

FILED  
COURT OF APPEALS  
DIVISION II

09 NOV -9 AM 9:16

NO. 37359-9-II

STATE OF WASHINGTON  
BY \_\_\_\_\_  
DEPUTY

---

**COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON**

---

In re the Detention of:

JOHN COPPIN,

Appellant,

v.

STATE OF WASHINGTON,

Respondent.

---

**RESPONDENT'S OPENING BRIEF**

---

ROBERT M. MCKENNA  
*Attorney General*

JANA R. HARTMAN  
*Assistant Attorney General*

WSBA No. 35524  
800 Fifth Ave., Ste. 2000  
Seattle, WA 98104  
(206) 389-3876

**ORIGINAL**

**TABLE OF CONTENTS**

I. ISSUES PRESENTED .....1

    A. Was Petitioner entitled to a jury trial? .....1

    B. Did the State prove that Petitioner had been convicted of a crime of sexual violence? .....1

    C. Was the State required to prove a "recent overt act"?.....1

    D. Did the trial court rely on inadmissible evidence to support its finding that Petitioner is an SVP? .....1

    E. Were Petitioner's due process rights violated by a pre-filing mental health examination?.....1

    F. Was Petitioner denied the effective assistance of counsel? .....1

II. STATEMENT OF THE CASE .....1

    A. Procedural History .....1

    B. Substantive History .....5

        1. Coppin's Criminal Sexual History .....5

        2. Expert Opinion Evidence: Dr. Dennis Doren.....6

III. ARGUMENT .....9

    A. Was Petitioner Entitled To A Jury Trial? .....9

        1. Coppin Waived His Right To A Jury Trial. ....10

        2. RCW 71.09.050(3) Is Not Inconsistent With CR 38.....11

    B. Did The State Prove That Petitioner Had Been Convicted Of A Crime Of Sexual Violence? .....13

    C. Was The State Required To Prove A "Recent Overt Act"?.....17

D. Did The Trial Court Rely On Inadmissible Evidence To Support Its Finding That Petitioner Is An SVP?.....	20
E. Were Petitioner's Due Process Rights Violated By A Pre-filing Mental Health Examination?.....	21
F. Petitioner Was Not Denied The Effective Assistance Of Counsel. ....	23
IV. CONCLUSION .....	23

## TABLE OF AUTHORITIES

### Cases

<i>Balise v. Underwood</i> , 71 Wn.2d 331, 428 P.2d 573 (1967).....	10
<i>City of Bellevue v. Acrey</i> , 103 Wn.2d 203, 691 P.2d 957 (1984).....	10
<i>City of Seattle v. Allison</i> , 148 Wn.2d 75, 59 P.3d 85 (2002).....	14
<i>City of Seattle v. Williams</i> , 101 Wn.2d 445, 680 P.2d 1051 (1984).....	10
<i>In re Detention of Boynton</i> , ___ P.3d ___, 2009 WL 2990498 (2009) .....	14
<i>In re Detention of Williams</i> , 147 Wn.2d 476, 55 P.3d 597 (2002).....	14
<i>In re Detention of Young</i> , 163 Wn.2d 684, 185 P.3d 1180 (2008).....	11
<i>In re Ellern</i> , 23 Wn.2d 219, 160 P.2d 639 (1945).....	13
<i>In re Estate of Kordon</i> , 157 Wn.2d 206, 137 P.3d 16 (2006).....	11
<i>In re the Detention of Dudgeon</i> , 146 Wn. App. 216, 189 P.3d 240 (2008), <i>review denied in</i> 165 Wn.2d 1028 (2009).....	17, 20
<i>In re the Detention of Henrickson</i> , 140 Wn.2d 686, 2 P.3d 473 (2000).....	19
<i>In re the Detention of Keeney</i> , 141 Wn. App. 318, 169 P.3d 852 (Div. 3, 2007).....	18, 20

