

NO. 36409-3-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO

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STATE OF WASHINGTON,

Respondent,

v.

DAVID JAMES LEWIS,

Appellant.

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STATE OF WASHINGTON  
COURT OF APPEALS  
BY \_\_\_\_\_  
CLERK OF COURT



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

The Honorable Stephanie Arend, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. A criminal defendant who is civilly committed at the Special Commitment Center (SCC) as a sexually violent prisoner should be granted credit for time served for pretrial detention at the SCC pending conviction and sentencing.
2. Civil commitment at the SCC pending conviction and sentencing is akin to partial confinement under the Sentencing Reform Act.
3. Even if civil commitment at the SCC does not meet the statutory definition of partial confinement under the SRA, credit for time served while civilly committed at the SCC is constitutionally mandated.
4. Credit for time served while civilly committed at the SCC is authorized under the equitable doctrine of time served at liberty.
5. The trial court abused its discretion by failing to dismiss the case based on prosecutorial mismanagement.
6. The state failed to prove that appellant's possession was unwitting.
7. The trial court abused its discretion in denying Mr. Lewis' motion to suppress evidence that had a flawed chain of custody
8. Mr. Lewis was prejudiced by the state's mismanagement of his case and the trial court abused its discretion in denying his motion to dismiss the charges.

Issues Presented on Appeal

1. Should a criminal defendant who is civilly committed at the Special Commitment Center (SCC) as a sexually violent prisoner be granted credit for time served for pretrial detention at the SCC pending conviction and sentencing?

2. Is civil commitment at the SCC pending conviction and sentencing akin to partial confinement under the Sentencing Reform Act?
3. Even if civil commitment at the SCC does not meet the statutory definition of partial confinement under the SRA, is credit for time served while civilly committed at the SCC constitutionally mandated?
4. Is credit for time served while civilly committed at the SCC authorized under the equitable doctrine of time served at liberty?
5. Did the trial court abuse its discretion by failing to dismiss the case based on prosecutorial mismanagement?
6. Did the trial court abuse its discretion in denying Mr. Lewis' motion to suppress evidence that had a flawed chain of custody?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The defendant David Lewis is a resident of the Special Commitment Center (SCC) on McNeil Island, having been committed there under RCW 71.09 as a sexually violent predator. On July 14, 2006, Lewis was charged by Information with one count of possession of depictions of minors engaging in sexually explicit conduct. CP 1.1 Mr. Lewis moved to suppress evidence obtained during a room search based on an incomplete chain of custody, based on discovery violations under CrR 4.7, and based on government

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<sup>1</sup> CP refers to the clerk's papers prepared from Pierce Superior Court Cause Number 06-1-03207-3.

mismanagement under CrR 8.3(b). RP 366-67; 547, 609-610. 2 The trial court denied both motions and the state failed to submit findings and conclusions to memorialize the court's rulings. RP 585-86, 608-09, 617-18.

After a number of continuances, jury trial began on May 1, 2007, before the Honorable Stephanie Arend. On May 10, 2007, the jury returned a guilty verdict on the charge, and the Court entered conditions on release that he be held without bail. CP 26; Supplemental CP (Order Establishing Conditions of Release 5-10-07). This timely appeal follows. CP 37-50.

(a) Facts Related to CrR 3.5 Hearing

Lewis objected to the introduction of the tape seized from his room at the SCC on grounds that it was not relevant under ER 402 and because the prejudice outweighed its probative value under ER 43, 48-49. RP 93. The Court denied the motion finding that the tape was relevant and not overly prejudicial. RP 94-95, 108, 113.

Lewis claimed to have asked Pierce County Detective Jackson, the person who interviewed him whether or not he needed a lawyer. RP 34-35. According to Lewis, Jackson told him that he did not need a lawyer. Id. Jackson testified that he advised Lewis of his rights and Lewis voluntarily waived all of his rights. RP 38, 47-48. The trial court found Jackson to be

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2 RP refers to the verbatim Report of Proceedings from Pierce County Superior Court

credible. RP 47.

(b) Facts Related to Sentencing Issue.

On July 28, 2006, Lewis was arraigned; the conditions of release indicate he was “released on his personal recognizance.” Supplemental Clerk’s Papers (Order Establishing Conditions of Release 7-28-06). This, of course, is a fiction, as Lewis was confined under heavy security in the SCC, was not free to leave without Department of Correction guards, and court orders are required before he could be transported to the Pierce County Jail for hearings in this case.

Sentencing was set for June 8, 2007. CP 54-64. On May 18, 2007, a bail hearing was held, at which time Lewis requested that he be allowed to return to the SCC to be held there pending sentencing. Supplemental CP (Order Establishing Conditions of Release 5-18-07). The Court changed the conditions of release to allow his return to the SCC. Id.

