ariz. 2000) (“*Frye* is inapplicable when a qualified witness offers relevant testimony or conclusions based on experience and observation about human behavior for the purpose of explaining that behavior”); *Commonwealth v. Dengler*, 843 A.2d 1241, 1244 (Pa.Super. 2004) (“psychological or psychiatric testimony of an expert at an SVP proceeding is not novel scientific evidence subject to *Frye*”); *People v. Ward*, 71 Cal.App.4th 368, 373 (1999) (“*Kelly-Frye* applies to cases involving novel devices or processes, not to expert medical testimony, such as a psychiatrist’s prediction of future dangerousness or a diagnosis of mental illness.”).

of the evidence, not its admissibility. *Berry*, 160 Wn. App. at 382. By stipulating to commitment, Scott obviously waived the right to test Dr. Packard's opinion through cross examination or challenge its admissibility pursuant to ER 702.

F. CASE LAW EVIDENCE DEMONSTRATES THE WIDESPREAD USE OF PARAPHILIA NOS (HEBEPHILIA).

The diagnosis of Paraphilia Not Otherwise Specified (Hebephilia) has been repeatedly accepted by courts, and not just in SVP civil commitment proceedings. In fact, the diagnosis has been referenced in criminal cases as early as 1992. *See, e.g., State v. Lamure*, 846 P.2d 1070, 1073 (N.M. App. 1992) (Defendant presented expert testimony about his homosexual hebephilia, which causes him to be sexually attracted to male adolescents); *United States v. Polizzi*, 549 F.Supp.2d 308, 337-38 (E.D.N.Y. 2008) (State's expert diagnosed defendant with, *inter alia*, Paraphilia NOS (sexual interest in adolescents)); *United States v. C.R.*, 792 F.Supp.2d 343, 408 (E.D.N.Y. 2011).

It is certainly true that Paraphilia NOS (Hebephilia) has been frequently diagnosed and discussed in SVP cases. That is the result, and evidence, of its general acceptance and application. It has been assigned

to respondents in civil commitment cases, both state and federal, across the United States by many different experts.⁶

G. SCOTT'S APPEAL MUST BE REJECTED BECAUSE HE STIPULATED THAT PEDOPHILIA ALONE WAS A SUFFICIENT BASIS FOR HIS COMMITMENT AS AN SVP.

Regardless of Scott's arguments pertaining to the validity of the diagnosis of hebephilia, the trial court's denial of his CR 60(b) motion to vacate his stipulation should be upheld because Scott stipulated that the diagnosis of pedophilia alone was a sufficient basis for his commitment.

In his stipulation Scott agreed that he suffered from a number of mental abnormalities and personality disorders: Paraphilia Pedophilia, Paraphilia Not Otherwise Specified (Hebephilia), and Personality Disorder, Not Otherwise Specified, with antisocial, narcissistic, and histrionic features. CP 36. He agreed that these mental abnormalities and personality disorders, "together or separately," make it seriously difficult for him to control his

⁶ See, e.g., *In re Martinelli*, 649 N.W.2d 886, 890-91 (Minn. App. 2002) (Dr. Fox and Dr. Alberg); *In re Civil Commitment of V.A.*, 813 A.2d 1252, 1254 (N.J.Super.A.D. 2003) (Dr. LoBiondo); *In re Johnson*, 85 P.3d 1252, 1255 (Kan. App. 2004) (Dr. Huerter); *In re Civil Commitment of A.H.B.*, 898 A.2d 1027, 1030 (N.J.Super.A.D. 2006) (Dr. Zeiguer); *In re Hehn*, 745 N.W.2d 631, 633 (N.D. 2008) (Drs. Belanger and Sullivan); *State v. Donald N.*, 881 N.Y.S.2d 542, 544 (N.Y.A.D. 2009); *People v. McRoberts*, 101 Cal.Rptr.3d 115, 117 (Cal.App. 2009) (Dr. Musacco); *In re Hanenberg*, 777 N.W.2d 62, 63 (N.D. 2010) (Dr. Sullivan); *In re Commitment of Rachel*, 782 N.W.2d 443, 450 (Wis.App. 2010) (Dr. Harasymiw); *In re G.R.H.*, 793 N.W.2d 460, 468 (N.D. 2011) (Dr. Coombs); *United States v. Wetmore*, 766 F.Supp.2d 319, 329 (D.Mass. 2011) (Dr. Prentky); *In re Williams*, 253 P.3d 327, 330 (Kan. 2011) (Dr. Reid); *In re Berg*, 342 S.W.3d 374, 379 (Mo.App. S.D. 2011) (Dr. Leavitt); *In re Civil Commitment of Navratil*, 799 N.W.2d 643, 648 (Minn.App. 2011) (Dr. Hoberman).

behavior, and that he is more likely than not to commit acts of predatory sexual violence if not confined in a secure facility. *Id.* Thus, Scott's stipulation to commitment wasn't even dependent on Paraphilia Not Otherwise Specified (Hebephilia), the diagnosis of pedophilia, standing alone or considered in conjunction with his personality disorder, is sufficient to sustain his commitment.

The record is replete with support for the diagnosis of pedophilia, and, in fact, in the stipulation Scott agreed that his sexual attraction was to prepubescent boys as young as seven. Scott acknowledged that his act of compiling the "Societies Monsters" document (attached to the stipulation) while at the SCC indicated an active and deviant sexual interest in relationships, including sexual contact, with boys ranging from ages 7 to 15. CP 36-37. VRP at 33. Scott's predicate SVP conviction is for five counts of Indecent Liberties against a child under 14. He was convicted in 1984 in King County No. 84-1-01467-5. The victims of these crimes were male, ranging from 7 to 13 years of age. CP 28-30. Scott sexually assaulted them at his business and residence. *Id.* Scott fondled the young boys' genitals (and forced them to fondle his), frequently exposed his genitals to the boys, showed them pornographic materials, and photographed the boys' genitals. *Id.* Scott threatened one of the boys with a knife, forcing him to perform sexual acts. *Id.* Scott has also

admitted that while he worked as a houseparent at a children's home he fondled seven to ten boys ranging in age from 7 to 12. CP 3.

By Scott's own agreement, which is readily supported by his history of sexually offending against prepubescent boys, the diagnosis of Paraphilia Not Otherwise Specified (Hebephilia), made by only one of the two psychologists whose evaluations supply the supporting record, was not a necessary basis for his commitment as an SVP. He is first and foremost a pedophile and was properly committed as such.

V. CONCLUSION

For the foregoing reasons, the State requests that this Court affirm the trial court's order denying Scott's CR 60(b) motion.

DATED this 12th day of February, 2014.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
DONALD J. PORTER, WSBA #20164
Senior Deputy Prosecuting Attorney
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ATTACHMENT

WASHINGTON APPELLATE PROJECT

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November 3, 2008

David Hackett
King County Prosecutor's Office-SVP Unit
King County Administration Bldg.
500 – Fourth Avenue, 9th Floor
Seattle, WA 98104

Re: In Re the Detention of Richard Scott
Court of Appeals No. 61121-6-I

Dear Counsel:

Enclosed are the following verbatim reports of proceedings for the above entitled case:

11/06/07

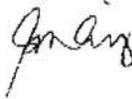
NO. OF VOL(S): (1)

Please return these transcripts (including ASCII discs, if any) to our office upon filing of the Respondent's Brief.

Very truly yours,

David L. Donnan
Attorney at Law

By:



Maria Arranza Riley
Legal Assistant

DLD/mar
Encl.

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

In Re the Detention of)
RICHARD ROY SCOTT) COA NO. 61121-6-I
NO. 03-2-25609-9 SEA)

VERBATIM REPORT OF PROCEEDINGS

Heard Before: The Honorable CAROL SCHAPIRA
November 6, 2007
9:20 a.m.
W327, KING COUNTY COURTHOUSE
SEATTLE, WASHINGTON

APPEARANCES DAVID J. W. HACKETT and CAROL J. MURRAY
representing the Petitioner,
State of Washington;

RICHARD ROY SCOTT, Respondent, appearing
pro se;

MICHAEL KAHRS, appearing as standby counsel
for Respondent.

REPORTED BY: TaraLynn A. Bates
CSR # 2464

WHEREUPON, the following proceedings were had,
to wit:

1 THE COURT: Okay. Are the parties ready to go on
2 the record?

3 MR. HACKETT: I think so, Your Honor.

4 THE COURT: All right. Good morning. Do you
5 want to call the case?

6 MR. HACKETT: Sure. Your Honor, we're here this
7 morning on In Re the Detention of Richard Roy Scott, number
8 03-2-25609-9. David Hackett and C. J. Murray representing
9 the State of Washington. And also present is Mr. Richard
10 Roy Scott, pro se, and his standby counsel, Michael Kahrs.
11 And I believe we have a few motions to address this morning
12 before we move on.

13 THE COURT: That's good.

14 As the parties know, I'm used to being in
15 Juvenile Court. It's fine with me if you don't rise when
16 you're addressing the Court. If you do want to rise, I
17 don't mind that, but I'm just saying it won't be perceived
18 as disrespectful or anything else if you remain in your
19 seat. Please do keep your voice up. As you can see, we
20 have a court reporter. Everyone can remind me to do the
21 same or speak more slowly.

22 So why don't we go through the motions as
23 expeditiously as we can. Is it your expectation that after
24 motions, we will begin opening statements?

25 MS. MURRAY: Yes.

1 THE COURT: And then begin with the witnesses?

2 MS. MURRAY: Yes.

3 THE COURT: Okay. So we will take care of any
4 motions I guess from the State first and then any of
5 respondent's motions.

6 THE RESPONDENT: If I may, Your Honor?

7 THE COURT: Yes, of course. Good morning.

8 THE RESPONDENT: As you can see, I stayed in the
9 jail yesterday. And they aren't allowing me to have my
10 clothes. I don't really feel comfortable proceeding
11 unshaven, unbathed. And I have a nice little headache, not
12 a migraine yet, but I was refused all medicine. And I was
13 housed in a unit where somebody was screaming all night.

14 Had I come to court this morning, I thought I
15 would be in my suit and have paperwork prepared. Also, I
16 brought a box of exhibits which were supposed to be sent
17 today.

18 So in other words, I'm not in a position to
19 proceed, argue or discuss anything. And if the Court
20 insists that we proceed with me in this condition, then I
21 would say that I cannot proceed pro se. And quite
22 literally, I feel as if I've been put through H for the
23 last 28 hours.

24 So if the Court insists on proceeding with me in
25 this condition, then I would have no other option than to

1 say, look, go ahead and commit me. Because there's no way
2 I can represent myself in this position. There is no -- I
3 understand I will be transporting back and forth. So there
4 is that option. I was unable to confirm a ruling by Judge
5 Armstrong. But anyway, that's my position.