<i>In re the Detention of Petersen</i> , 145 Wn.2d 789, 42 P.3d 952 (2002).....	12
<i>In re the Detention of Strand</i> , ___ P.3d ____, 2009 WL 3210402 (2009) .....	22, 23
<i>In re Turay</i> , 139 Wn.2d 379, 986 P.2d 790 (1999), <i>cert. denied</i> 531 U.S. 1125 (2001).....	18
<i>Limstrom v. Ladenburg</i> , 136 Wn.2d 595, 963 P.2d 869 (1998).....	12
<i>Morris v. Blaker</i> , 118 Wn.2d 133, 821 P.2d 482 (1992).....	14, 15
<i>Overlake Fund v. City of Bellevue</i> , 60 Wn. App. 787, 810 P.2d 507 (1991).....	12
<i>Rental Housing Ass'n of Puget Sound v. City of Des Moines</i> , 165 Wn.2d 525, 199 P.3d 393 (2009).....	14
<i>Sackett v. Santilli</i> , 146 Wn.2d 498, 47 P.3d 948 (2002).....	12
<i>Sofie v. Fibreboard Corp.</i> , 112 Wn.2d 636, 771 P.2d 711, 780 P.2d 260 (1989).....	10
<i>State ex rel. Citizens Against Tolls v. Murphy</i> , 151 Wn.2d 226, 88 P.3d 375 (2004).....	15
<i>State v. Armendariz</i> , 160 Wn.2d 106, 156 P.3d 201 (2007).....	14, 15
<i>State v. Keller</i> , 143 Wn.2d 267, 19 P.3d 1030 (2001).....	14, 15
<i>State v. Thomas</i> , 109 Wn.2d 222, 743 P.2d 816 (1987).....	23

<i>US West Communications, Inc. v. Wash. Util. &amp; Transp. Comm'n.</i> , 134 Wn.2d 74, 949 P.2d 1337 (1997).....	15
---	----

**Statutes**

RCW 71.09 .....	passim
RCW 71.09.020(12).....	19
RCW 71.09.020(17).....	15, 16
RCW 71.09.020(17)(a) .....	15
RCW 71.09.020(18).....	13
RCW 71.09.025 .....	21
RCW 71.09.030 .....	16
RCW 71.09.030(1).....	16
RCW 71.09.030(1)(e) .....	19
RCW 71.09.030(5).....	19
RCW 71.09.050(3).....	11
RCW 71.09.090(2).....	12

**Rules**

CR 38 .....	12, 13
CR 38(d).....	12

## **I. ISSUES PRESENTED**

- A. Was Petitioner entitled to a jury trial?**
- B. Did the State prove that Petitioner had been convicted of a crime of sexual violence?**
- C. Was the State required to prove a "recent overt act"?**
- D. Did the trial court rely on inadmissible evidence to support its finding that Petitioner is an SVP?**
- E. Were Petitioner's due process rights violated by a pre-filing mental health examination?**
- F. Was Petitioner denied the effective assistance of counsel?**

## **II. STATEMENT OF THE CASE**

### **A. Procedural History**

This Sexually Violent Predator (SVP) civil commitment action was initiated on November 22, 2005. CP at 12. On that date, John Coppin was serving a 300-month sentence on a 1988 conviction for two counts of Statutory Rape in the First Degree. Shortly before Coppin was scheduled to be released, the State filed the SVP Petition.

At the time of filing, the State filed a demand for a jury trial. CP at 16. On October 31, 2007, the trial court held a status conference regarding the scheduled trial date, at that time set for February 11, 2008. RP 10/31/07 at 2. The court advised the parties that it was unavailable for the February 2008 trial date. At that time counsel for the State made a

record regarding Dr. Doren's impending retirement and the need to have the trial held no later than February 2008. *Id.* at 4. The State argued that any delay in trial beyond February 2008 would result in "considerable expense and additional delay [of] the trial" and would cause "great prejudice to the State to lose [Dr. Doren]." *Id.* at 4, 8. The State suggested moving the trial forward to January 2008, and the parties agreed<sup>1</sup> to a new trial date of January 22, 2008. *Id.* at 10.

On January 4, 2008, the trial court held a status conference to determine the readiness of all parties. At that hearing, Coppin's attorney informed the court that he and Coppin had discussed proceeding forward via bench trial, and indicated to the court that it "seemed as though it was something that [Coppin] would agree with" however he wanted additional time to "confirm my client's willingness to do that...". RP 1/4/08 at 3. The court noted that even though SVP cases are civil in nature, he was "extremely uncomfortable not having Coppin participate in the issue of jury waiver." *Id.* at 4. The parties agreed to continue the matter until Mr. Coppin's attorney could discuss the issue further with Coppin and obtain a written waiver of his right to a jury trial. *Id.*

On January 16, 2008, more than a week before trial was scheduled

---

<sup>1</sup> On the morning of trial, Coppin's attorney stated that he had objected to the trial date being moved forward. 1RP at 9. A review of the record indicates that Coppin's attorney was in agreement with the January 22, 2008 trial date. RP 10/31/07 at 9.