On June 7, 2007, one day prior to sentencing, the Attorney General’s Office moved for leave to file an *amicus curiae* brief on behalf of the Department of Social and Health Services (DSHS) regarding sentencing. CP 29-36. At sentencing held on June 8, 2007, DSHS argued that Lewis’s sentence could not be served by law at the SCC. Lewis argued that he was

entitled to credit for time served (CFTS) prior to conviction, while confined at the SCC. Supplemental CP (Defense Memorandum 7-12-07).

The trial court sentenced Lewis to 12 months, and denied Lewis CFTS for the *entire* time he has been confined at the SCC since his arraignment on July 28, 2006, granting him credit only for 35 days, representing the time spent while at the Pierce County Jail. CP 54-64. The trial court denied Lewis' motion to reconsider the issue of CFTS. Supplemental CP (Clerk's Minutes 8-2-07)<sup>3</sup>.

## 2. SUBSTANTIVE FACTS

Terrell Smith a Residential Rehabilitation Counselor grade 2 ("RRC-2") was working the front desk at the SCC in Alder Unit on January 11, 2006 between 8:00 AM and 4:00PM. RP 233-34. Residents of the SCC Alder unit are not allowed to enter each other's rooms or sit near the door to a resident's room. RP 301, 338.

On January 11, 2006, Terrell Smith observed Ryan Moinette, another resident of Alder Unit sitting outside Lewis' room for 10-20 minutes. RP 235. Smith wondered what was going on so he cued the microphone and listened to their conversation for 5-10 minutes. Smith heard either Lewis or Moinette make vulgar, sexual comments about an eleven year old girl. RP

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<sup>3</sup> The trial court did not enter and order denying Lewis' motion for reconsideration, but

237.

Other staff members were convened and RRC Sheri Riconosciuto took notes while watching Moinette at Lewis' door. RP 249, 289-90. Riconosciuto watched and listened to Moinette and Lewis for 5-6 minutes and heard sexual comments. RP 291-292. Richard Dexter another RRC-2 filling in as a RRC-3 arrived and he called supervisor Angela Tate. RP 318-19, 323. Dexter arrived at 3:15 PM and observed Moinette looking into Lewis' room for 25-30 minutes. RP 323, 325. Tate arrived at about 3:25 PM and decided to search Lewis' room. RP 324. The search team arrived at 3:45 PM. RP 325. Annette Rivers another RRC-2 arrived to participate in the search as the camera person. She testified to observing Moinette sitting outside Lewis room looking intently at something for 10 minutes. 267-68, 271.

Roy McIntyre another RRC-2 at the SCC assembled the search team and briefed them on the procedure for the search, including the operation of the video camera to record the search. RP 169, 173. McIntyre testified that as he approached Lewis room with the team he saw a video on Lewis' TV screen depicting an adult male having penile penetration intercourse with a juvenile female. RP 176. According to McIntyre, when Lewis saw him enter the room, he turned off the video. RP 176.

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the VRP and the clerk's minutes reflect the court's denial of the motion).

McIntyre removed the tape from the VCR and gave it to a search team member Eddie Blackburn to put in the confiscated items box. RP 179. The tape had the name of several movies written on it: "Reckless", "As Good as it Gets" and "Mrs. Doubtfire", in addition to the name "Michael" RP 179, 184. McIntyre wrote a report summarizing the search but failed to note that he saw pornography on the TV in Lewis' room, even though he admitted that this was a significant fact. RP 184-85, 206.

Once McIntyre gave the tape to Blackburn, he was unaware of the chain of custody and Blackburn no longer worked for the SCC at the time of trial. RP 217-18. Mike Hogan another member of the search team testified that he did not see anything on the TV screen in Lewis' room but that he seized 18 VHS tapes and put them into a box. RP 386.

What we do is everything we confiscate we'll have a box that we put everything so after we've confiscated all the items we put it in the box and then from there, if the box was escorted to a locker, and then we do paperwork - - we do the inventory on what we confiscate, we make copies, give the copies to the investigators or the appropriate individuals that need copies and we put the items in a locker and we lock it and then we waited for administrators to come in and deal with it.

RP 386. Hogan testified that there is always a witness to the placing of the

confiscated items into an evidence locker and that in this case, he believed that McIntyre, Blackburn and himself placed the items in to the evidence locker. RP 387. McIntyre, testified that he was not present when the tapes were placed into evidence. RP 217-18. Once the lockers are locked, the staff does not have access, the only person with a key is Darold Weeks, the chief investigator at the SCC. RP 416, 424-25.