6 THE COURT: Okay. But you do have clothes that
7 are here in King County?

8 THE RESPONDENT: Yes, but I've been denied my
9 meds. I have a headache right now, which will turn into a
10 migraine, and I haven't shaven or bathed. Yesterday, I
11 wasn't even allowed a piece of paper or pencil, phone
12 calls, which you asked for, or to bathe. And, of course, I
13 hate that lovely food that they have here. But I just, I
14 feel dirty right now.

15 MR. HACKETT: Your Honor, we're happy to get
16 declarations from the jail and get to the bottom of this.
17 I was fully expecting to hear from Mr. Scott or Mr. Kahrs
18 yesterday if there was a problem and we heard absolutely
19 nothing. In the past, Mr. Scott has greatly exaggerated
20 any problems that he's had with facilities holding him. So
21 we by no means believe in the truth of what he's saying
22 until there's something additional before the Court.

23 THE COURT: Well, I'm just wondering if there's
24 anything we can do I guess at the current time. Perhaps he
25 could get changed at lunch. I guess I'm a little surprised

1 that you don't get to take a shower or something of that
2 sort. That's not something --

3 MR. KAHR: If I may, Your Honor. They placed
4 him in administrative segregation on the 11th floor. So I
5 don't know what his limitations are but, obviously, there
6 are always limitations in administrative segregation. And
7 they differentiate between individuals that they place
8 there for protective custody, from their perspective, and
9 whether or not they're just plain misbehaving.

10 THE COURT: Well, again, my experience goes back
11 a few years but I've had defendants who were held in such
12 conditions, people who were shackled when they were brought
13 to court, but they never said they couldn't take a shower.

14 MR. KAHR: Well, I don't know the particular
15 conditions on that ward, Your Honor, but that may or may
16 not be the case. I'm just talking about where he was
17 placed.

18 THE RESPONDENT: And I did arrive in a suit but
19 was told this morning it was a bench trial, I had no need
20 for my suit. I also brought hygiene supplies, underarm
21 deodorant, not allowed. I brought cassettes and videos and
22 they're down in the property room. Did you have a problem
23 getting those out? I had prepared myself for today's
24 hearing, you know. It's just amazing.

25 THE COURT: Well, as I say, you certainly don't

1 want to be without your medication. I obviously understand
2 your preference for being in your own clothing and there's
3 no reason that you shouldn't be. I guess I'm just
4 wondering whether if I sign an order, if he can take his
5 medication. If he goes back across the street, you think
6 we can assume that in an hour and a half or something he
7 could have the medication? I don't think he could be
8 clothed necessarily in that time. But I don't know whether
9 there's an option of getting the medication out of the
10 jail. I would do that if somebody thought that was
11 possible, if I sign an order. And then he can come dressed
12 either after lunch or tomorrow.

13 THE RESPONDENT: Nevertheless, I'm not prepared
14 to argue. I don't have any paperwork here, that I know of.
15 Do you have any copies of what's before the Court?

16 MR. KAHR: It's on the computer, which we're
17 waiting for electricity.

18 THE RESPONDENT: I'm not prepared, Your Honor, to
19 proceed. There's no way. If necessary, commit me on the
20 basis that I can't proceed. Particularly when I'm pro se,
21 there's just no way I can get out of a jail cell and be pro
22 se.

23 I didn't have any sleep last night, Your Honor.
24 People were banging on the door and kicking and screaming.
25 There was the level four, which is kind of, excuse the

1 expression, but a nut house. It's where the disruptive
2 people are placed. There's no way I could operate out of a
3 jail cell, there's just no way.

4 MR. HACKETT: Of course, Your Honor, he's going
5 to have to operate out of a jail cell. Mr. Scott's been
6 asking for a continuance now for the better part of a
7 month. And he was told before he arrived that he would
8 need to be prepared for the week and that he shouldn't
9 necessarily rely on being able to do a lot of preparation
10 in the jail, just due to the nature of not being able to
11 bring all his papers with him.

12 Mr. Scott's filed the motions, he ought to be
13 able to proceed with those legal motions this morning. We
14 are currently looking into his claims that he was not
15 allowed to wear his suit and such. And I'm sure we can get
16 those resolved.

17 The Court has already signed an order, as I
18 recall, allowing him to bring his medication to the jail.
19 And my understanding from e-mails between SCC and the jail
20 is that those two agencies worked together to make sure
21 that would happen.

22 THE RESPONDENT: I got none, Your Honor, zero.

23 MR. KAHRS: Actually, as I understand it, the
24 situation was that the jail is making it available but SCC
25 would not provide them.

1 THE RESPONDENT: And I asked the jail, those
2 bailiffs or guards, they were talking about we don't have
3 any of your meds. There is no system set up to deal with
4 somebody. I have hard medicine I take with headaches,
5 which I prefer over the implants, which I think are
6 dangerous. And there is no system set up in the jail to
7 deal with a pro se with mental needs.

8 THE COURT: Again, that hasn't been my
9 experience. But as I say, perhaps we can have some
10 intervention from the person in the prosecutor's office who
11 represents the jail. That person is expected to assist in
12 making sure that the jail meets what it understands to be
13 its obligation to pro ses. And certainly the medical
14 obligations is no different whether you are pro se or with
15 an attorney.

16 THE RESPONDENT: I would note, no paper and no
17 writing instruments, zero. Or I would have been preparing
18 yesterday; all day I would have been preparing.

19 A funny story, they gave me a storage form with
20 no pencil. And on the storage form you can order hygiene,
21 such like underarm, for free. And they're just not set up
22 for pro ses. A pro se needs paper, pencil, he needs to be
23 able to bring these things with him and take them to the
24 room. And you don't take things to the room.

25 MR. KAHR: Your Honor, I had been talking with

1 John Gerberding of the civil division of the prosecutor's
2 office and I also had some done some phone messaging with
3 Rhett Hobarts, I believe is his name, who is the overall
4 head of the Department of Adult Detention. But he was out
5 of the office yesterday. So we have been trying to resolve
6 these issues and make them aware of them. But
7 classifications will do what they're going to do.

8 THE RESPONDENT: Transport back and forth is
9 possible.

10 THE COURT: You tell me that. If I see a
11 declaration from somebody, I'm certainly happy to consider
12 that. We don't just do things because somebody said, I
13 heard that so and so --

14 THE RESPONDENT: No, the sheriffs said I can do
15 that. They can do it. And that's what happened with Judge
16 Gillespie in Kitsap. And what was the name of the Judge in
17 Pierce County, in the Wilson case in Pierce. Back and
18 forth every day. And those weren't pro ses. Me being pro
19 se makes it an even bigger problem or bigger importance.
20 You cannot operate out of a jail cell where there's people
21 screaming, yelling, kicking doors all night. It's just not
22 going to happen. How can I come in here unshaven, without
23 any sleep and expect to cross-examine a PhD?

24 THE COURT: Does either of the prosecutors know,
25 there used to be a woman prosecutor who was assigned to the

1 jail from the civil division.

2 MR. HACKETT: Yes, I've also been in touch with
3 Mr. Gerberding.

4 THE COURT: So Mr. Gerberding is the prosecutor?

5 MR. HACKETT: He is in charge of that. And I
6 would suggest what we do is take a short recess, that we
7 ask the jail to get Mr. Scott's box of documents here, if
8 that's possible, and check this out, to see if we have
9 another manufactured thing from Mr. Scott or if we do have
10 an issue we need to address. If we have an issue we need
11 to address, I would anticipate we can address it fairly
12 quickly and get back on track.

13 THE COURT: Well, it won't be quick if he has to
14 go all the way back and forth. I think it will be an hour,
15 hour and a half.

16 I think I will sign an order and I'll ask the
17 officers to take it with them, that he is permitted to take
18 a particular medication for headache. Obviously, nobody
19 needs a headache on the first day of trial. You don't know
20 whether he's going to be able to shave or --

21 MR. KAHR: If I may, Your Honor. The actual
22 discussion that took place between SCC medical and the jail
23 was also about Mr. Scott being permitted to take the
24 medication and bring it up to the courtroom. Because, you
25 know, if he needed to take it, if a migraine was coming on,

1 you do it right then and there.

2 THE COURT: And what's the medication?

3 MR. KAHRs: That was Imitrex and Ibuprofen. And
4 baby aspirin for a heart condition. And that's what I
5 understand the extent of the medical issues, that I
6 understand.

7 THE RESPONDENT: And as far as housing, it is
8 entirely possible that I have a cell in the infirmary. I
9 had one last time. They had a shower and a toilet, a
10 single cell. The housing issue is very important to me
11 because I can't see a lawyer being up all night.

12 MR. HACKETT: I think that depends on what
13 Mr. Scott is doing over in the jail, if he's earned his way
14 out of --

15 THE RESPONDENT: I'm in protective custody.

16 MR. KAHRs: That has been confirmed by the jail,
17 it was protective custody, not by any fault of Mr. Scott.

18 THE RESPONDENT: It's normal for sex offenders.

19 MR. KAHRs: They didn't do it on any particular
20 request by Mr. Scott.

21 MR. HACKETT: Your Honor, we would suggest we
22 send him back, we sign an order that he come back in his
23 clothes, come back with his box of documents.

24 THE RESPONDENT: Showered and shaved?

25 MR. HACKETT: Showered and shaved is fine with

1 me.

2 THE RESPONDENT: And then housing in an
3 individual cell.

4 MR. HACKETT: I think that's up to the jail.

5 THE COURT: Perhaps we can get in touch with
6 Mr. Gerberding and he can be working on that.

7 MR. HACKETT: That sounds acceptable to me.

8 THE COURT: So I guess I'll ask the officers to
9 take Mr. Scott in just a moment. We will sign an order to
10 make sure he has access to -- the property room, is that
11 something that the officers control, as well?

12 A CORRECTIONS OFFICER: It's controlled by the
13 property clerks. As far as the medication, I know that's
14 taken care of by the jail medical staff. So we're not
15 allowed to deal with that. And I don't think that -- I
16 don't know if he can bring it to court or not, as far as
17 that goes. But as far as where he's housed, they get out
18 an hour a day to shower. I think he just came here
19 yesterday so he probably, they probably didn't have the
20 timing set up for him.