to begin, the parties held another hearing to discuss proceeding with a bench trial. Stating that this was a "critical stage in the proceedings", the court noted that Coppin had been transported from the Special Commitment Center (SCC) and was physically present for the hearing. RP 1/16/08 at 2. Coppin's attorney stated that he had spoken with Coppin regarding the waiver of jury trial both over the telephone the previous day and that very morning in the county jail. *Id.* at 3. Coppin's attorney presented to the court a waiver signed by Coppin, his attorney and the State's attorney indicating the State's withdrawal of their jury demand and Coppin's desire to have the matter tried by the bench. CP at 15. The court then engaged in an extended colloquy with Coppin regarding his waiver of jury trial, indicating to Coppin that the State's withdrawal of its jury demand in no way prohibited Coppin from entering his own demand for a jury trial. *Id.* at 4. Coppin indicated repeatedly that he agreed to have the matter heard by a judge and without a jury. RP 1/16/08 at 4. The court inquired of Coppin if he had any questions about his rights, and Coppin indicated he did not. *Id.* at 5. The court also pointed out that if it accepted Coppin's waiver of jury that the matter would "go to trial on the 22<sup>nd</sup> before the Court sitting without a jury". *Id.* Coppin agreed. Coppin affirmed that he was waiving his right to a jury trial freely and voluntarily. *Id.* at 6. With the consent of all parties, the State withdrew its demand for

a jury trial. As a result, court administration did not summon a pool of jurors for the start of trial. RP 1/22/08 at 7. His SVP commitment trial began on January 22, 2008. *Id.* at 4.

On the morning of trial the State was prepared to present the testimony of its expert, Dr. Dennis Doren, who is a licensed psychologist who had flown to Lewis County from Wisconsin the previous evening. IRP at 6. Prior to opening statements, Coppin sought to withdraw his waiver of jury trial and asked the court to set the matter for a jury trial. *Id.* at 5. The State objected, arguing that the State had previously made clear to all parties that Dr. Doren was retiring and would be unavailable for any future court appearances. The State reiterated its previous position that should the Court grant Coppin's request, the State would be denied its opportunity to present the expert testimony of Dr. Doren and would be forced to have Coppin reevaluated by a new expert, resulting in significant and unreasonable delay to the trial. *Id.* at 10. The Court denied Coppin's last minute request for a jury trial, finding that SVP proceedings are civil in nature, that Coppin had not made a timely demand for a trial by jury, and that Coppin had not objected to the State's withdrawal of their demand when he was physically present in front of the court over a week prior. *Id.* at 12.

At trial, the State presented the testimony of Dr. Dennis Doren and

published the videotaped deposition of Coppin. 1RP at 27-160, 2RP at 3-4, Ex. 18. In his defense, Coppin testified before the court. On January 23, 2008, the judge found that the State had proven beyond a reasonable doubt that Coppin was a SVP. 2RP at 77-91, CP at 5. Coppin was committed to the SCC where he remains today. CP at 10. This appeal follows.

**B. Substantive History**

**1. Coppin's Criminal Sexual History**

John Coppin has a history of sexual assaults consisting of rape and child molestation. That history includes the following incidents, charges and convictions:

In 1976 Coppin was convicted of Forcible Rape for the rape of a sixteen-year old girl. Ex. 18 at 16:22, CP at 22.

In the fall of 1978, Coppin sexually assaulted a nine-year old girl, C.P. At the time Coppin was 19 years old. Coppin admitted to touching C.P.'s vaginal area on three occasions. Ex. 18 at 27:5. Coppin pleaded guilty and was convicted of Lewd and Lascivious Conduct for these offenses. CP at 4.

Between October 1981 and January 1982, Coppin sexually assaulted four-year-old G.H. CP at 20. Coppin admitted to touching G.H.'s vagina on multiple occasions. Ex. 18 at 43:25. Coppin pleaded

guilty and was convicted of Lewd and Lascivious Conduct for these offenses. CP at 21.

In the spring and summer of 1982, Coppin digitally raped five-year-old K.F. on multiple occasions. Ex. 18 at 43:25. Coppin pleaded guilty and was convicted of Lewd and Lascivious Conduct for these offenses. CP at 21. Coppin was sentenced to six years in prison for the offenses against C.P., G.H., and K.F. *Id.*

In August of 1987, Coppin began to sexually molest his five-year-old biological daughter, J.O. Ex. 18 at 45:24. Coppin admitted to placing his finger into J.O.'s vagina on approximately 10 to 12 occasions. *Id.* Also during this time period Coppin raped and molested four-year-old S.C. *Id.* Coppin was charged with three counts Statutory Rape in the First Degree. CP at 4. Coppin pleaded guilty to two counts and was given an exceptional sentence of 300 months. *Id.* Coppin has been incarcerated continuously since this conviction. Ex. 18 at 57:21.