Hogan generated a document Ex 7 which listed the number of tapes and CD's confiscated from Lewis' room. RP 408. The document was two pages long, but Hogan never saw page 2 and was only responsible for page one. RP 411-12. Exhibit # 6 was another search document signed by Hogan and Blackburn. RP 407. Weeks generated the second page of Exhibit #7 on January 12, 2006. He removed the Videos and CD's from locker #8 , viewed all of them and placed Exhibit #5 a single tape into locker # 6. RP 422-24, Locker #6 is located in a secure evidence room accessible only to Weeks. RP 424-25. Weeks took Exhibit #5 home on the Friday before his date to testify in Lewis' trial and brought it to court the following Monday. RP 428-31.

Weeks gave Exhibit #3, a copy of Exhibit #5 to Detective Portmann. RP 431, 438. Weeks told Portmann that the tape was a copy. RP 439. Weeks had no idea about the chain of custody prior to his obtaining the tape from the locker at the SCC. RP 454. Portmann knew the tape was a copy but his

report does not indicate that the tape is a copy. RP 537, 556. The tape itself has a label indicating that the tape is a copy. RP 537. Defense investigator Morgan Armijo viewed the tape but never handled it and never saw the word “copy” on the tape cover. Jackson also never informed him that the tape was a copy. RP 671-74.

Detective Jackson of the Pierce County Sheriff’s department investigated Lewis’ case and went to the SCC to interview Lewis. RP 500, 508-09. As part of his investigation, Jackson viewed the copy of the tape seized from Lewis’ room, Exhibit #3 and the original tape, Exhibit #5. RP 527, 530. The beginning of the two tapes are different, but the pornographic content is the same except the original tape has an addition moment of pornography that is not captured on the copy. RP 534, 554, The tapes contained about 5 minutes of child pornography and other commercial television program of unknown duration.

During the interview Lewis informed Jackson that he loaned a tape to another resident so that he could use it to tape a movie. When the tape was returned to Lewis it contained the child pornography. RP 514. Lewis told another resident Ryan Moinette about the pornography and asked him what to do. Moinette and Lewis watched the tape and Lewis decided to tape over it to remove the pornography to avoid getting into trouble for possessing

contraband. RP 514-18. The guards came into Lewis room to do a search when Lewis was beginning to tape over the pornography. RP 515.

Dr. Yolanda Duralde, the medical director of the Child Abuse Center at Mary Bridge Hospital testified regarding the child images in the tape seized from Lewis' room. She opined that the children depicted in the pornographic scenes ranged in age from small pre-pubescent children to teens. RP 567-572. Dr. Duralde also testified that the images on the tape were depictions of actual children. Id.

Darryl Cosme a former Immigration Customs Enforcement officer testified that after viewing the tape seized from Lewis' room, he recognized the scenes and children depicted from years of investigating child abuse cases. RP 629-35, 645-49. The child pornographic images on the tape were clips of longer video tapes created in the 1970's and 1980's. RP 646-47.

### C. ARGUMENT

#### 1. THE TRIAL COURT ABUSED HER DISCRETION BY FAILING TO SUPPRESS EVIDENCE FOR WHICH THE CHAIN OF CUSTODY WAS TOO TENUOUS.

A trial court's decision to admit evidence is reviewed for abuse of discretion. State v. Campbell, 103 Wn.2d 1, 21, 691 P.2d 929 (1984), cert. denied, 471 U.S. 1094, 85 L.Ed.2d 526, 105 S.Ct. 2169 (1985). A trial court

abuses its discretion if its decision is manifestly unreasonable or based upon untenable grounds or reasons State v. Stenson, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997), cert denied, 523 U.S. 1008, 140 L.Ed.2d 323, 118 S.Ct. 1193 (1998).

During trial, Lewis objected to the admission of the tape seized during a room due to a flawed and incomplete chain of custody. A physical object connected with a crime may properly be admitted into evidence when properly identified and when shown to be in substantially the same condition as when the crime was committed. Campbell, 103 Wn.2d at 21.

While the evidence need not be identified with absolute certainty, nor must every possibility of alteration or substitution be eliminated, the item **must be properly identified** as the same item placed into custody. Campbell, 103 Wn.2d at 21, citing, Brown v. General Motors Corp., 67 Wn.2d 278, 285-86, 407 P.2d 461 (1965). (emphasis added). Factors to be considered "include the nature of the article, the circumstances surrounding the preservation and custody of it, and the likelihood of intermeddlers tampering with it." Campbell, 103 Wn.2d at 21, quoting, United States v. Gallego, 276 F.2d 914, 917 (9<sup>th</sup> Cir. 1960).