21 THE RESPONDENT: You don't get anything on the
22 first day.

23 A CORRECTIONS OFFICER: That very well could be.
24 And this is the second day.

25 THE RESPONDENT: Thank you.

1 THE COURT: Do you have a blank civil order?

2 And it's called Imitrex?

3 THE RESPONDENT: Imitrex, baby aspirin,

4 Ibuprofen.

5 MR. HACKETT: I think it's Imutrex,

6 I-M-U-T-R-E-X.

7 THE BAILIFF: I just looked it up.

8 I-M-I-T-R-E-X.

9 THE COURT: Okay. So take a look at this,
10 Counsel, and Mr. Scott.

11 MR. HACKETT: Do we want to put a time on this,
12 Your Honor?

13 MS. MURRAY: Within a certain amount of time, so
14 we can get back on track?

15 THE COURT: I think that's a good suggestion.
16 What language would you put in?

17 MR. HACKETT: It's now a quarter to 10:00. Do we
18 want to try to reconvene at 11:00?

19 THE COURT: As I say, I think that's very
20 unrealistic.

21 MS. MURRAY: How about 1:30, at least?

22 THE RESPONDENT: Excuse me, how about after
23 lunch? That way I can have a lunch and be in good shape.

24 THE COURT: I'll ask the officers, perhaps can we
25 reconvene at 1:15? I think to get all this done and think

1 you're going to get anything done before noon is not too
2 likely. If he gets here at a quarter to 12:00, what
3 effectively are we going to get done?

4 A CORRECTIONS OFFICER: What exactly is the Court
5 asking?

6 THE COURT: Well, he needs I think to get into
7 the shower, get his medications, needs to get his property
8 box. And I think he'd like to come back here in civilian
9 clothes. So I'm assuming that if we got this done in an
10 hour and a half, that would be --

11 THE RESPONDENT: Realistically, after lunch.
12 Realistically. We're going to have to break for lunch,
13 come back and talk for ten minutes and go to lunch.

14 MR. HACKETT: It might be good to do that just so
15 that we know things are taken care of.

16 THE COURT: Okay. So let's plan to come back
17 after lunch. Now, can you come back before 1:30 or is that
18 hard on the shift?

19 A CORRECTIONS OFFICER: Before 1:30?

20 THE COURT: So like if I ask everyone to convene
21 at 1:15?

22 A CORRECTIONS OFFICER: I believe that would be
23 fine. It depends on the assignments. If you call for him
24 at 1:00, I'm sure he'll be here.

25 THE COURT: So let's plan on that.

1 Thank you. Let's just finalize the order.

2 Now, I think what we have to do is make a copy
3 and then we will file the original.

4 Did Mr. Scott have a chance to look at this?

5 MR. HACKETT: Not yet. I was just giving it to
6 Your Honor to write in the time, you've already signed it,
7 and then I'll hand that to Mr. Scott.

8 THE COURT: So give this to Mr. Scott. As I say,
9 we will make a copy. And we will ask the prosecutors to
10 talk to Mr. Gerberding, if possible, to see if maybe he
11 makes a call, maybe this will happen more smoothly than if
12 it's all brand new information.

13 (Discussion off the record.)

14 THE RESPONDENT: This terminology here, you said
15 and take his meds. You mean take one or what did you mean?

16 THE COURT: I'm not going to order that they be
17 present in the Court. I've never had anyone who had
18 medications in --

19 THE RESPONDENT: I don't take this stuff just to
20 take it. I take it -- the baby aspirin, I do. But it's
21 not the kind of medication you take just to take. It's not
22 preventive. What's the word, it's not preventive, it's
23 after.

24 MR. KAHR: Responsive.

25 THE RESPONDENT: Responsive. Like if you take it

1 every day, you'd end up with ulcers. It needs to be
2 available with me. That means I need to take it with me.

3 THE COURT: Are you planning to take it today?

4 THE RESPONDENT: Imitrex I take if the migraine
5 hits. I take the Imitrex and it kills it right off. It
6 doesn't prevent headaches.

7 THE COURT: Do you want me to order that you have
8 an Imitrex in your pocket? Do you take one?

9 THE RESPONDENT: Yeah, that would be fine. That
10 would be good.

11 A CORRECTIONS OFFICER: Your Honor, medical
12 sometimes delivers medicine to inmates during court. I
13 don't think it will be possible for him to carry medicine
14 with him.

15 MR. HACKETT: So, Your Honor, I'll put on here
16 Mr. Scott shall have an Imitrex available to him. And then
17 they'll figure out how to get it here.

18 Is it proper for Mr. Kahrs to give him the
19 Imitrex in the courtroom?

20 A CORRECTIONS OFFICER: I don't believe so.

21 MR. HACKETT: Okay.

22 THE COURT: Thank you.

23 Okay. Everybody has the papers that they need
24 for the moment? Thank you, very much, officers. Sorry for
25 the inconvenience. And we will call you, I expect, right

1 around 1:15. Thank you, Mr. Scott.

2 A CORRECTIONS OFFICER: Yes, Your Honor.

3 THE COURT: All right. We'll be off the record.

4 (Court recessed at 10:00 a.m.)

5 AFTERNOON SESSION

6 **November 6, 2007**

7 1:25 p.m.

8 THE COURT: Thank you, Officers. I appreciate
9 your assistance.

10 A CORRECTIONS OFFICER: Yes, Your Honor.

11 MR. HACKETT: Your Honor, could we use the jury
12 room to confer a little bit?

13 THE COURT: All of you?

14 MR. HACKETT: Yes, all of us.

15 THE COURT: I don't know whether the officers
16 need to go in with you, but yes, you may.

17 (WHEREUPON, the parties went into the jury
18 room.)

19 MR. HACKETT: One thing that would help speed
20 things along, Your Honor, is if we could argue the work
21 product violation motion. We would need a ruling on that
22 to effectuate the agreements between the parties. So do
23 you still want to proceed with that, Mr. Scott, while I
24 continue to jot this down?

25 THE COURT: So we're ready to go on the record?

1 THE RESPONDENT: Yes.

2 THE COURT: Thank you.

3 So good afternoon to everybody. And I appreciate
4 everyone's cooperation. And, Mr. Scott, I hope you're
5 feeling at least a little better now that you're showered
6 and in your own clothing. And I thank you to the officers
7 for your part in assisting us in getting that done.

8 So we're back on the record on In Re the
9 Detention of Richard Roy Scott. The cause number is
10 03-2-25609-9, SEA. We convened as a group perhaps ten or
11 fifteen minutes ago. The State attorneys, the prosecutors,
12 as well as Mr. Scott and Mr. Kahrs and a few other people
13 retired to the jury room looking at the potential I guess
14 for some resolution of this case. I don't know the
15 details, and that's just fine, I don't expect to understand
16 the details until somebody makes a presentation.

17 We're going to go forward now on one of a number
18 of motions. And you can alert me if there's other motions
19 that we need to take a look at. The motion that I
20 understand we're taking a look at is Mr. Scott's motion for
21 a dismissal based on work product violations having to do
22 with materials taken off a computer, and you can certainly
23 correct me, a computer used by Mr. Scott at the SCC. The
24 allegation is that those materials were designed to be
25 looked at and copied for a particular purpose but that

1 perhaps additional files and/or materials were looked at
2 and copied, including materials that were part of
3 Mr. Scott's case, perhaps including materials that he had
4 worked on with while he was represented by an attorney,
5 particularly because of his pro se status, that these
6 materials were work product. So that's just my summary of
7 the nature of the motion.

8 Mr. Scott, are you planning to make your
9 presentation first?

10 THE RESPONDENT: Yeah. It will be very brief. I
11 stand by my declaration and by my briefing. I think not
12 much more needs to be said.

13 THE COURT: All right. I will mention that I, as
14 everybody knows, I have not been in the court for a number
15 of days. So I think it arrived yesterday but I looked at
16 it today, a declaration from someone in the prosecutor's
17 office. Is her last names Skinkel?

18 MR. HACKETT: Zwinkel, Your Honor.

19 THE COURT: And her declaration I think also had
20 to do with this motion, is that correct?

21 MR. HACKETT: Yes, the State filed a fairly thick
22 pleading and then got declarations to supplement that.

23 THE COURT: The bulk of the pleading appeared to
24 be duplicates of pages leading to the numbering with Bates
25 stamps of files of Ms. Zwinkel -- and, again, this is my

1 summary, I don't mean to substitute it for the actual
2 material -- indicating she had received a letter from
3 Mr. Scott, and perhaps it wasn't a letter, perhaps it was a
4 fax, in 2005, when Mr. Scott was pro se, asking that the
5 prosecutor duplicate these materials and put Bates stamps
6 on it. This is a handwritten note, I'll call it, that asks
7 to do this. Ms. Zwinkel goes on and indicates what she
8 did. And the attachments are not necessarily decipherable
9 to somebody other than her. There's a set of charts that
10 there's some handwriting on some of them and so forth. So
11 I won't pretend that I understand exactly what the
12 underlying documents would be, but I did read through her
13 declaration.

14 Mr. Scott, is that something you received? I
15 think I received it yesterday, could have been late last
16 week. Do you recall?

17 THE RESPONDENT: I have it in front of me.

18 THE COURT: So is there anything that you wish to
19 say about that? That certainly would not have arrived in
20 time for you to respond to that.

21 THE RESPONDENT: Right. The basis of our need
22 for an evidentiary is the fact that in our December
23 hearing, which there's a transcript that Mr. Hackett
24 provided, refers to the box I sent him. But these, um,
25 files were actually taken off of a CD. He's now claimed I

1 sent him a CD, but there's no evidence that a CD was ever
2 sent. I did send a box of documents. I never sent a CD.
3 And my computer expert compared the files that they
4 created, the pro se respondent files, to the inside of my
5 computer and they matched.

6 So we will ask for an evidentiary because we want
7 them to produce and we've asked them to produce the CDs
8 that they claim I sent and that Zwinkel was working off of.

9 Now, it's noteworthy that they say she received
10 this box and CDs in December of 2005, but they didn't
11 create the files until after my computer was taken in
12 March. They didn't create the files until June, leaving me
13 to believe the CDs were created at SCC, when they took my
14 computer, gave it to the prosecutor, and at that point they
15 created these files. Now, I don't deny I sent them a box
16 of investigator files. A box, that's it.

17 THE COURT: But those aren't the materials you're
18 concerned about, you're concerned about the so-called CDs?

19 THE RESPONDENT: Right. And those contain
20 letters to my attorney and my attorney to me. And my mom,
21 for that matter. Just the contents of the material that
22 was seized in March.

23 There's no way they could have gotten the files
24 that are in those files in December, because there are
25 letters written in March that were in my computer.

1 So I'm asking for an evidentiary because I just
2 think we have a disputed fact. We've not been allowed to
3 depose Zwinkel because she has actively opposed our
4 request of Judge Scott to depose. We haven't attempted to
5 depose her and they've not responded to our request to
6 produce these three CDs. And we can tell from the CDs who
7 created them, by the way.

8 So that's my request, for an evidentiary hearing
9 on that motion.

10 MR. HACKETT: Your Honor, the State will stand by
11 its briefing. I think that explains in detail, with the
12 only admissible declarations on these issues, exactly what
13 happened and exactly what the order of events were.
14 Mr. Karstetter, who is Mr. Scott's own expert, agrees that
15 the representations here are consistent with the forensic
16 evidence.