## **2. Expert Opinion Evidence: Dr. Dennis Doren**

At trial, the State offered the expert opinion testimony of clinical and forensic psychologist Dennis Doren, Ph.D, one of the pre-imminent experts in the field. He is the author of *Evaluating Sex Offenders: A Manual for Civil Commitments and Beyond*, the definitive reference book for SVP evaluations. Dr. Doren also has considerable experience in the

evaluation, diagnosis, treatment, and risk assessment of sex offenders. 1RP at 28-46. Dr. Doren has been licensed as a psychologist since 1978 and holds licenses to practice psychology in Wisconsin, Iowa and Washington. *Id.* at 29. Dr. Doren has evaluated approximately 25 individuals in Washington to determine whether they meet the statutory criteria for civil commitment pursuant to RCW 71.09. *Id.* at 45. In addition, Dr. Doren has evaluated and treated, or supervised the evaluation and treatment, of thousands of sex offenders. *Id.* at 32. Dr. Doren was the unit chief and sole psychologist in a maximum-security treatment unit in a forensics program, where he designed and implemented a treatment plan and supervised other treatment providers. *Id.* at 31.

As part of his evaluation, Dr. Doren reviewed approximately 1900 pages of documents relating to Coppin. *Id.* at 50. Dr. Doren testified that the records he reviewed were of the type that he and other mental health professionals commonly rely upon when evaluating sex offenders. *Id.* In addition, prior to rendering an opinion Dr. Doren personally interviewed Coppin for approximately 3 1/2 hours. *Id.* at 51. Prior to the interview Coppin was informed that he did not have to participate in the interview, and Dr. Doren discussed informed consent with Coppin. *Id.* at 51-52. Coppin chose to participate in the interview. *Id.* at 51.

Dr. Doren testified that, in his professional opinion, Coppin suffers

from a mental abnormality, specifically Pedophilia. *Id.* at 75, 85. Dr. Doren also diagnosed Coppin with a personality disorder. *Id.* at 75. In diagnosing those conditions, Dr. Doren relied upon a classification system that is used universally by mental health workers, and is found in the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision (DSM-IV-TR). *Id.* at 78.

Dr. Doren also conducted a risk assessment to determine whether Coppin was more likely than not, as a result of his mental abnormality, to commit a predatory sex offense in the future. *Id.* at 109. The risk assessment involved actuarial instruments, the Hare Psychopathy Checklist (PCL-R) and an examination of dynamic risk factors that research in the field has identified as associated with sexual offending. *Id.* at 110, 129. An actuarial instrument is a list of factors which are associated with sexual re-offense. *Id.* at 113-14. When administered, an offender receives a score which is statistically associated with a likelihood of committing a future sex offense. *Id.*

Dr. Doren employed the use of three actuarial instruments in his risk assessment of Coppin: the RRASOR, the Static-99 and the Minnesota Sex Offender Screening Tool, Revised (MnSOST-R). *Id.* at 111, 115, 120. Coppin's scores on all three instruments indicated he is at a high risk to reoffend. *Id.* at 114, 119, 125.

Dr. Doren also scored Coppin on the PCL-R, which measures an individual's psychopathy. *Id. at 129.* In addition, Dr. Doren looked at various "dynamic risk factors" which are changeable characteristics that are related to the risk of reoffense. *Id. at 133.* Dr. Doren testified that Coppin's score on the PCL-R and an analysis of the relevant dynamic factors did not reduce Coppin's overall risk of reoffense. *Id.*

Based upon his education and experience and his review of the evidence, Dr. Doren testified that it was his professional opinion that Coppin has a mental abnormality that causes him serious difficulty controlling his behavior and makes him more likely than not to commit predatory acts of sexual violence if he is not confined in a secure facility. *Id. at 139.*

### **III. ARGUMENT**

Coppin makes several arguments on appeal, all of which are without merit. Therefore, this Court should deny Coppin's appeal and affirm his civil commitment as a Sexually Violent Predator.

#### **A. Was Petitioner Entitled To A Jury Trial?**

Coppin argues that the trial court erred by refusing to grant, on the morning of trial, his request for a jury trial. The trial court did not abuse its discretion in its denial of Coppin's request, and therefore there was no error.

### 1. Coppin Waived His Right To A Jury Trial.

In Washington, the right to a trial by jury in "inviolable" and neither legislative nor judicial action can impair it. *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 656, 771 P.2d 711, 780 P.2d 260 (1989). "Where a defendant is demonstrably aware of the constitutional right to a jury and has expressly waived that right in writing, the waiver will be effective." *City of Bellevue v. Acrey*, 103 Wn.2d 203, 208, 691 P.2d 957 (1984). A motion to withdraw a waiver of jury trial should be granted unless "the trial court finds that the motion was made for the purpose of delay, or that granting the motion would unduly delay the trial or otherwise impede the cause of justice." *City of Seattle v. Williams*, 101 Wn.2d 445, 452-53, 680 P.2d 1051 (1984) (citing *Thomas v. Commonwealth*, 218 Va. 553, 238 S.E.2d 834 (1977)) (motion to withdraw a waiver after a trial has begun is untimely). Absent an abuse of discretion, the decision by the trial court to grant or deny a jury demand after a previous waiver will not be overturned. *Balise v. Underwood*, 71 Wn.2d 331, 340, 428 P.2d 573 (1967).