Chain of custody may established even without proof of an unbroken chain of custody . . . "A failure to present evidence of an unbroken chain of

custody does not render an exhibit inadmissible if it is properly identified as being the same object and in the same condition as it was when it was initially acquired by the party.” State v. Picard, 90 Wn. App. 890, 897, 954 P.2d 336, review denied, 136 Wn.2d 1021, 969 P.3d 1065 (1998) (citation omitted) quoting, State v. DeCuir, 19 Wn. App. 130, 135, 574 P.2d 397 (1978). “[M]inor discrepancies or uncertainty on the part of the witness will affect only the weight of evidence, not its admissibility.” Campbell, 103 Wn.2d at 21 citing, 5 KARL TEGLAND, Washington Practice § 90, at 203 (2d ed. 1982).

The inability to determine the whereabouts of the original tape after it was taken from Lewis’ room until it was deposited into an evidence locker cannot be considered a "minor discrepancy", rather the inability to determine who possessed the tape and for what period of time the undermines the foundation requirement needed to apply the more the permissive language in the chain of custody rules. Either the chain of custody must be iron-clad or the witness must be able to positively identify the item in question.

In State v. Neal, 144 Wn.2d 600, 607-08, 610-11, 30 P.3d 1255 (2001), the Court held that the trial court abused its discretion by admitting the flawed lab certification evidence without the proper foundation and chain of custody. The abuse of discretion was held to be reversible error. The court

reasoned that CrR 6.13(b), an exception to the hearsay rule, only provided for the admission of lab certifications in lieu of live testimony when the rule was strictly complied with. The Supreme Court agreeing with the Court of Appeals affirmed that the lab report and certification have two functions, "furnishing prima facie evidence of both the test results and the chain of evidence custody to and from the testing expert." State v. Neal, 144 Wn.2d. at 607. (Citation omitted).

In Neal, the Deputy was able to testify that he was the person who handled the substance between the Tacoma crime lab and the Skamania evidence vault, but his testimony did not supply the information specifically required by the court rule: the name of the person from whom the tester of the substance received the evidence. State v. Neal, 144 Wn.2d at 606.

In Neal, in the context of introducing hearsay, the Supreme Court recognized that failure to strictly comply with the rules would create an unintended "catch-all" that would create an unacceptably unpredictable application of the law.

Despite purported safeguards, there is a serious risk that trial judges would differ greatly in applying the elastic standard of equivalent trustworthiness. . . . There would be doubt whether an affirmance of an

admission of evidence under the catchall provision amounted to the creation of a new exception with the force of precedent or merely a refusal to rule that the trial court had abused its discretion.

State v. Neal, 144 Wn.2d at 610-11.

Unlike in the instant case, in the cases cited herein, either the chain of custody was flawed but the identification not in issue, or the identification was certain and the chain of custody flawed but accompanied by no evidence of tampering. To permit the state to avoid both the chain of custody requirement and the identification requirement would eliminate the evidentiary safeguards designed to protect the accused's right to due process.

State v. Neal, 144 Wn.2d at 607-08.

In the instant case both the identification of the tape and the chain of custody are insufficient to establish the necessary foundation. No one was able to testify to the whereabouts of the tape for an indeterminate amount of time. The trial court also acknowledged that the tape could have been tampered with during the time that its whereabouts were unknown. "The timing of this was all fairly short, arguably though sufficient enough time to have tampered with it, and I suppose - - I suppose that's always a possibility, but unless there's some showing that it could have been, I don't think it goes

to admissibility.” After acknowledging the problems with the chain of custody and the possibility of tampering with the evidence, the trial court denied the motion to dismiss for failing to establish a valid chain of custody. RP 617-18.

The trial court abused its discretion by failing to dismiss the case based on an incomplete chain of custody because the ability to tamper with the state’s most critical piece of evidence against Lewis completely undermined required foundation and trustworthiness for admission into evidence. Admission of the tape under these circumstances amounted to the type of "catch-all" held **impermissible** in State v. Neal, *supra*. In the instant case, the trial court abused its discretion because the state was unable to establish an unbroken chain of custody and was also unable to identify the tape as the same item retrieved from Lewis’ room. State v. Neal, 144 Wn.2d at 607-08.

When the trial court abuses its discretion, the reviewing court must determine whether the error was harmless or prejudicial. Reversal is required if the error results in prejudice. State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). An error is prejudicial if, "within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected." State v. Neal, 144 Wn.2d at 611, quoting, State v. Smith,

106 Wn.2d 772, 780, 725 P.2d 951 (1986). Improper admission of evidence constitutes harmless error only if the evidence is of minor significance in reference to the evidence as a whole. Thieu Lenh Nghiem v. State, 73 Wn. App. 405, 413, 869 P.2d 1086 (1994).