17 THE COURT: Okay. Something additional? Were
18 you planning to say anything further, Mr. Scott?

19 THE RESPONDENT: No, that's fine.

20 THE COURT: The Court is familiar with the
21 pleadings. We had the benefit on October 26th and 29th to
22 talk about a number of issues pretrial. And, of course,
23 lots of material has come in. I think the only new thing
24 on this issue was the declaration which I just mentioned.
25 So I believe that I am current on this.

1 The Court is going to deny the motion to dismiss.
2 Certainly Mr. Scott, as a pro se, has a right to protect
3 his work product. Given the pleadings and declarations in
4 this matter, I believe that there were materials that were
5 confiscated from Mr. Scott. Some of those have been before
6 Judge Scott, who has served as a discovery master in this
7 case. And those rulings, some of which have been
8 reconsidered or sought as a motion for reconsideration,
9 those rulings still stand.

10 The Court is going to deny the motion. The Court
11 does not believe that the work product privilege has been
12 violated. There's no question that files have been
13 confiscated. Part of a portion with the work product
14 privilege is what entitlement there is to confidentiality.
15 Where a person keeps their files, how a person keeps their
16 files does affect whether or not they have a work product
17 privilege.

18 This is true, as well, of an attorney-client
19 privilege. But even more so with respect to the work
20 product, that the need for protection has to originate with
21 the attorney himself. Or, in this case, Mr. Scott, acting
22 as his own attorney.

23 The State did come into possession of an array of
24 photographs, as well as other files, both because of the
25 actions of the SCC, who I believe had a right to react to

1 what they believed was a violation of their procedures, as
2 well as the array of materials that Mr. Scott has sent out
3 under various guises. I do not find that the prosecutor in
4 this case, who represents the petitioner, has violated
5 Mr. Scott's work product privilege.

6 Again, do I need to add anything?

7 MR. HACKETT: I think that does cover it, Your
8 Honor.

9 THE COURT: Okay. Any particular questions from
10 you, Mr. Scott? Is there anything additional I need to say
11 about that?

12 THE RESPONDENT: Will there be a written order?

13 THE COURT: Yes. Perhaps I can ask the State to
14 prepare something. Do we need to have a written order on
15 the motions in limine, or do any of the matters we ruled on
16 last week need to be reduced to writing for your purposes?

17 MR. HACKETT: No, Your Honor.

18 THE COURT: I have notes on them. I don't think
19 that will be particularly necessary to do. But you don't
20 think that will be necessary?

21 MR. HACKETT: No, I don't think it will.

22 THE COURT: Is there some drafting that the
23 parties are working on now or at some point, with what the
24 parties have discussed?

25 THE RESPONDENT: It's all ready.

1 MR. HACKETT: We need to go through this with
2 Mr. Scott on the record.

3 THE RESPONDENT: Looks like the guys are here to
4 do the 2:00 o'clock transport.

5 MR. KAHR: Your Honor, if that's an issue, the
6 only thing I would suggest is have your staff call the
7 Sheriff's Office and see if a transport is necessary,
8 available for this afternoon.

9 THE COURT: Okay. I think we can do that.

10 (Discussion off the record.)

11 MR. HACKETT: Your Honor, Mr. Scott has indicated
12 his desire to submit to civil commitment, reserving a few
13 appellate issues. I do need you, Mr. Scott, to initial
14 some pages here.

15 So he's indicated his desire to stipulate based
16 on that. And I think we need to handle the stipulation as
17 Your Honor would handle a stipulation in a criminal case,
18 in other words, a plea. And I'm not sure what Your Honor's
19 practice is as to how you proceed, but I'm happy to go over
20 the agreement with Mr. Scott.

21 THE COURT: I'd appreciate that. And then I can
22 ask a few additional questions.

23 Is There something written?

24 MR. HACKETT: There is. In fact, it might make
25 it fast if we could make two copies of that, one for the

1 Judge and one for Mr. Scott.

2 And, Your Honor, while we're waiting for copies,
3 I did speak to John Gerberding and Jane McKensie, who are
4 both senior deputies in my office and represent King County
5 Jail.

6 THE COURT: Can you just wait a second. I think
7 medication may be here. So let's have him take the
8 medication and then he can listen to you with both ears.

9 MR. HACKETT: That sounds great.

10 THE COURT: I'm not too distracted but it looks
11 like he's completely distracted.

12 Thank you, very much. I appreciate it.

13 So, again, Mr. Scott, you'll just take your
14 medication and then we're going to put some matters on the
15 record. I know you're understandably distracted, but this
16 way we will all be paying attention to the same thing.

17 THE RESPONDENT: Okay.

18 MR. HACKETT: Okay. Your Honor, after following
19 the discussion this morning, I did speak with Jane McKensie
20 and John Gerberding of my office, both of whom are civil
21 attorneys representing the King County Jail. They
22 indicated by return today that Mr. Scott would be getting a
23 shower and arrive here in civilian clothes, and both of
24 those appear to be accurate. That Mr. Scott would be able
25 to carry any materials to court with him that he needed.

1 And that he would get his meds today. And it appears that
2 all of those have happened. The meds are headache
3 medications, basically, with the exception of the baby
4 aspirin. That's Ibuprofen and Imitrex.

5 And in speaking with Mr. Scott back in the jury
6 room, I did not get the impression, although perhaps
7 Mr. Scott can clarify as to whether he feels well enough to
8 enter into a stipulation at this point.

9 THE RESPONDENT: Sure, yes, Your Honor.

10 MR. HACKETT: Mr. Scott, are you entering into
11 this stipulation knowing that you will be civilly committed
12 under RCW 71.09 as a sexually violent predator?

13 THE RESPONDENT: Yes, I do.

14 MR. HACKETT: And you acknowledge that you
15 received a copy of the petition, certification and --
16 actually, I'm going to cross out another line here, because
17 it says it's attached and it is not. Mr. Scott, have you
18 previously read the petition, certification that's been
19 filed?

20 THE RESPONDENT: Yes, I have.

21 MR. HACKETT: And do you have any questions about
22 that petition and certification?

23 THE RESPONDENT: No, I don't.

24 MR. HACKETT: Mr. Scott, you understand the
25 English language and are able to read that language?

1 THE RESPONDENT: Yes.

2 MR. HACKETT: You have read this stipulation,
3 correct?

4 THE RESPONDENT: Yes.

5 MR. HACKETT: Have you had a chance to address
6 any questions regarding the stipulation with Mr. Kahrs?

7 THE RESPONDENT: Yes, I have.

8 MR. HACKETT: And acting pro se, you understand
9 that you are also representing yourself in this matter,
10 correct?

11 THE RESPONDENT: Yes.

12 MR. HACKETT: Do you have any unanswered
13 questions regarding this stipulation?

14 THE RESPONDENT: No.

15 MR. HACKETT: Do you understand that by entering
16 into this stipulation, you're waiving the following rights:
17 A fully adversarial trial by a court or jury to determine
18 whether you're a sexually violent predator. At this trial,
19 the State would have the burden to prove beyond a
20 reasonable doubt that Respondent has been convicted of a
21 sexually violent offense, that he has serious difficulty
22 controlling his behavior because he currently suffers from
23 a mental abnormality or personality disorder, that that
24 makes him likely to engage in predatory acts of sexual
25 violence if not confined in a secure facility, and that

1 Respondent has committed a recent overt act. If Respondent
2 were to choose to have a jury trial, the verdict would be
3 required to be unanimous. Do you understand those rights?

4 THE RESPONDENT: Yes, I do.

5 MR. HACKETT: Do you understand you have the
6 right to assistance of counsel?

7 THE COURT: Would you pause for one second;
8 Mr. Hackett.

9 (Discussion off the record.)

10 THE COURT: All right.

11 MR. HACKETT: You understand that you have a
12 right to assistance of counsel, but you've chosen to go pro
13 se in this matter, correct?

14 THE RESPONDENT: Yes.

15 MR. HACKETT: You understand that you have a
16 right to retain experts to perform mental health
17 examinations and to assist you at trial if you desired,
18 correct?

19 THE RESPONDENT: Correct.

20 MR. HACKETT: And you understand that if you're
21 unable to afford an expert, the Court would provide you
22 with one, correct?

23 THE RESPONDENT: Yes.

24 MR. HACKETT: Do you understand you have the
25 right to confront and cross-examine witnesses who testify

1 in this matter?

2 THE RESPONDENT: Yes.

3 MR. HACKETT: Do you understand that you have the
4 right to have witnesses testify on your behalf and have the
5 Court order those witnesses to be present?

6 THE RESPONDENT: Yes.

7 MR. HACKETT: You understand that you have a
8 right to appeal from an order of commitment entered
9 following trial, and that you are waiving that right with
10 the exceptions of the items that we've listed on page 2(a)?

11 THE RESPONDENT: Right.

12 MR. HACKETT: Okay. I'm going to ask you to
13 initial that paragraph that we just read.

14 And the issues that you have reserved are set
15 forth on 2(a). Those include the trial Court's ruling
16 denying your motion to dismiss regarding the circumstances
17 of your filing, correct?

18 THE RESPONDENT: Regarding the circumstances of
19 the filing?

20 MR. HACKETT: Including the question of whether
21 you were in unlawful custody.

22 THE RESPONDENT: That's correct.

23 MR. KAHR: Lawfully confined is the language you
24 used.

25 THE RESPONDENT: Right.

1 MR. HACKETT: You understand that you have the
2 right remaining to appeal the Court's order dismissing your
3 motion for work product violations, correct?

4 THE RESPONDENT: Right.

5 MR. HACKETT: And you understand that you have a
6 continuing right to appeal the trial Court's ruling
7 determining that Mr. Scott's conviction for ROC 3 in 2001
8 in Pacific County is a recent overt act under RCW 71.90.020
9 and In Re Marshall?

10 THE RESPONDENT: Correct.

11 MR. KAHR: I was not here for that ruling. One
12 point of clarification is is that, indeed, the case under
13 which the Court made the ruling?

14 MR. HACKETT: I don't have the ruling in front of
15 me. But it's certainly the controlling case. And I think
16 Mr. Scott would agree with that, correct, Mr. Scott?

17 THE RESPONDENT: In Re Marshall was just cited
18 afterwards. Can we just strike the cite?

19 MR. HACKETT: If that will make you more
20 comfortable, we will do that, for the record. Of course,
21 that leaves either side to argue whether In Re Marshall
22 controls or not.

23 THE COURT: In fact, I didn't make that ruling.
24 I wasn't called upon to.

25 MR. HACKETT: Mr. Scott, can you verify that you

1 have not been threatened or coerced into entering this
2 stipulation, nor have you received any promises causing you
3 to enter into this stipulation?

