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Division III
State of Washington

NO. 32396-0

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

In re the Detention of Anthony Rushton:

STATE OF WASHINGTON,

Appellant,

v.

ANTHONY RUSHTON,

Respondent.

APPELLANT'S REPLY

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I. INTRODUCTION

Rushton argues that his right to due process was violated by the State's submission of its annual report 15 months after the anniversary of his commitment date, and that release was the proper remedy for that constitutional violation. This argument fails for two sets of reasons. First, Rushton has no constitutional right to review within precisely 12 months of the anniversary of his commitment date. Rather, his constitutional right, as made clear by the Washington State Supreme Court in *In re McCuiston*, 174 Wn.2d 369, 385, 275 P.3d 1092 (2012), is to "periodic" review. Even if the State's submission of his 2014 evaluation is determined by this Court to have been untimely, it was a statutory right, not a constitutional right, that was violated.

Second, there is no support to be found in reason or law for the release of a sexually violent predator ("SVP") whose continuing mental illness and need for treatment and incapacitation are established by the report by DSHS and where the offender presents no evidence to the contrary. Even if the report were in fact untimely, the release of a person who is both mentally ill and sexually dangerous is neither required by law nor sound as a matter of public policy. There are other constitutionally permissible solutions available for persons aggrieved by purportedly untimely reviews, solutions that target those responsible for the delay without endangering the public. This Court should reverse the trial court and deny Rushton's Motion to Dismiss.

II. ARGUMENT

A. **The Timing of Rushton's Annual Review Violated Neither His Statutory Nor His Constitutional Rights**

Rushton argues that the State's evaluation was untimely, and that its "late" filing "violated the mandatory procedure in RCW 71.09.070(1) as well as Rushton's right to due process." Respondent's Brief ("Rsp.Br") at 5. This argument fails for two reasons: First, as argued in the State's Opening Brief, the report was not untimely. Second, because Rushton has no liberty interest in release until a court has determined that release is appropriate, his right to due process was not violated.

1. **The Timing of the Annual Review Did Not Violate Rushton's Statutory Rights**

Rushton argues that the State's annual review was "late" because it was not filed "either on the anniversary date of commitment or one year after the end of the previous review period." Rsp. Br. at 10. He also argues that the State's "belated repudiation" of "admissions" before the trial court "should not be countenanced." *Id.* at 5, 7.

The issue of whether the State's annual review was untimely was extensively briefed in the State's Opening Brief ("App. Br.")(see pps. 12-16) and those arguments need not be repeated here. Rushton, however, suggests that, because the State did not raise this argument in the trial court, it is precluded from raising it at this juncture. This argument fails. The State did, in fact, argue below that, because the State's report had been submitted

before the Motion to Dismiss was heard, any claim of a statutory violation was moot. CP at 329. To the extent the assistant attorney general appears to have conceded that the report was “late” (RP at 17-20, 27, 32), this Court is not bound by such concession. It is well established that the court is not bound by erroneous concessions of legal principles. *In re Personal Restraint of Pullman*, 167 Wn.2d 205, 212 n.4, 218 P.3d 913 (2009). Indeed, whether such a concession was made is “unimportant,” “the question being one of law to be determined from admitted facts.” *In re Dunn’s Estate*, 31 Wn.2d 512, 528, 197 P.2d 606 (1948). As previously argued, the report was not “late,” and this Court is not bound by any apparent concessions by the State’s attorney at oral argument before the trial court.

Nor is Rushton correct when he (twice) suggests that the report was “nearly six months past the anniversary date of the earlier review period[.]” Rsp. Br. at 3, 9. This assertion is not supported by the record, as is clear from elsewhere in Rushton’s brief. Rsp. Br. at 2 (“The report was completed... 15 months after the 12th anniversary of Rushton’s commitment.”) The incorrect reference to six months appears to have originated in the State’s trial brief, in which the State erroneously stated that the report was “tendered 6 months after the end of the review period” (CP at 329), and appears to be simply a typographical error.