It is unchallenged that Coppin affirmatively unequivocally waived his right to a jury trial. Coppin's attempt to withdraw his waiver on the morning of trial would have substantially delayed the trial and impeded the cause of justice, as the State would have been required to have Coppin

reevaluated by a new expert<sup>2</sup>. Under the totality of the circumstances, the trial court did not abuse its discretion in denying Coppin's request to withdraw his waiver of jury trial.

**2. RCW 71.09.050(3) Is Not Inconsistent With CR 38.**

Coppin argues that the civil rules governing the procedure for demanding a jury do not apply to SVP proceedings. However, SVP proceedings are governed by the civil rules, except where the rules conflict with statutory provisions governing SVP proceedings. *In re Detention of Young*, 163 Wn.2d 684, 693, 185 P.3d 1180 (2008). Where the statutory provisions are consistent with the civil rules, or are silent, the civil rules will apply. *Id.*; see also *In re Estate of Kordon*, 157 Wn.2d 206, 213, 137 P.3d 16 (2006). Under RCW 71.09.050(3), "The person, the prosecuting attorney, or the judge shall have the right to demand that the trial be before a twelve-person jury. If no demand is made, the trial shall be before the court."

While the right to demand a jury trial is contained in the statute, the statute is silent regarding the procedures for making such a demand. In such a case, the trial court will rely on the civil rules to determine the parameters of the event in question for purposes of applying the statute.

---

<sup>2</sup> At the time of trial Dr. Doren was being paid \$300 an hour and had billed approximately \$10,000 for his expert services on the case. 1RP at 10, 47.

*See In re the Detention of Petersen*, 145 Wn.2d 789, 801, 42 P.3d 952 (2002) ("Even assuming former RCW 71.09.090(2) probable cause hearings were special proceedings, nothing in that statute is inconsistent with the civil discovery rules."<sup>3</sup>). *See also Limstrom v. Ladenburg*, 136 Wn.2d 595, 605, 963 P.2d 869 (1998) (citing *Dawson v. Daly*, 120 Wn.2d 782, 789-90, 845 P.2d 995 (1993); *Overlake Fund v. City of Bellevue*, 60 Wn. App. 787, 795, 810 P.2d 507 (1991)).

The civil procedures for demanding a jury trial are outlined in CR 38. CR 38(d) provides that "[t]he failure of a party to serve a demand as required by this rules, to file it as required by this rule, and to pay the jury fee required by law in accordance with this rule, constitutes a waiver by him of trial by jury." CR 38(d) is constitutional and enforceable. *Sackett v. Santilli*, 146 Wn.2d 498, 508, 47 P.3d 948 (2002).

Here, the State made a timely demand for a jury trial and paid the fee required by law. On January 16, 2008, the State, with the consent of all parties, withdrew their demand for a jury trial and the trial court accepted Coppin's affirmative and written waiver of his right to a jury trial. CP at 15. The court made clear that the State's withdrawal of their

---

<sup>3</sup> RCW 71.09.090(2) provides the mechanism through which persons civilly committed as SVPs may have a hearing on whether probable cause exists to warrant a hearing on whether the person's condition has so changed that: (i) he or she no longer meets the definition of a sexually violent predator; or (ii) conditional release to a proposed less restrictive alternative would be in the best interest of the person and conditions can be imposed that would adequately protect the community.

demand did not prevent Coppin from making his own jury demand, however his failure to do so would result in a trial by the bench. RP 1/16/08 at 5. RCW 71.09 does not accord an absolute right to a jury trial, but is rather qualified or conditional upon a demand being made for a jury trial. It is a right that can be waived and is waived unless a demand is timely made. *See In re Ellern*, 23 Wn.2d 219, 224, 160 P.2d 639 (1945) (the right to a jury trial in the involuntary civil commitment of insane persons is waived if proper demand is not made). There is nothing in RCW 71.09 that is inconsistent with the procedures outlined in CR 38, leaving the procedures governed by CR 38 applicable in this case. Here, Coppin not only failed to file a timely demand, he affirmatively waived his right to a jury trial. The trial court's denial of his attempt to withdraw that waiver was not an abuse of discretion.

**B. Did The State Prove That Petitioner Had Been Convicted Of A Crime Of Sexual Violence?**

In order to prove that an individual is a sexually violent predator, the State must prove beyond a reasonable doubt that the individual "has been convicted of or charged with a crime of sexual violence...". RCW 71.09.020(18)<sup>4</sup>. The review of a statutory interpretation is de novo.