Under this test, plaintiff's exhibits #2 and #5 should have been excluded because the State could not prove that the original tape had not been tampered with and exhibit #2 had no value as it was simply a copy of a potentially tampered with piece of evidence. The state could not have proceeded in its prosecution of Lewis without the tape, because without it, there was insufficient evidence to find the elements needed to prove the crime of possession of child pornography.

3. THE TRIAL COURT ABUSED ITS DISCRETION FOR FAILING TO DISMISS THE CHARGES BASED ON PROSECUTORIAL MISMANAGEMENT

CrR 8.3 provides in relevant part:

The court, in furtherance of justice, after notice and hearing, may dismiss any criminal prosecution due to the arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial.

To obtain a dismissal, the defendant must establish (1) arbitrary action or government misconduct, and (2) prejudice materially affecting the defendant's right to a fair trial. State v. Moore, 121 Wn. App. 889, 894, 91 P.3d 136, review denied, 154 Wn.2d 1012, 114 P.3d 657 (2004). The rule authorizing dismissal of criminal charges in furtherance of justice exists to protect a defendant from unfair treatment. State v. Michelli, 132 Wn.2d 229, 239, 937 P.2d 587 (1997); see also, State v. Stephans, 47 Wn. App. 600, 603, 736 P.2d 302 (1987) ("The purpose of [8.3(b)] is to ensure that once an individual has been charged with a crime, he or she is treated fairly." (Citations omitted)).

Dismissal of criminal charges does not require a finding of evil or dishonest governmental action, rather simple mismanagement is sufficient. Moore, 121 Wn. App. at 894. A trial court's decision under CrR 8.3(b) will be reversed for abuse of discretion. State v. Blackwell, 120 Wn.2d 822, 832, 845 P.2d 1017 (1993); Michelli, 132 Wn.2d at 240. An abuse of discretion is a decision that is manifestly unreasonable or based on untenable grounds. *Id.*

The trial court agreed that the state's handling of the critical evidence tape was inexcusable and should have been turned over to the sheriff's secure evidence lockers. RP 605-07. The trial court also agreed that the tape could have been tampered with. RP 627-18. Inconsistent with these findings, the

trial court concluded that Lewis was not prejudiced because although the tape could have been tampered with, there was not direct evidence of tampering. RP 627-18. Lewis was prejudiced precisely because the evidence used against him was not sufficiently identified as being tamper free.

The trial court abused its discretion by denying the motion to dismiss, because Lewis established that his right to a fair trial could not be safeguarded when the state's witnesses had an opportunity to tamper with the evidence and it was impossible to determine that the tape had not been tampered with.

The handling of the tape in the instant case is an example of the type of simple mismanagement considered sufficient to warrant dismissal. Michelli, 132 Wn.2d at 239.

3. PRETRIAL DETENTION AT THE SCC, REGARDLESS OF SEMANTICS, DOES NOT CONSTITUTE ACTUAL "RELEASE ON PERSONAL RECOGNIZANCE," BUT INSTEAD IS EQUIVALENT TO "PARTIAL CONFINEMENT," SIMILAR TO ELECTRONIC HOME MONITORING OR HOUSE ARREST, FOR WHICH THE DEFENDANT MUST BE GRANTED CREDIT FOR TIME SERVED.

The Sentencing Reform Act (SRA) requires the sentencing court to "give the offender credit for all confinement time served before the

sentencing if that confinement was solely in regard to the offense for which the offender is being sentenced.” RCW 9.94A.505(6)(emphasis added). “Confinement” is defined as “total or partial confinement.” RCW 9.94A.030(11)(emphasis added). “Partial confinement” is in turn defined as “confinement for no more than one year in a facility or institution operated or utilized under contract by the state or any other unit of government, . . . [and] includes work release, home detention, work crew, and a combination of work crew and home detention as defined in this section.” RCW 9.94A.030(32).

Conditions of release which amount to home detention entitle a defendant to credit for the time so confined. See, e.g., State v. Speaks, 119 Wn.2d 204, 209, 829 P.2d 1096 (1992)(holding that defendant was entitled to credit for time served prior to sentencing in electronically monitored home detention); State v. Anderson, 132 Wn.2d 203, 207, 937 P.2d 581 (1997)(holding that defendant was entitled to post conviction home monitoring, finding no distinction between pretrial and post conviction confinement; State v. Swiger, 159 Wn.2d 224, 1229-30, 49 P.3d 372 (2006)(holding petitioner was entitled to credit for time served while released on post-conviction GPS home monitoring pending appeal).

In this case, Lewis submits that his confinement at the SCC pending

trial entitles him to credit under the SRA for that time served, as a form of “partial confinement.”