4 THE RESPONDENT: That's correct.

5 MR. HACKETT: You understand that if the Court
6 accepts this stipulation and enters the order proposed by
7 the parties, that you will be committed to the custody of
8 DSHS and housed in a secure facility for control, care and
9 treatment?

10 THE RESPONDENT: Correct.

11 MR. HACKETT: And you understand that this
12 commitment lasts until your condition is so changed that
13 you no longer meet the definition of a sexually violent
14 predator or you are conditionally released to a less
15 restrictive alternative?

16 THE RESPONDENT: Correct.

17 MR. HACKETT: You understand that if the Court
18 accepts this stipulation and enters the order, that you
19 will be under that jurisdiction until you're
20 unconditionally discharged?

21 THE RESPONDENT: Correct.

22 MR. HACKETT: You acknowledge that you have been
23 committed and been convicted of five counts of indecent
24 liberties under a 1984 King County cause number and that
25 these convictions are for sexually violent offenses as

1 defined in RCW 71.09.020?

2 THE RESPONDENT: Correct.

3 MR. HACKETT: You acknowledge that you suffer
4 from the following mental abnormality and/or personality
5 disorders: Paraphilia pedophilia, Paraphilia Not Otherwise
6 Specified (Hebephilia), Personality Disorder Not Otherwise
7 Specified, with Antisocial, Narcissistic and Histrionic
8 features, is that correct?

9 THE RESPONDENT: Correct.

10 MR. HACKETT: You understand that these mental
11 abnormalities and personality disorders, together or
12 separately, make it seriously difficult for you to control
13 your behavior such that it makes it more likely than not
14 that you will commit further acts of predatory sexual
15 violence if not confined to a secure facility, correct?

16 THE RESPONDENT: Correct.

17 MR. HACKETT: You acknowledge that your actions
18 in compiling the "Societies Monsters?" document, which is
19 attached to this stipulation, while confined at SCC pending
20 trial indicates an active and deviant sexual interest in
21 relationships, including sexual contact, with boys ranging
22 from ages seven to fifteen?

23 THE RESPONDENT: It's not attached.

24 MR. HACKETT: It will be. We have the attachment
25 right here.

1 THE RESPONDENT: Correct.

2 MR. HACKETT: And we have stricken the final
3 sentence, which indicates that is a recent overt act?

4 THE RESPONDENT: Correct.

5 MR. HACKETT: Okay. And I should note, for the
6 record, that that is stricken but is not stricken with
7 prejudice toward either party to make that argument as
8 necessary.

9 THE COURT: That's fine.

10 MR. HACKETT: You understand, as set forth in the
11 stipulation, you agree you are a sexually violent predator
12 as defined in RCW 71.09.020. In combination, your history
13 of criminal sexual violence, psychological diagnosis and
14 actuarial risk assessment satisfies the requirement for
15 committment as a sexually violent predator under RCW
16 71.09.060 beyond a reasonable doubt?

17 THE RESPONDENT: Correct.

18 MR. HACKETT: And as a result, you should be
19 committed pursuant to the statute?

20 THE RESPONDENT: Right. There's one line
21 missing. We discussed this but I don't see it here. The
22 State supports an LRA.

23 MR. HACKETT: That is something we determined,
24 because it is happening on the day of trial, that we are
25 not willing to offer at this point. Are you willing to

1 enter into the stipulation without that provision?

2 THE RESPONDENT: I think we need it to stipulate.

3 MR. HACKETT: Okay. I think we will have to
4 proceed to trial, then, Your Honor.

5 THE COURT: Okay.

6 THE RESPONDENT: The question, Mr. Hackett, is
7 whether you would oppose an LRA hearing?

8 MR. HACKETT: This is probably not really the
9 place to negotiate, Mr. Scott.

10 THE RESPONDENT: It's relative.

11 THE COURT: Well, let's see.

12 MR. HACKETT: We're basically talking about
13 waiving a show cause hearing. The State opposes that.

14 THE COURT: Doesn't an LRA hearing have to take
15 place anyway, even if he stipulates?

16 MR. HACKETT: No, Your Honor, it doesn't.

17 THE COURT: So he can agree there is no less
18 restrictive alternative, you believe?

19 MR. HACKETT: There's some additional language
20 we'd have to put in there for sure.

21 What we will do, Your Honor, is we will agree,
22 and this is language that is contained in other agreements,
23 and, frankly, we'd encourage Mr. Scott to engage himself in
24 the program down there, we will agree that no sooner than
25 eighteen months from the date of this agreement, that if

1 Mr. Scott comes forward before the Court with a less
2 restrictive alternative satisfying the requirements of
3 RCW 71.09.020 and 71.09.090, that we will waive a show
4 cause hearing and allow that to proceed.

5 THE RESPONDENT: I will stipulate to that fact.

6 MR. HACKETT: And by that, what is meant is you
7 will need to come forward with an LRA that included the
8 basic statutory requirement of a treatment provider, a place
9 to live and a treatment plan.

10 THE RESPONDENT: Which is part of my community
11 custody. I have three years of community custody. I have
12 fifteen conditions on community custody. But you're not
13 privy to that. So anyway, we would agree to that.

14 Would the State be willing to make that twelve
15 months?

16 MR. HACKETT: We believe eighteen months is
17 appropriate.

18 THE RESPONDENT: How about fifteen?

19 MR. HACKETT: How about eighteen.

20 THE RESPONDENT: Sixteen?

21 MR. HACKETT: We're adding this as it is. So
22 it's eighteen.

23 THE RESPONDENT: Yeah.

24 MR. HACKETT: All right. I need to write that
25 out, if you'll give me a few minutes.

1 THE RESPONDENT: Okay.

2 THE COURT: Let's go off the record here for a
3 moment.

4 MR. HACKETT: So there's one more paragraph I
5 need to go over, Your Honor.

6 Mr. Scott, returning to the stipulation, in the
7 interim, we entered into an additional agreement. The
8 State agrees to waive the requirements for a show cause
9 hearing under RCW 71.09.090 and allow Mr. Scott to proceed
10 with a conditional release trial under RCW 71.09.090(3) no
11 sooner than eighteen months from the date of this
12 stipulation, provided that Mr. Scott's request for an LRA
13 includes a treatment provider, appropriate housing and a
14 treatment plan that satisfies the requirements of RCW
15 71.09.092. Do you agree to that provision?

16 THE RESPONDENT: I agree to that provision.

17 MR. HACKETT: Do you have any questions about
18 that provision?

19 THE RESPONDENT: No.

20 MR. HACKETT: And then finally, Mr. Scott,
21 returning to page four of the stipulation, you agree that
22 the facts and opinions set forth in this stipulation are
23 supported by the petition and the attached exhibits, and
24 the attached reports of Dr. Richard Packard and Dr. Brian
25 Judd. And you also agree that these materials are admitted

1 in the proceeding only for purposes of supporting the
2 factual and legal basis of the stipulation, and that the
3 State may submit a selection of e-mail postings from 1998
4 to 2001 in support of the stipulation?

5 THE RESPONDENT: I agree.

6 MR. HACKETT: And it looks like you've done that,
7 Your Honor. The Court's findings are on it looks like the
8 second page.

9 It's all messed up here.

10 THE COURT: Well, after page four, we end up on
11 page two, that starts with --

12 MR. HACKETT: Oh, okay. I see what happened to
13 mine.

14 THE COURT: Then comes something that says order
15 and then findings. Is that what you're talking about?

16 MR. HACKETT: Yes. And that is for the Court.

17 THE COURT: So should we change the page number
18 so that that will become page five?

19 MR. HACKETT: Yes.

20 THE COURT: Since we're thinking of it all as a
21 document. So I'm going to change where it says stipulation
22 and order of commitment, instead of being two, the page
23 that begins with the order at the top will be page five.

24 MR. HACKETT: Yes.

25 THE COURT: The next page, where a few lines down

1 it says Conclusions of Law, will be page six. And the
2 final page, which has what appears to be Mr. Scott's
3 signature, Mr. Kahrs' signature but not your signature,
4 maybe it's on the original, and a place for my signature,
5 that will be page seven.

6 MR. HACKETT: Yes. And I've got the original
7 here. I'm going to affix my signature at the end of the
8 stipulation, as well.

9 THE COURT: Okay. So you have I guess two pages
10 to sign, page four and page seven.

11 MR. KAHRs: Excuse me, Your Honor, there is one
12 bit, or actually, Mr. Hackett, in connection with the prior
13 language, there's a line 21 on the stipulation and order
14 where it says has committed a recent overt act. That's on
15 page two of the order.

16 THE COURT: The real page two or the one that
17 was just renumbered?

18 MR. KAHRs: I think it's the renumbered. It's
19 the stipulation and order of commitment.

20 MR. HACKETT: Yes, we crossed that provision out
21 on the original one. So we will cross that out here, as
22 well.

23 THE COURT: So page five, line 21, we are
24 crossing out that he has committed a recent overt act?

25 MR. HACKETT: Yes.

1 THE COURT: By crossing it out, everyone is
2 agreeing that is reserved?

3 MR. HACKETT: Yes. And that issue is addressed
4 by a prior order of the Court so it does not need to be
5 addressed here.

6 So I'm going to have you go ahead and initial
7 that.

8 Thank you for mentioning that. And I have the
9 attachments here, Your Honor. Mr. Scott and Mr. Kahrs, if
10 you want to review these?

11 THE COURT: So let's go over this form. I don't
12 have the language that you added with the eighteen months
13 something.

14 MR. HACKETT: I can hand it forward.

15 THE COURT: But I guess that is on the original?

16 MR. HACKETT: Yes. I'm handing the original up,
17 Your Honor.

18 THE COURT: Do you want to take my copy for now?

19 So good afternoon again to you, Mr. Scott. A lot
20 has happened in the hour that we have been together this
21 afternoon. Perhaps because I wasn't involved, more
22 happened.

23 What we're going to do next is I want to ask you
24 a few additional questions. Are you focused on what we're
25 doing?

1 THE RESPONDENT: Yes.

2 THE COURT: I know there's a lot of activity.
3 But as I say, the most important things are that you and I
4 are able to focus on exactly the same document. I think
5 you have a copy in front of you? I have the original in
6 front of me. So that includes the language having to do
7 with I'll call it paragraph 4(a). And we will get to that
8 in a moment.

9 I guess the important thing, and I'll try not to
10 repeat all Mr. Hackett's questions, is that this is a
11 decision that you have made freely and voluntarily?

12 THE RESPONDENT: Correct.

13 THE COURT: That nobody has brought pressure on
14 you or somebody you care about so that you would change
15 your position on your right to have a trial in this matter?