---

<sup>4</sup> In 2009, the legislature amended RCW 71.09.020. Laws of 2009 c 409 § 1, eff. May 7, 2009. The pertinent provisions are identical, but have been renumbered. The definitions of "sexually violent offense" and "sexually violent predator" that were

*State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007). "Our purpose when interpreting a statute is to determine and enforce the intent of the legislature." *Rental Housing Ass'n of Puget Sound v. City of Des Moines*, 165 Wn.2d 525, 536, 199 P.3d 393 (2009). In interpreting a statute, the court should look first to the statute's plain language, and assume that the legislature means what it says. *In re Detention of Boynton*, \_\_\_ P.3d \_\_\_, 2009 WL 2990498 (2009) (citing *Armendariz*, 160 Wn.2d at 110, 156 P.3d 201, *State v. Keller*, 143 Wn.2d 267, 276, 19 P.3d 1030 (2001)). "When interpreting a statute, we must avoid unlikely, absurd, or strained results." *Morris v. Blaker*, 118 Wn.2d 133, 143, 821 P.2d 482 (1992).

Under the "plain meaning rule," the court must "examine the language of the statute, other provisions of the same act, and related statutes to determine whether we can ascertain a plain meaning." *City of Seattle v. Allison*, 148 Wn.2d 75, 81, 59 P.3d 85 (2002). "Each provision must be read in relation to the other provisions, and we construe the statute as a whole." *In re Detention of Williams*, 147 Wn.2d 476, 490, 55 P.3d 597 (2002). "Statutes on the same subject matter must be read together to give each effect and to harmonize each with the other."

---

formerly RCW 71.09.020(15) and (16) respectively, are now subsections (17) and (18). I will refer to the current version throughout the brief.

*US West Communications, Inc. v. Wash. Util. & Transp. Comm'n.*, 134 Wn.2d 74, 118, 949 P.2d 1337 (1997). If the plain language of the statute is unambiguous, this court's inquiry is at an end and we enforce "the statute in accordance with its plain meaning." *Armendariz*, 160 Wn.2d at 110.

"If, after this inquiry, the statute remains susceptible to more than one reasonable meaning, the statute is ambiguous and it is appropriate to resort to construction aides, including legislative history." *State ex rel. Citizens Against Tolls v. Murphy*, 151 Wn.2d 226, 242-43, 88 P.3d 375 (2004). Language is ambiguous if it is subject to more than one reasonable interpretation, but "is not ambiguous simply because different interpretations are conceivable." *Keller*, 143 Wn.2d at 276. "The spirit and intent of the statute should prevail over the literal letter of the law." *Morris*, 118 Wn.2d at 143.

RCW 71.09.020(17) defines a "sexually violent offense" as:

(a) An act defined in Title 9A RCW as rape in the first degree, rape in the second degree by forcible compulsion, rape of a child in the first or second degree, *statutory rape in the first or second degree*, indecent liberties against a child under age fourteen, or child molestation in the first or second degree... (emphasis added).

Under the plain language of RCW 71.09.020(17)(a), a conviction for statutory rape in the first degree meets the definition of a "crime of sexual

violence" and qualifies as a predicate offense for commitment as a sexually violent predator. There can be no other reasonable interpretation of the statute, and the intent of legislature is clear: an individual must have been charged or convicted of a sexually violent offense to qualify as a sexually violent predator. Any other interpretation of the statute would render RCW 71.09.020(17) superfluous and meaningless.

Furthermore, throughout RCW 71.09 the legislature uses the term "sexually violent offense" in a manner requiring such a charge or conviction as a necessary predicate to the filing of an SVP petition. *See* RCW 71.09.030<sup>5</sup>. This indicates the clear intent of the legislature that a "sexually violent predator" be one who has been charged or convicted of a "sexually violent offense" under RCW 71.09.020(17).

Coppin does not dispute his 1987 conviction for statutory rape in the first degree. The court made a finding based upon the clear and uncontroverted evidence presented at trial, and made a proper finding under the only reasonable interpretation of the statute that Coppin met the definition of a sexually violent predator since he had, among other things, a conviction for a sexually violent offense.

---

<sup>5</sup> The SVPA allows the State to file an SVP petition "[w]hen it appears that...[a] person who at any time previously has been convicted of a sexually violent offense is about to be released from total confinement." RCW 71.09.030(1). The statute outlining the procedure for filing an SVP petition does not reference "crimes of sexual violence".

C. **Was The State Required To Prove A "Recent Overt Act"?**

Coppin argues he was unlawfully confined when the State filed the SVP petition because a jury did not enter findings to support his underlying exceptional sentence. This court lacks jurisdiction to consider the question of lawful confinement because this is a separate civil commitment action, not the underlying criminal case for which Coppin was serving his sentence at the time the SVP petition was filed. Thus, jurisdiction of this court is limited to determining this SVP civil commitment action.