First, there is no question he was confined “in a facility or institution operated or utilized under contract by the state or any other unit of government.” RCW 9.94A.030(32). Second, although the State may argue that he was not confined “solely in regard to the offense” for which he has been sentenced here as provided by RCW 9.94A.505(6), in fact that he has been confined there “solely in regard” to this case, because he is not charged with any other criminal offense. Third, civil confinement at the SCC, even though designated as release on “personal recognizance” in fact has more severe restrictions placed on the resident than does “partial confinement” of electronic home monitoring or house arrest. For these reason, confinement at the SCC “amounts to” home detention. Speaks, Anderson, and Swiger, supra.

There are sound policy reasons supporting this conclusion. In another Pierce County criminal case in which the defendant is civilly committed at the SCC pending trial, Craig Adams, the Deputy Prosecuting Attorney representing the Pierce County Jail, stated on the record that confinement at the SCC is in the nature of “partial confinement,” in that an offender confined at the SCC is not free on his own recognizance, but is placed on restrictions:

If it may please the Court, my name is Craig Adams. I'm a deputy prosecuting attorney and legal advisor to the sheriff. . . .

. . . Well, when Mr. Moore has been here in the past he's been a level 1 classification, which is the most serious classification. He would be put in 3 south under protective custody, serious restrictions on any time he has. He is also a considerable behavioral risk when he's in our custody.

. . .

Now the issue . . . about credit for time served, if a person here is in total confinement or partial confinement, such as electronic home detention or something of that nature, they accrue credit for time served. If a person has no restrictions, they are on their own recognizance or the like, in fact they do not accrue credit for time served. If the order incarcerating or putting Mr. Moore at the SCC would be considered at least partial confinement, he would accrue his time, that would be a decision for Your Honor to make, or whoever ultimately the sentencing judge should be.

But we would strongly urge the Court not to be revoking him or putting him with the Pierce County Jail. We don't think that's going to work well for the jail. We believe it's inappropriate . . .

Supplemental CP (Defense Memorandum 7-12-07) (attachments to the

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<sup>4</sup> Craig Adams' position was taken in this case when the defendant Paul Moore set a bail hearing to request that his conditions of release be changed from "personal recognizance" to a bail hold, to ensure that he could get credit for time served. See Supplemental Clerk's Papers (VRP Moore 8-2-07) at page 5-7.

Defense Memorandum attached hereto as Exhibit A); Supplemental Clerk's Papers (VRP Moore 8-2-07) at page 5-7. .

Mr. Adams' position makes sense. Incarcerating sexually violent predators in the jail pending trial presents significant potential security risks as well as liability for the county. *Id.*, at pp. 5-6. "Releasing" sexually violent predators charged with a crime on their "personal recognizance," however, is a complete legal fiction, since they are even more securely confined at the SCC than under electronic home detention. If credit is not given for the time served at the SCC, the potential "fallout" could be similarly-situated defendants requesting *bail or even a no bail hold* at arraignment, resulting in their placement in the jail population for the duration of their pending proceedings. This would place an undue burden on the jail. Lewis therefore respectfully requests this Court reverse the Judgment & Sentence, and grant him day for day credit for confinement at the SCC, as a form of partial confinement authorized by statute.

- (i). Even if Pretrial Detention at The SCC Is Not Statutorily Equivalent to Partial Confinement, Credit For Time Served is Constitutionally Mandated.

"Under both federal case law and the case law of this state,

presentence detention time is required to be credited against the sentence ultimately imposed.” State v. Speaks, 119 Wn.2d at 206, citing, Reanier v. Smith, 83 Wn.2d 342, 347, 517 P.2d 949 (1974). “Even without statutory authority for the allowance of such credit, it is constitutionally mandated.” State v. Speaks, 119 Wn.2d at 206, citing Reanier, 83 Wn.2d at 347, In re Knapp, 102 Wn.2d 466, 469, 687 P.2d 1145 (1984).

In Reanier, *supra*, a number of petitioners sought review of the parole board’s<sup>5</sup> refusal to grant them credit for pretrial confinement. Among the petitioners was one defendant, Reanier, who was confined alternately in the county jail and Western State Hospital, both pretrial and pending sentencing. The Court in Reanier held that failure to give all of the defendants “credit . . . [for] time served in detention prior to trial, conviction and sentencing violates their rights, under the fifth and fourteenth amendments to the United States Constitution, to due process of law, equal protection under the law, and freedom from multiple punishment.” Reanier, 83 Wn.2d at 346.

The Court in Reanier did not make any distinction between Mr. Reanier’s confinement at both the county jail and Western State Hospital and those defendants who served all of their confinement in county jails, noting that “an unconvicted accused who is not allowed or cannot raise bail is

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<sup>5</sup> This case was prior to enactment of the Sentencing Reform Act of 1981, and the

deprived of his liberty.” *Id.* at 349, quoting, Culp v. Bounds, 325 F. Supp. 416, 419 (W.D.N.C. 1971)(emphasis added).