16 THE RESPONDENT: As I've expressed already to
17 this Court today, I don't see that as a pro se housed in
18 the jail, that I could win. So it's a case of I don't feel
19 I could win as a pro se housed in the jail.

20 THE COURT: All right. Now, in looking through
21 some of these materials, and please correct me if I am
22 wrong, it does appear that you have a GED and studied
23 beyond that?

24 THE RESPONDENT: Just a GED.

25 THE COURT: Okay. But I'm saying I believe in

1 one of the interviews, you indicated that, for example, you
2 know how to use a computer and that you're self-taught in
3 that?

4 THE RESPONDENT: Yes.

5 THE COURT: That some of the activities that have
6 kept you busy involve lots of reading, legal research,
7 other kinds of research, publications and so forth?

8 THE RESPONDENT: Correct.

9 THE COURT: You don't have any problems with
10 reading, writing or understanding the English language?

11 THE RESPONDENT: No.

12 THE COURT: Okay. You believed, when you became
13 pro se, that you were able to manage these proceedings and
14 comply with the Court's requirements to represent yourself?

15 THE RESPONDENT: At the time, yes.

16 THE COURT: You do understand the nature of these
17 proceedings, you've studied other peoples' cases, you've
18 been very involved, whether you were represented or
19 represented yourself, you have been very involved in every
20 step of these proceedings?

21 THE RESPONDENT: Correct.

22 THE COURT: All right. You have had a chance, I
23 know, again, it's been not a long time that we've been
24 together this afternoon, but you have had a chance to think
25 about all of the options that are open to you, whether it's

1 a trial, an entry of a stipulation or some other outcome?

2 THE RESPONDENT: Correct.

3 THE COURT: You believe that this outcome, which
4 is now put down into these seven or eight pages, including
5 the handwritten additions, that it is a complete statement
6 of your agreement with the State?

7 THE RESPONDENT: That's correct.

8 THE COURT: Now, in the middle of going through
9 the discussion with you about this stipulation, the issue
10 of the less restrictive alternative came up. You've had a
11 discussion with Mr. Hackett. You understand that they will
12 agree that there is not a necessity for a show cause
13 hearing in this matter, but they haven't agreed to anything
14 else about what that hearing will involve?

15 THE RESPONDENT: Correct.

16 THE COURT: That you will make a presentation in
17 terms of your belief about what the LRA is and they will
18 make their presentation?

19 THE RESPONDENT: Correct.

20 THE COURT: Now, Mr. Hackett went over the
21 various stipulations that you are making. I know at times
22 you have believed that the petition lacked validity, that
23 Dr. Judd's or Dr. Packard's reports had mistakes or errors
24 or omissions in them. And on these documents, you are no
25 longer asserting those objections?

1 THE RESPONDENT: I still reserve my objection,
2 Your Honor --

3 THE COURT: Okay.

4 THE RESPONDENT: -- to the factual case.

5 THE COURT: That's fine. I'm taking a look at
6 what's called in this stack of paper 2(a). It's
7 handwritten.

8 THE RESPONDENT: Right.

9 THE COURT: What it says here is that by entering
10 into this stipulation, Mr. Scott reserves the right to
11 appeal the following rulings. So are you looking at that
12 page?

13 THE RESPONDENT: I don't think we have that page,
14 do we?

15 MR. KAHR: Yes, you do, right there.

16 THE RESPONDENT: Okay.

17 THE COURT: So the first is the trial Court's
18 ruling denying the motion to dismiss having to do with the
19 filing of the petition. I'll call it the timeliness and so
20 forth. So that's one of the issues you're reserving?

21 THE RESPONDENT: Correct.

22 THE COURT: And then it says including the
23 question of whether he was lawfully confined?

24 THE RESPONDENT: Yes.

25 THE COURT: The second issue that's listed here

1 is the trial Court's order denying Scott's motion to
2 dismiss for work product violations. And that's what we
3 just talked about, right? We didn't go through all the
4 pleadings but we know that that's the motion that was just
5 ruled upon, which was reserved for the day of trial?

6 THE RESPONDENT: Correct.

7 THE COURT: And then the third issue listed here
8 is the trial Court's ruling determining that Mr. Scott's
9 conviction for rape of a child three in 2001 in Pacific
10 County is a -- it says an recent overt act under
11 RCW 71.09.020?

12 THE RESPONDENT: Correct.

13 THE COURT: And then something was crossed off
14 there on mine. It says, and In Re Marshall.

15 THE RESPONDENT: Right.

16 THE COURT: But what this document says to me is
17 that those are the issues that you are reserving. That's
18 what it says on the prior page. So if you think there are
19 other issues that are being reserved as to the underlying
20 petition, this would be a good time to discuss those with
21 me. Because we don't want you to think there are issues
22 out there that you have reserved that other people don't
23 think you have. We don't want there to be a
24 misunderstanding.

25 THE RESPONDENT: We discussed this. Those are

1 the correct three issues, primary issues.

2 THE COURT: All right. Thank you.

3 So when I go to the next page, again, there's
4 typed material here. You've had a chance to go over this
5 document completely?

6 THE RESPONDENT: Correct.

7 THE COURT: Do you feel like you need -- I know
8 there's a sense of pressure, but I don't want you to -- we
9 now believe you're not going to be back to the SCC until
10 tomorrow. So I don't want anybody to feel it's a good idea
11 to rush. Do you feel as though you've had enough time to
12 read this over, think this through yourself, talk to
13 Mr. Kahrs, all of those things that you would tell a friend
14 of yours to do if they were in your situation? Have you
15 done all of the kind of thinking that is necessary to do
16 before you enter into this stipulation?

17 THE RESPONDENT: As I stated, it's a case of I
18 don't believe that I could win pro se housed in a jail.
19 That's the main reason I'm entering the stipulation, is
20 that I don't feel I can proceed housed in the jail.

21 THE COURT: Okay. And I don't know whether
22 that's true or whether that's not true but I'm not sure
23 that that is going to change the work that we're currently
24 doing. If you feel, as I say, that you need more time to
25 think about it or Mr. Kahrs has raised a question with you

1 that would cause you to think you need more time, this is
2 the time to let me know that.

3 THE RESPONDENT: I'd rather do it now, thank you.

4 THE COURT: Okay. Now, you understand that it
5 will be very difficult, that it will be very difficult, I'm
6 not minimizing the issues that are reserved, okay, that it
7 will be very difficult to tamper with this stipulation once
8 I sign it and it is filed? Again, I'm not minimizing that
9 there are issues you have reserved. I'm not taking those
10 away or minimizing how important they might be to what
11 happens in this case. But, again, a stipulation, like any
12 contract, when people enter into it, we expect that that
13 will continue to be the case, that you're permitted to
14 count on this document, as are the State and the Court,
15 that we're all expecting that what's in this contract is
16 entered into in good faith and will continue to be abided
17 by. Would you agree with that statement?

18 THE RESPONDENT: Yes, I would.

19 THE COURT: All right. Now, I'm looking at page
20 number three. And it indicates that the State is planning
21 to attach a document, it's called Societies Monsters,
22 question mark. That's the title of the document. I don't
23 think I've seen that, although I've certainly seen the
24 title. So you understand at some point, it may not be this
25 minute while we're all in court, there will be an

1 attachment? Perhaps this will be attachment one.

2 THE RESPONDENT: Correct.

3 THE COURT: And you know what's referred to by
4 that?

5 THE RESPONDENT: Correct.

6 THE COURT: On the next page, page four, it
7 indicates that the State was planning to add the reports --
8 it says on this page you were planning to add the reports
9 of Dr. Judd and Dr. Packard?

10 MR. HACKETT: Yes, Your Honor. And we've shown
11 them to Mr. Scott.

12 THE COURT: And some e-mails?

13 MR. HACKETT: Yes.

14 THE COURT: Yes, here it is, in paragraph
15 thirteen on the page which says number four at the bottom.
16 And I think Dr. Judd has filed more than one report, hasn't
17 he?

18 MR. HACKETT: Yes. The reports we're attaching
19 are the most recent reports from both experts.
20 Dr. Packard's report is dated March 20th, 2007, and
21 Dr. Judd's report is dated August 16th, 2006.

22 THE COURT: All right. Thank you. So I'm sure a
23 number will be applied to these reports, either in series
24 or as a cumulative. And then there are some e-mails. And,
25 again, I know there's been many e-mails, but are those

1 packaged as an exhibit?

2 MR. HACKETT: No, I have to go back and have
3 those copied. There is a total of almost four thousand
4 pages of postings and that exhibit is about 35 different
5 postings. And that's for purposes of this stipulation.

6 THE COURT: All right.

7 Now, it sounds like that's as a group, an
8 activity that we would do together as a group. What, as a
9 practical matter, are you planning to do?

10 MR. HACKETT: No, it's not a group activity, Your
11 Honor, it's just something that we're going to submit to
12 complete the record.

13 THE COURT: True. But I don't want, obviously,
14 Mr. Scott to be surprised by an e-mail or you to be
15 unpleasantly surprised when he says that shouldn't go in
16 there or that's not mine.

17 MR. HACKETT: I think that we are well covered on
18 that, Your Honor. I'm not concerned with that.

19 THE COURT: Okay. That's fine. Obviously, I
20 remain ready to assist the parties if that's necessary. Or
21 if, for any reason, that were to go to Judge Scott, I'm
22 sure he would assist, as well, if it had something to do
23 with rulings that he has already made.

24 MR. HACKETT: Yes, Your Honor.

25 THE COURT: So, again, turning back to you,

1 Mr. Scott. I apologize for the diversion here. Again, I'm
2 on page four, we're looking at the paragraph that's
3 numbered thirteen. Mr. Hackett has clarified the
4 particular report of Dr. Judd and the particular report of
5 Dr. Packard that he was planning to include. Do you see
6 that, at lines ten and eleven?

7 THE RESPONDENT: Yes, Your Honor.

8 THE COURT: So you understand that at some point,
9 they will be attached?

10 THE RESPONDENT: I don't see any problem with
11 that. I don't see the relevancy, either.

12 THE COURT: I'm just speaking from my
13 perspective, they were very likely to be admitted at trial
14 when the doctors testified. And so they are being
15 attached. They do refer back to matters having to do with
16 the petition and what the evidence would have been. I'm
17 not asking you to say that you're stipulating to the
18 reports, but you're stipulating that the reports were
19 prepared after interviewing you and testing you?

20 THE RESPONDENT: I don't mind them attaching
21 anything they want. It's not relative, Your Honor.

22 THE COURT: Okay. Then when we move to the
23 bottom of paragraph thirteen, roughly at line eleven,
24 pardon me, roughly at lines twelve and thirteen, there's
25 information that the State is planning to prepare having to

1 do with e-mails from 1998 to 2001 in support of the
2 stipulation. So do you understand what it is that
3 Mr. Hackett is referring to?