The issue of "lawful custody" was discussed in *In re the Detention of Dudgeon*, 146 Wn. App. 216, 189 P.3d 240 (2008), *review denied* in 165 Wn.2d 1028 (2009). In that case, this Court considered Dudgeon's argument that his due process rights had been violated because he had been unlawfully held beyond his earned early release date, and had he been released as planned the State would have had to make the additional showing of a "recent overt act". *Id.* at 222, 189 P.3d 240. This Court rejected Dudgeon's argument, holding that the SVP court did not have jurisdiction to determine the lawfulness of Dudgeon's underlying detention. *Id.* Because Dudgeon was in custody when the SVP petition was filed, the State did not need to prove a recent overt act. *Id.* at 224, *see also In re the Detention of Keeney*, 141 Wn. App. 318, 169 P.3d 852

(Div. 3, 2007).

The Washington State Supreme Court also denied a similar challenge in the seminal SVP case of *In re Turay*, 139 Wn.2d 379, 986 P.2d 790 (1999), *cert. denied* 531 U.S. 1125 (2001). There, Turay tried to use his SVP action to challenge DSHS "conditions of confinement" at the SCC. The Washington Supreme Court rejected Turay's attempt to use his complaint against DSHS to gain release in the SVP action: "Turay's remedy for these unconstitutional conditions is not a release from confinement. Turay's remedy for unconstitutional conditions of confinement at the SCC is, therefore, an injunction action and/or award of damages." *Id.* at 420. The constitutional complaint against DSHS was not for the SVP court to decide. *Id.* ("The trier of fact's role in an SVP commitment proceeding ... **is to determine whether the defendant constitutes an SVP; it is not to evaluate the potential conditions of confinement.**") (emphasis added).

The proper role of the trial court in this SVP case was to try the statutory question of whether Coppin is a sexually violent predator, not to decide the lawfulness of his confinement during his last prison term or any other issues pertaining to confinement either before or after his civil commitment.

The State was not required to prove a recent overt act at trial

because Coppin was never released from confinement prior to the filing of the SVP petition. A "recent overt act" is "any act, threat or combination thereof that has either caused harm of a sexually violent nature or creates a reasonable apprehension of such harm in the mind of an objective person who knows of the history and mental condition of the person engaging in the act or behaviors." RCW 71.09.020(12). Under certain circumstances, proof of a recent overt act may be required to establish current dangerousness. According to the clear language of RCW 71.09.030(1)(e)<sup>6</sup>, however, the State is required to plead and prove a recent overt act to the finder of fact only "if, on the date that the petition is filed, the person was living in the community after release from custody."

Coppin was in total confinement on the day that the State initiated RCW 71.09 proceedings. Thus, pursuant to the statute's "unambiguous directive that the State need not prove a recent overt act when the subject of a sexually violent predator petition is incarcerated on the day the petition is filed," Coppin has no statutory right to require the State to plead and prove a recent overt act prior to committing him. *In re the Detention of Henrickson*, 140 Wn.2d 686, 693, 2 P.3d 473 (2000).

---

<sup>6</sup> RCW 71.09.030(1)(e) was previously codified as RCW 71.09.030(5).

**D. Did The Trial Court Rely On Inadmissible Evidence To Support Its Finding That Petitioner Is An SVP?**

Coppin asserts that any evidence derived during his "unlawful detention" should not have been admitted at trial, and therefore he has suffered actual prejudice that constitutes a manifest error. Brief of Appellant at 23. Coppin's argument fails.

Even if Coppin was unlawfully detained at the time the SVP petition was filed, the established case law is clear that such considerations are irrelevant in SVP proceedings. *See Dudgeon*, 146 Wn. App. 216, *Keeney*, 141 Wn. App. 318. Furthermore, under the facts of this case any substantive evidence entered at trial was offered both through Dr. Doren and through the Coppin himself, making any error harmless.

At trial the State entered into evidence a videotaped deposition of Coppin taken on December 18, 2007. 2RP at 3, Ex. 18. In that deposition Coppin admits to being convicted of all of his sexual offenses, and he admits to molesting numerous children including two adjudicated victims. Ex. 18 at 76:13. Coppin also admitted to having deviant sexual thoughts of minor children. *Id.* Via Coppin's deposition testimony, the evidence at trial also outlined the numerous DOC and SCC infractions Coppin had received since 1988, including two infractions for sexual assault. *Id.* Finally, during the deposition Coppin discussed his

participation in the Sex Offender Treatment Program (SOTP) while incarcerated. Given that Coppin did not deny receiving any of the DOC or SCC infractions, he did not dispute any of the SOTP progress notes or any of his offense history, any evidence that might have been obtained during Coppin's alleged "unlawful detention" would have been admitted at trial substantively through other means.