2. The Timing of the Annual Review Did Not Violate Rushton's Right to Substantive Due Process

Rushton argues that the timing of the report's filing violated his right to substantive due process. Rsp. Br. at 12-15. He urges that the annual review requirement must be strictly construed, and that for this reason, they must be due "either on the anniversary date of commitment or one year after the end of the previous review period." *Id.* at 10. There is nothing in the statute that supports this rigid interpretation. Neither does substantive due process require such a rigid construction: as explained in the State's Opening Brief, the constitutional standard is "periodic review," not, as suggested by Rushton, review every 365 days. App. Br. at 11-19. Moreover, Rushton cites only cases that stand broadly for the proposition the civil commitment implicates due process; he cites no cases that actually support his contention. Nor does he distinguish between the liberty interests of persons not yet committed and the liberty interests of a committed sex predator.

As noted by the Supreme Court in *In re the Detention of Young*, the liberty interests of a person alleged to be an SVP "are substantially infringed during the 45-day period leading up to trial." 122 Wn.2d 1, 46 857 P.2d 989 (1993). The courts have, however, long recognized limitations to the fundamental rights of convicted sex offenders and committed sexually violent

predators.¹ Rushton's case illustrates that there are good reasons for this: Rushton has been found beyond a reasonable doubt to be both mentally ill and dangerous, and both the persistence of this condition and his need for continuing detention have been repeatedly affirmed since his original commitment. Having been committed and that commitment repeatedly affirmed, Rushton has no fundamental liberty interest in release where the only evidence before the trial court is that he remains mentally ill and dangerous.

A similar argument was soundly rejected by Division I in *In re the Detention of Bergen*, 146 Wn. App. 515, 524, 195 P.3d 529 (2008), *review denied*, 165 Wn.2d 1041 (2009). Bergen, a committed SVP, appealed the results of his trial on the issue of placement in less restrictive alternative housing. Not unlike Rushton, he asserted that he "has a fundamental liberty interest in his conditional release because '[i]nvoluntary civil commitment and indefinite detention are serious infringements of an individual's liberty interest.'" *Id.* at 525. (*Cf.* Rsp. Br. at 12-15). The court rejected his argument, noting that this assertion was based on cases "involving due process challenges *to the initial*

¹ Courts have distinguished between the fundamental rights of convicted sex offenders and committed SVPs and those of private citizens in various contexts. "In Washington, convicted sex offenders have a reduced expectation of privacy because of the public's interest in public safety and in the effective operation of government." *In re the Detention of Elmer Campbell*, 139 Wn.2d 341, 355-56, 986 P.2d 771 (1999) (citing *State v. Ward*, 123 Wn.2d 488, 502, 869 P.2d 1062 (1994)) (quoting Laws of 1990, ch. 3, § 116); "Although persons involuntarily committed to the SCC are entitled to more considerate treatment and conditions of confinement than criminals, *In re Pers. Restraint of Andre Young*, 122 Wn.2d 1, 34, 857 P.2d 989 (1993), they do not enjoy the same Fourth Amendment protections as ordinary citizens." *In re Personal Restraint of Herman Paschke*, 80 Wn. App. 439, 447, 909 P.2d 1328 (1996), *remanded on other grounds*, 156 Wn.2d 1030, 131 P.3d 905 (2006).

SVP commitment, not to a post-commitment petition for an LRA, which is at issue here.” *Id.*(emphasis added). The due process clause, the court held, “does not create a liberty interest when a sexually violent predator seeks release *before the court has determined that he or she is no longer likely to reoffend or that he or she is entitled to conditional release to a less restrictive alternative.*” *Id.*, citing *In re Detention of Enright*, 131 Wn.App. 706, 714, 128 P.3d 1266 (2006), review denied, 158 Wn.2d 1029, 152 P.3d 1033 (2007) (emphasis added). No court has ever made even a threshold determination that there is probable cause to believe that Rushton is entitled to a new trial on the issue of conditional or unconditional release, much less found that Rushton is “no longer likely to reoffend.” As such, Rushton has not demonstrated his asserted constitutionally-protected liberty interest in release.