4 THE RESPONDENT: As I said, they can attach
5 anything they want. I don't understand the relativeness of
6 attaching these things, but I don't give a darn.

7 MR. KAHR: You know what --

8 THE RESPONDENT: I understand it's being
9 attached. I don't know why it is.

10 THE COURT: And I'm not saying I know why either.
11 But Mr. Hackett believes that these e-mails are supportive
12 of this stipulation that has been entered into. You may
13 not agree that they're supportive or that they show what he
14 says, but he is planning to attach them. The next person
15 who looks at this certainly may read them, feel that they
16 are supportive of the stipulation.

17 THE RESPONDENT: One second.

18 (Respondent conferring with standby
19 Counsel.)

20 THE RESPONDENT: Just a second, Your Honor.

21 THE COURT: Of course.

22 (Respondent conferring with standby
23 Counsel.)

24 THE RESPONDENT: What he's reading, these
25 materials are going to be received only for the purpose of

1 the Court's finding a factual and legal basis for this
2 stipulation. And it should say, which includes the
3 e-mails.

4 MR. KAHRs: And the State has just stated on the
5 record that it does include the e-mails, if I understand
6 correctly Mr. Hackett's statement?

7 MR. HACKETT: Yes.

8 THE RESPONDENT: We're fine with that, Your
9 Honor.

10 THE COURT: Thank you.

11 So the next page -- am I the only one who has the
12 next page?

13 MR. HACKETT: Yes, Your Honor.

14 THE COURT: Would you like a copy of this? This
15 has to do with the eighteen months.

16 THE RESPONDENT: Yeah, I think we should.

17 THE COURT: If you don't mind, let's make copies
18 so we're all looking at the same document.

19 MR. KAHRs: If I may, on the order part, while
20 the copies are being made, I'll bring to the State's
21 attention there should be at least somewhere in the order
22 where it talks about the reserved issues. I don't know
23 where to put that.

24 MR. HACKETT: I think --

25 MR. KAHRs: Maybe under section four, have

1 another section under Conclusions of Law that, you know,
2 further reserved issues and so forth and so on.

3 THE COURT: So why don't I write reserved issues
4 and we will refer back to 2(a), or whatever it is.

5 MR. KAHR: I think that should be fine, Your
6 Honor. But I do think it should be part of the order.

7 MR. HACKETT: You could add a fifth Conclusion of
8 Law that Mr. Scott reserves the right to appeal the issues
9 on page 2(a). I think the stipulation is fine either way.

10 MR. KAHR: I think it's fine to have that
11 consistency.

12 THE RESPONDENT: And we should have on the order
13 it should include an order of transport.

14 THE COURT: It does say that here. We might want
15 a separate piece of paper. But it does say that upon entry
16 of this order.

17 THE RESPONDENT: I have had one before where we
18 didn't have one and I wasn't transported for three days'
19 worth.

20 THE COURT: So everybody now has a copy of what I
21 have in yellow, you have the handwritten so-called 4(a)?

22 THE RESPONDENT: Yes, Your Honor.

23 THE COURT: Thank you. So again, Mr. Hackett
24 went over this with you. I'll give you a chance to read it
25 over. I know he said it, but sometimes reading something

1 makes it more understandable.

2 THE RESPONDENT: The State agrees to waive the --

3 THE COURT: No, I'm just saying you can read it
4 to yourself.

5 THE RESPONDENT: Okay.

6 I agree with that, Your Honor.

7 THE COURT: Okay. So again, the highlights of
8 this, and I know that you negotiated it, I don't know
9 whether that was actually on the record but it was in this
10 room in everybody's presence, that the State is willing to
11 waive the requirement of a show cause hearing provided that
12 eighteen months from now you are able to come up with an
13 LRA, a less restrictive alternative, which includes a
14 treatment provider, appropriate housing and a treatment
15 plan which satisfies RCW 71.09.092.

16 THE RESPONDENT: I do have one question to the
17 prosecutor. Immediately after this, I have the right
18 actually to file for an LRA? I'm not in some way giving
19 up that right, am I, by this?

20 MR. HACKETT: Well, you have an eighteen month
21 limitation before you can seek that LRA trial, yes. Under
22 this stipulation, you have eighteen months before you can
23 do that.

24 THE RESPONDENT: That would restrict me from next
25 week filing that?

1 MR. HACKETT: Yes.

2 MR. KAHR: No, all this says is that the State
3 agrees to waive the requirement for a show cause hearing in
4 eighteen months. It means if you were to file in two
5 weeks, then there would have to be a show cause proceeding.
6 Is the way I see it.

7 MR. HACKETT: Yes, I guess that would be fine.

8 MR. KAHR: So in other words, then, in eighteen
9 months, you go without a show cause. But if he were to
10 file in two weeks, there would be the whole process?

11 MR. HACKETT: Yes. And Mr. Scott understands
12 this provision operates once, it's not a waiver of a show
13 cause hearing forever.

14 THE RESPONDENT: Correct, Your Honor.

15 MR. KAHR: In other words, in eighteen months,
16 he can move forward no matter what happens previously. But
17 this is a one time deal.

18 MR. HACKETT: Yes.

19 THE RESPONDENT: Is that clear to Your Honor?

20 THE COURT: Oh, definitely. Thank you. I
21 appreciate that you ask the questions now.

22 So again, let's move to the next page, which used
23 to be number two and now is number five. It begins with
24 the word Order at the top. Nothing has been changed with
25 regard to the typed material until we get to the bottom, we

1 crossed off at line 21 the sentence, "He has committed a
2 recent overt act." And again, you think Mr. Hackett has
3 indicated, and I believe you agree, that by crossing that
4 out, neither of you is waiving your position on that. The
5 State still can argue at some point that you did, and you
6 can still argue at some point that you did not.

7 THE RESPONDENT: This may cause a legal problem.
8 Because I was released in 94 and I had to have legally
9 committed a recent overt act to be committed. So we might
10 have created a little drama here.

11 MR. HACKETT: I don't believe so, because of the
12 Court's prior ruling stating that the State doesn't have to
13 prove --

14 MR. KAHRS: And I would say under the concept of
15 plea bargains in a criminal context, that even an Alford
16 plea, many bargains happen through lots of reasons. So I
17 think by stipulating they have enough, I don't see the
18 problem.

19 THE RESPONDENT: In other words, the State is not
20 saying that I didn't commit a recent overt act. Okay.

21 THE COURT: Correct. By crossing something out,
22 it doesn't mean the negative of that.

23 THE RESPONDENT: Correct.

24 THE COURT: So we're only saying that neither of
25 you have committed to a position in this document. Both of

1 you reserve your rights on that particular issue.

2 So then taking a look at page six, at the bottom
3 of that page, I haven't changed any of what's typed here.
4 I put at line 19, Roman numeral V, reserved issues, colon,
5 see page 2(a), supra. Which are the three reserved issues
6 we discussed earlier.

7 Do I need to do 4(a) also?

8 MR. KAHRS: I think that would be appropriate,
9 just so that we tie it together with that last piece of
10 string.

11 THE COURT: I'm going to make that six.

12 MR. KAHRS: Oh, okay.

13 THE COURT: I'm just writing LRA, see 4(a),
14 supra.

15 MR. HACKETT: Okay.

16 THE COURT: And that's Arabic 2(a) and Arabic
17 4(a). Because that's what's written on the bottom of those
18 pages in our handwriting.

19 Okay. Everybody is with me on that?

20 THE RESPONDENT: Yes. So it's page seven, I
21 guess.

22 THE COURT: Now we move on to page seven. I
23 guess I should indicate on page four, I put in the date
24 here, the 6th day of November. You have signed that,
25 Mr. Scott?

1 THE RESPONDENT: Yes.

2 THE COURT: And you were here to see Mr. Kahrs
3 also sign it as your standby counsel?

4 THE RESPONDENT: Go ahead, Your Honor. I'm
5 sorry.

6 THE COURT: That's okay. Do you need another
7 moment?

8 THE RESPONDENT: Yes.

9 (Respondent conferring with standby
10 Counsel.)

11 THE RESPONDENT: Okay. Your Honor, we're ready.

12 THE COURT: Okay. So I'm turning back to page
13 four for a second, just to say that's where your signature
14 is?

15 THE RESPONDENT: Correct.

16 THE COURT: And you saw Mr. Kahrs sign that?

17 THE RESPONDENT: Did he sign it?

18 THE COURT: Yes, on this one, he did.

19 THE RESPONDENT: Okay. It's page seven now.

20 THE COURT: No, I'm looking at page four, where
21 we get to the end of the stipulation. And Mr. Hackett
22 signed it standing up here. But again, I'll pass you the
23 original in a moment so you'll be sure.

24 THE RESPONDENT: It's all signed, yes.

25 THE COURT: So I'm returning to page seven, if

1 everybody's ready to move forward.

2 THE RESPONDENT: Correct.

3 THE COURT: So again, there are no changes to
4 page seven other than the number seven at the bottom.

5 THE RESPONDENT: That's correct, Your Honor.

6 THE COURT: I guess it used to have the number
7 four at the bottom, but that's been changed to number seven
8 so the document is consistent.

9 Now, again, I see what appears to be your
10 signature, Mr. Scott?

11 THE RESPONDENT: Correct.

12 THE COURT: And again, on my copy is Mr. Kahrs'
13 signature and Mr. Hackett's. I'll pass you down this one
14 so you'll see what I'm talking about. But again, I'm going
15 to date this the 6th and put in my signature.

16 Now, again, do you have any additional questions
17 that you want to ask Mr. Kahrs? Do you have any need to
18 think about this further? Would you like to look at the
19 original and then you can ask a question?

20 THE RESPONDENT: I'm ready and fine, thanks. We
21 do have the transport order ready to be signed.

22 THE COURT: And, of course, I would sign that,
23 regardless, whether you --

24 THE RESPONDENT: Right.

25 THE COURT: But again, Mr. Scott, I know you're

1 kind of in a rush to wrap this up, but is there anything
2 that we haven't talked about in court or in this document
3 that you want to bring to my attention?

4 THE RESPONDENT: I'd just like to express my
5 appreciation to the Court.

6 THE COURT: Okay. Well, that is kind. And
7 certainly we may have some dealings in the near future or
8 in the far future. I don't know that I will continue to be
9 assigned to this case. But I will certainly give my prompt
10 attention to anything that needs to be signed or any
11 rulings that need to be made.

12 But again, today, the choice is yours, Mr. Scott.
13 There's no question that you have a right to trial and we
14 were all prepared to go to trial today. Is there any
15 hesitation that you have about moving forward based on
16 these documents, whereby there will be entered a
17 stipulation reserving a few issues, perhaps very important
18 issues, perhaps dispositive issues, but again, relatively
19 few issues compared to all of the things that would have
20 happened at trial. That is your wish today?