In re Knapp, 102 Wn.2d at 467 followed on the heels of Reanier, and considered whether “time spent confined in a state mental hospital pursuant to a valid criminal conviction [must] be credited against the offenders’ subsequently imposed . . . sentences.” The Court in Knapp emphasized that the Court in Reanier failure to distinguish between those defendants held in jails and those held at a mental hospital was purposeful:

While this court has never addressed whether “non jail” custodial confinement in a state facility pursuant to a valid criminal conviction must be credited against an individual’s prison term, we have previously dealt with the issue of sentence credit. In Reanier v. Smith, 83 Wash. 2d 342, 517 P.2d 949 (1974), we held that the denial of credit against the maximum and mandatory minimum terms for pretrial detention is unconstitutional.

. . .

One petitioner in Reanier, convicted of second degree assault, was seeking credit for the 23 months he spent in both the county jail and Western State Hospital prior to judgment and sentence. Neither this court nor the parties treated this fact as a distinguishing point in terms of sentence credit. See Reanier, at 343. See also In re Quinlivan, 22 Wash.App. 240, 243 n. 1, 588 P.2d 1210 (1978)(Reanier requires credit for petitioner’s pretrial incarceration at Eastern State Hospital.

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petitioners were serving indeterminate sentences subject to review by the parole board.

In re Knapp, 102 Wn.2d at 469-70(emphasis added).

The Court in Knapp also noted that the issue of post-conviction credit for “hospital” time has been addressed by statute, providing that if a person convicted of a crime and incarcerated in a correctional facility or institution is in need of mental health treatment, he can be “transferred or moved for observation, diagnosis or treatment to any state institution or facility for the care of the mentally ill . . .” Id., at 471, citing, RCW 72.68.031. The Court further noted that once transferred his sentence would continue to run for the duration of the period he is detained or confined at the mental health facility. Id. at 472, citing RCW 72.68.031. Finally, the Court in Knapp stated that “the Legislature has determined that after a person is committed to a state hospital pursuant to a determination of sexual psychopathy, all time in the state hospital shall count as part of his sentence.” Id., citing RCW 71.06.120.

Importantly, Knapp makes it very clear that even if there was no statutory authority for granting credit for confinement spent in a mental hospital, the equal protection clause requires it:

There is no logical reason for distinguishing between persons who are transferred to mental health facilities after confinement in prison and persons originally sent to mental health facilities by sentencing court prior to confinement in prison.

...  
... The Legislature has determined that custodial confinement in a state mental hospital is substantially synonymous with custodial confinement in prison or jail and that individuals incarcerated in the former should be treated the same as those incarcerated in the latter. See, e.g., RCW 72.68.031.  
... The distinction urged by the State ignores the fact that, like confinement in a prison or jail, a person committed to a mental hospital pursuant to a valid criminal conviction is subject to a massive curtailment of liberty. . . . Like probationers incarcerated in jail, probationers confined in state hospitals are not free to leave the facilities. Neither petition in this case could request to leave the state hospital and by that request be allowed to leave. Cf. RCW 71.050.050 (any person voluntarily admitted for inpatient treatment shall be released immediately upon his request).

Id. at 473-74 (emphasis added, some citations omitted).

Here, Lewis's confinement at the SCC pending conviction and sentencing is akin to confinement for mental health treatment at a state mental hospital. Like a mental hospital, at the SCC, he is subject to a "massive curtailment of liberty," and is not free to leave the facilities. Denying Lewis that credit for this confinement would deny him equal protection of the law guaranteed by our constitution.

Moreover, denying Lewis credit for time served at the SCC raises

*actual* violations of equal protection in this county. For instance, in *State v. Paul Moore*, the conditions of Mr. Moore's release specifically allow his confinement there to be treated as partial confinement, so that he can be given credit for time served, and the prosecuting attorney there did not oppose it. Supplemental Clerk's Papers (Defense Memo 7-12-07; specifically attachments thereto at Verbatim Report 2/21/07, pp. 2, 7; Superior Court No. 06-1-01864-0, Order Establishing Conditions on Release, entered 2/21/07). And in another Pierce County criminal case, an SCC resident was given a plea bargain which deferred sentencing with credit for time served for his confinement at the SCC pending sentencing. Supplemental Clerk's Papers (Defense Memo 7-12-07; specifically attachment referencing, *State v. Bob Pugh*, Superior Court No. 06-1-00431-2, Order Establishing Conditions on Release, entered 2/26/07). Again, that was by agreement with the prosecuting attorney.