Furthermore, at trial, Coppin's attorney called Coppin to the stand. Coppin again did not deny any factual statements that had been made by Dr. Doren, nor did he contradict any of the testimony he had given during his deposition. Since any evidence that was allegedly taken in violation of Coppin's constitutional rights would have been offered substantively through alternative means, Coppin cannot and has not established any actual prejudice that would constitute manifest error. As a result, any error that might have existed would be harmless.

**E. Were Petitioner's Due Process Rights Violated By A Pre-filing Mental Health Examination?**

Coppin argues that his due process rights were violated when he was interviewed by Dr. Doren for the RCW 71.09.025 pre-filing evaluation. He asserts the court should have held a voluntariness hearing prior to the admission of any of the statements he made to Dr. Doren during the RCW 71.09.025 evaluation. This same argument was raised in

*In re the Detention of Strand*, \_\_\_ P.3d \_\_\_\_, 2009 WL 3210402 (2009), and on October 7, 2008, this court issued a order staying Coppin's appeal pending a decision by the Washington Supreme Court in *Strand*. On October 8, 2009, the Supreme Court rendered their decision in *Strand*, holding that there was no violation of due process.

In *Strand*, the petitioner had argued that the State could not conduct a mental health evaluation prior to the commencement of SVP proceedings, that he had been denied access to counsel, and that the State had not proved that his statements were made voluntarily. *Id.* at 1. In summarily rejecting each of these claims, the Court held that RCW 71.09 authorizes a pre-filing psychological examination that does not include the right to the assistance of counsel. *Id.* at 3, 5. Furthermore, the Court held that the statements Strand made during the pre-filing examination were not subject to a voluntariness hearing because Strand had provided nothing more than a bare assertion of involuntariness. *Id.* at 6.

Like Strand, Coppin has failed to establish any violation of his due process rights. He has also failed to assert any facts or evidence that his statements to Dr. Doren during the pre-filing evaluation were involuntary. As a result, *Strand* is directly on point and Coppin's argument that he was denied a voluntariness hearing must be rejected.

**F. Petitioner Was Not Denied The Effective Assistance Of Counsel.**

Coppin argues that he was denied the effective assistance of counsel when his attorney failed to object to the State's use of Dr. Doren's pre-filing evaluation.

In order to prevail on an argument of ineffective assistance of counsel, Coppin must show that his trial counsel's performance was deficient and that this deficient performance prejudiced him. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (quoting *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). In light of *In re Strand*, it is clear that Coppin's attorney did not have any legal grounds upon which to object to the use of Dr. Doren's pre-filing evaluation, therefore his performance was not deficient. Coppin fails to demonstrate that he suffered any prejudice by his attorney's failure to raise an issue in the trial court that has been squarely rejected by the Washington Supreme Court. Even if his attorney had raised the issue below, this court is bound by the Strand decision, and his argument would be rejected.

**IV. CONCLUSION**

For the foregoing reasons, the State requests that this Court deny

Coppin's appeal, and affirm his civil commitment as a sexually violent predator.

RESPECTFULLY SUBMITTED this 5th day of November, 2009.

ROBERT M. MCKENNA  
Attorney General

  
\_\_\_\_\_  
JANA R. HARTMAN, WSBA No. 35524  
Assistant Attorney General  
Attorney for the Respondent

NO. 37359-9-II

WASHINGTON STATE COURT OF APPEALS, DIVISION II

In re the Detention of:

JOHN COPPIN,

Appellant.

DECLARATION OF  
SERVICE

I, Jennifer Dugar, declare as follows:

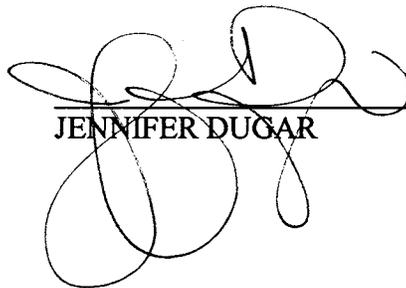
On this 5th day of November, 2009, I deposited in the United States mail true and correct copy(ies) of Respondent's Opening Brief and Declaration Of Service, postage affixed, addressed as follows:

Manek Mistry  
203 4th Ave E, Suite 404  
Olympia, WA 98501

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 5th day of November, 2009, at Seattle, Washington.

FILED  
COURT OF APPEALS  
DIVISION II  
09 NOV -9 AM 9:16  
STATE OF WASHINGTON  
BY DENISE

  
\_\_\_\_\_  
JENNIFER DUGAR

**ORIGINAL**