21 THE RESPONDENT: Yes.

22 THE COURT: That's what you are indicating to the
23 Court by your signature?

24 THE RESPONDENT: That is my wish and I agree with
25 Your Honor that very likely these three issues might be

1 dispositive of this case anyway. So by moving forward with
2 those three issues now, it might speed up my release.

3 MR. HACKETT: And, Your Honor, if I could clarify
4 one other thing on the record. Mr. Scott, you understand
5 that as happened this morning, that the Court is here to
6 assist you with obtaining whatever you may need from the
7 jail to proceed pro se if this trial were to go forward?

8 THE RESPONDENT: No, I would not be able to. I
9 do not feel that I could proceed pro se in the King County
10 Jail under any circumstances.

11 MR. HACKETT: What I'm saying is you understand
12 that the Court is here to make sure that you have materials
13 available to you at the jail? For instance, this morning
14 the Court helped you obtain materials that you brought to
15 court this afternoon. You understand the Court is here to
16 do that role. Knowing that the Court does that role, do
17 you still wish to go forward with the stipulation?

18 THE RESPONDENT: I'm not aware of any materials
19 that were brought here to the Court today on my behalf.

20 MR. HACKETT: I'm going to try one more time,
21 Mr. Scott. And I apologize for my question perhaps being
22 too long. Do you understand that the Court would make
23 available to you the materials that you need to appear pro
24 se if this trial were to continue?

25 THE RESPONDENT: I would not give that

1 impression, no.

2 MR. HACKETT: Your Honor, I think that's an issue
3 that we need to explore. The record should not be left to
4 reflect that Mr. Scott is entering into this stipulation
5 because he feels he's being denied pro se materials at the
6 jail. I think what I'm hearing Mr. Scott say is that he's
7 entering into this stipulation because he recognizes the
8 reality that he is probably not going to prevail in this
9 trial as a pro se and is thus bargaining for things he
10 would not otherwise receive.

11 THE COURT: Of course, that was my assumption.

12 There are many challenges to any person who
13 appears pro se, whether that is in a divorce, in a criminal
14 case or in a very serious civil case like this one. I
15 certainly understand your position, Mr. Scott, that it is
16 challenging to be pro se and that it is challenging to be
17 present in the King County Jail. I don't want to ask any
18 kind of question that will make you uncomfortable, but you
19 understand that the Court is prepared to do what is
20 necessary to assure that there is a fair, prompt and
21 expeditious trial? I've said that to you before. I
22 certainly understand that you and many other people don't
23 like to be at the King County Jail. If that's why you're
24 entering into this stipulation, I don't think that's a very
25 good strategy. But as I say, if there's something more

1 than that that you need to discuss with me, that's fine.
2 But as I say, I am prepared to go ahead to trial,
3 obviously, the State is prepared to go ahead to trial and I
4 believe that you were ready to go ahead to trial.

5 I assume that you are entering this stipulation,
6 as I say, as a more sensible way to get the core issues of
7 your case decided by an appellate court. If there's,
8 again, something that I don't know about that you want to
9 discuss with me, this would be the time to do that.

10 THE RESPONDENT: Just a second.

11 THE COURT: Of course.

12 (Respondent conferring with standby
13 Counsel.)

14 THE RESPONDENT: If Mr. Hackett is agreeable,
15 we'd like to add one more reserved issue that you kind of
16 missed. And that was the denying of continuance, which we
17 have on appeal, in fact, at this point. In fact, I kind of
18 have to reserve it because it's already on appeal.

19 THE COURT: Is this the one that we had
20 relatively recently, two weeks ago, when we decided it?
21 Then I think there was some renewal of it last week.

22 THE RESPONDENT: Correct. And it is before the
23 State Supreme Court, so I do have to reserve it. It's
24 already before them. So on the page that we have the
25 reserved issues, if Mr. Hackett is agreeable?

1 MR. HACKETT: I believe that Mr. Scott has not
2 answered the question yet, Your Honor. And I think that
3 we've entered a deal here. That was not mentioned before.

4 THE RESPONDENT: I may have reserved it by the
5 fact that it's already in the State Supreme Court. If
6 Mr. Hackett's not willing to add it here, I think the fact
7 that it's already on appeal preserves it anyway.

8 THE COURT: I don't know.

9 MR. HACKETT: The State's not willing to add it.
10 So I think we both have our arguments before the State
11 Supreme Court.

12 THE RESPONDENT: Okay. It is already before the
13 Court, so it's reserved.

14 THE COURT: The important thing, I don't want
15 there to be something that is left unsaid. If you believe
16 that you are entering into this stipulation because some
17 other situation forced you to do so, then you need to tell
18 me that. As I say, if you're making this choice freely and
19 voluntarily, that was one of the questions I asked you.
20 It's not a happy day, necessarily, for any of us, including
21 you. But you are the one who is forced with making a
22 choice today.

23 If there is something that is not voluntary about
24 this, this would be the time to let me know. If you
25 believe that it's better to have a trial, then that's the

1 choice you should make. If you believe it is not better to
2 have a trial, and again, believe me, I will do everything I
3 can to make it a fair trial, then you can discuss that with
4 me. But only you can decide that.

5 I wouldn't pretend to give you advice. I know
6 you have had Mr. Kahrs available to give you advice. I
7 don't know whether this agrees with what he recommends or
8 doesn't, but today, you are the person who makes this
9 decision.

10 THE RESPONDENT: The Court seems hesitant to
11 accept the stipulation.

12 THE COURT: Oh, no.

13 THE RESPONDENT: As I said before, I do not --
14 this is just like someone who would enter a guilty plea
15 because they feel a jury would convict them. I'm entering
16 this plea because I feel, as a pro se, I cannot proceed
17 from a county jail. Of which I have no choice but to
18 proceed from a county jail.

19 It's pretty simple. So I'm entering this
20 stipulation on the ground I don't feel I would win as a pro
21 se operating from a county jail. I think that's enough.
22 I've repeated it a couple of times.

23 THE COURT: You have. I will mention, though,
24 that is not a reserved issue. So I don't know what would
25 happen if you tried to raise that at some other time, that

1 is, that you were somehow disadvantaged because you had to
2 operate from a county jail. The choice to be a pro se is
3 one you have made not once but twice and, again, after a
4 full opportunity to work with talented counsel, available
5 counsel.

6 So I don't mind your saying those words, but if
7 you feel that means that it's not voluntary, that this
8 isn't your choice but something that you're being forced to
9 do, those are different words.

10 MR. HACKETT: The State understands, Your Honor,
11 Mr. Scott to be saying he's making this choice after
12 weighing the strategic benefits of proceeding versus the
13 strategic benefits of entering into a stipulation. And I
14 believe the Court has made it clear to Mr. Scott that the
15 Court would make sure that resources were available to him.

16 THE COURT: That is true.

17 THE RESPONDENT: I think Mr. Hackett has said it
18 better than I could.

19 THE COURT: Okay. And certainly better than I.

20 So again, do you have any additional questions
21 that you want to discuss with Mr. Kahrs, anything
22 additional that you would like to bring up? We all know
23 that sometimes we forget to ask a question.

24 THE RESPONDENT: I think we just need a signature
25 on the transport order, if that's possible.

1 THE COURT: And, of course, that's possible.

2 So the Court has signed the document. We've all
3 taken a look at the changes. I guess I'll go through and
4 initial all the changes that have been discussed.

5 MR. HACKETT: Your Honor, we'd be happy to take
6 that down and have it certified.

7 THE COURT: Okay. Let me get the transport order
8 signed.

9 Okay. And everybody thinks as soon as practical
10 is going to mean as soon as practical?

11 MR. HACKETT: Yes. I think the transport will
12 happen as soon as it can happen.

13 THE COURT: Okay. Thank you.

14 So I've gone ahead and signed this. Let's make a
15 copy for the officers and for Mr. Scott.

16 MR. HACKETT: I believe we'll have to go
17 downstairs and get it certified. Mr. Kahrs can come with
18 us.

19 THE COURT: But do the officers need a copy now?

20 MR. HACKETT: Probably not, no. It goes to a
21 different department.

22 MR. KAHR: The Regional Justice Center, Your
23 Honor.

24 (Discussion off the record.)

25 THE COURT: So in terms of the attachments, when

1 will that happen and how will that happen?

2 MR. HACKETT: Tomorrow, Your Honor.

3 THE COURT: Okay. Obviously, I don't need these
4 notebooks for anything. So I will return them to your
5 care. But obviously, they have copies of Dr. Judd's and
6 Dr. Packard's reports, if that makes things easier.

7 MR. HACKETT: This is complete. We've got those
8 attachments on there from our notebooks.

9 THE COURT: Okay.

10 So we will excuse you, Mr. Scott. Mr. Kahrs will
11 accompany the prosecutors to get the certified copy.

12 MR. KAHRs: You bet.

13 THE COURT: Let's make a copy of the order for
14 Mr. Scott so that he has it just in case there is any
15 confusion.

16 Now, will the officers take his pills?

17 MR. KAHRs: No, they've been instructed on that.

18 A CORRECTIONS OFFICER: He'll keep them in his
19 room.

20 THE COURT: Thank you. I appreciate your
21 patience. I'm sorry we didn't take a break this afternoon.
22 But it was good to get it done.

23 Goodbye, Mr. Scott.

24 (Court adjourned at 3:00 p.m.)

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C E R T I F I C A T E

I, TARALYNN A. BATES, Certified Shorthand Reporter and Official Court Reporter for the King County Superior Court, State of Washington, do hereby certify that I reported the court proceedings annexed hereto in the foregoing cause number while acting in my official capacity;

I FURTHER CERTIFY that the foregoing transcript is a full, true and correct copy of said proceedings ordered to be transcribed, to the best of my ability, reported stenographically and computer transcribed by me;

I FURTHER CERTIFY that I am not related to any of the parties to this cause of action, nor am I interested in the outcome thereof.

WITNESS MY HAND this 21st day of May, 2008.

15/ Tara Lynn A. Bates

TARALYNN A. BATES
Official Court Reporter
King County, Washington

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COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

In re the Detention of)
)
 RICHARD ROY SCOTT) No. 70692-6-I
)
)
) Declaration of Service
)

KELLY LORENZEN, being first duly sworn on oath, deposes and states that I arranged for service of a copy of the following documents by ABC Legal messenger delivery:

State's Response Brief

on:

Marla Leslie Zink
Washington Appellate Project
1511 3rd Ave Ste 701
Seattle, WA 98101-3635

Under penalty of perjury under the laws of the State of Washington, I certify the foregoing is true and correct.

Signed and dated by me this 12th day of February, 2014 at Seattle, Washington.


Kelly Lorenzen

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