Defendants equally situated are entitled equal protection under the law. Reanier, Knapp, supra. Disallowing Lewis credit for his time confined at the SCC where other defendants similarly situated have received that benefit violates Lewis's right to equal protection, guaranteed by both federal and state constitutions. This Court should reverse the trial court decision denying Lewis that credit, and give him credit from the date he was arraigned under

this cause.

- ii. Credit for time served at the SCC may also be given under the equitable doctrine of time served at liberty.

If the State takes the position that Lewis has been “released” on his personal recognizance, he is still entitled to credit for the time confined at the SCC under the equitable doctrine of time served at liberty. See State v. Dalseg, 132 Wn.App. 854, 864-68, 134 P.3d 261 (2006)(reversing trial court’s denial of credit for time served in the Nisqually Tribal Jail work release program after the defendants had served more than 11 of 12 months, where program was found not to comply with statutory requirements).

In State v. Dalseg, supra, two defendants pleaded guilty to drug offenses and money laundering. State v. Dalseg, 132 Wn.App. at 857. As part of their plea agreement, the State agreed to recommend a work release sentence. Id. The trial court permitted them to serve their 12-month sentences on work release, and on their sentencing paperwork under the heading “partial confinement,” checked the box for “work release.” State v. Dalseg, 132 Wn.App. at 858. After the men had served 11 months under a work release program with the Nisqually Tribal Jail, it was discovered that the program did not comply with the statute authorizing work release,

because they reported to the jail every morning and evening, but returned home overnight. State v. Dalseg, 132 Wn.App. at 865

After learning of this information, the prosecutor asked the court to enforce the judgment and sentences, and after a show cause hearing, the court denied the men credit for the 11 months served. On appeal, Division Two of the Court of Appeals reversed, holding that the defendants were entitled for credit for time spent in the Nisqually program, under the equitable doctrine of “credit for time spent at liberty.” State v. Dalseg, 132 Wn.App. at 864, citing, In re Personal Restraint of Roach, 150 Wn.2d 29, 74 P.3d 134 (2003)(holding that a prisoner who was erroneously released from the Department of Corrections after he had served only the lesser of two concurrent sentences, and was extradited back to Washington to serve the remainder of the sentence after he left this state, was entitled to credit for time served). The Court in Roach, 150 Wn.2d at 35, adopted this equitable doctrine articulated by the Ninth Circuit Court of Appeals in United States v. Martinez, 837 F.2d 861, 865 (9<sup>th</sup> Cir. 1988) (7 year delay in execution of a 4 year sentence due to clerical error).

The Court in Roach held that “a convicted person is entitled to credit against his sentence for time spent erroneously at liberty due to the State’s negligence, provided that the convicted person has not contributed to his

release, has not absconded legal obligations while at liberty, and has had no further criminal convictions.” State v. Roach, 150 Wn.2d at 37.

In Lewis’ case release on his personal recognizance can be attributed to the State’s recommendation at the time of his arraignment. This creates an appearance of unfairness, by shifting the burden of his confinement back on the SCC, thereby avoiding his incarceration at the Pierce County Jail at the County’s expense. The State claimed that Lewis was at “liberty” on his own “personal recognizance” at the SCC. However for any time spent at the Pierce County Jail Lewis would be entitled to credit for time served. Lewis did not contribute to this legal fiction, he did not abscond from his legal obligations while confined at the SCC, and had no further criminal convictions.

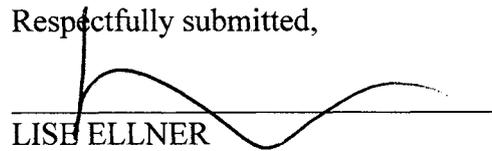
Lewis is entitled to equitable relief. To deny him credit for time served would be unfair. This Court should reverse the trial court order denying Lewis credit for time served in confinement at the SCC, and grant him day for day credit for time spent at the SCC pending trial and sentencing.

#### D. CONCLUSION

Mr. Lewis respectfully requests this Court reverse his conviction and dismiss the charges, or alternatively, remand for re-sentencing with credit for time served while awaiting trial at the SCC.

DATED this 30th day of October 2007

Respectfully submitted,



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WSBA No. 20955  
Attorney for Appellant

I, Lise Ellner, a person over the age of 18 years of age, served the Pierce County Prosecutor's office, appeals department 930 Tacoma Ave. S. County-City Building Rm 946, Tacoma WA 98402 David James Lewis DOC# 992524 Pierce County Jail 910 Tacoma Ave S., Tacoma WA 98402. Tacoma, WA a true copy of the document to which this certificate is affixed, on October 30, 2007 Service was made by depositing in the mails of the United States of America, properly stamped and addressed.

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Signature