Nor, contrary to Rushton’s assertions, does *McCuiston* help him in this regard. *See* Rsp. Br. at 13. The *McCuiston* Court made clear that “[s]ubstantive due process requires *only* that the State conduct *periodic review* of the patient’s suitability for release.” *Id.* at 385 (citing *Jones v. United States*, 463 U.S. 354, 368, 103 S. Ct. 3043, 77 L. Ed. 2d 694 (1983)) (emphasis added). While it is correct that the *McCuiston* Court noted that “[t]he State must provide an evaluation on a yearly basis” to demonstrate that *McCuiston* continued to meet commitment criteria (174 Wn.2d at 386), the Court attached no particular constitutional significance to the term “annual”

except insofar as to indicate that such a scheme satisfied—as opposed to was required by—due process.

3. The Timing of the State’s Report Did Not Violate Rushton’s Right to Procedural Due Process

Although Rushton’s primary constitutional claim is that his right to substantive due process was violated, he appears to suggest that his right to procedural due process was violated as well, arguing that “there is no need to engage in a *Mathews*² balancing test to determine what process is due[,]” because “[t]he process due Rushton is spelled out in RCW 71.09.070 and the case law addressing that provision.” Rsp. Br. at 15. This procedural due process argument is not otherwise developed,³ and Rushton does not direct the reader to the alleged “case law addressing that provision.”

Moreover, the argument overlooks the distinction between statutory and constitutional rights, essentially arguing that any violation of a statutory right is, by definition, a violation of a constitutional right. This is, of course, not correct. As was discussed at length in *McCustion*, Washington’s statutory scheme “provides protections beyond what is required by substantive due process[.]” 174 Wn.2d at 388-89. *See also Id.* at 386 (distinguishing statutory and constitutional right to full evidentiary hearing). The same is true regarding procedural due process: even if there is not strict

² *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976).

³ In the trial court, the State argued that, because Rushton had not supported his “brief mention” of procedural due process, the trial court should not consider that claim. CP at 329.

compliance with the statute, that noncompliance does not prove a violation of a right to procedural due process. As such, in order to determine whether the failure to produce a report within 365 days constitutes a constitutional (as opposed to a statutory) violation, it is indeed essential to engage in the *Mathews* balancing test.

At its core, procedural due process is a right to be meaningfully heard. *In re Det. of Stout*, 159 Wn.2d 357, 370, 150 P.3d 86 (2007). Unlike some legal rights, due process “is not a technical conception with a fixed content unrelated to time, place and circumstances.” *Mathews*, 424 U.S. at 334. It is “flexible, and calls for such procedural protections as the particular situation demands.” *Id.* citing *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S. Ct. 2593, 2600, 33 L. Ed. 2d 484 (1972). To determine whether a particular procedural protection is required in a given context, the court must consider “three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.” *Mathews*, 424 U.S. at 335. Application of these factors demonstrates that Rushton’s rights to procedural due process were not violated.

First, as discussed above, Rushton’s “private interest” in personal liberty is limited at this point. On the other hand, the State’s interest in protecting the public and in treating a dangerous sex offender is “compelling.” *Young*, 122 Wn.2d at 26, 42; *In re Detention of Morgan*, 180 Wn.2d 312, 321, 330 P.3d 774 (2014).

Nor is there any real risk of erroneous deprivation of liberty at this point: Rushton has been determined beyond a reasonable doubt to be a sexually violent predator, a determination that has been affirmed in every subsequent review by DSHS, including that submitted by DSHS in February of 2014. CP at 251-324. Indeed, this is a point that Rushton himself does not dispute. Rushton attempts to avoid this conclusion by raising the specter of the person who “remains committed despite ceasing to meet the SVP definition solely because the annual review evaluation is tardy.” Rsp. Br. at 12. Rushton’s argument reveals confusion about the statutory procedures. A DSHS report that fails to provide a prima facie basis for continued detention is not synonymous with a determination that the person “ceas[es] to meet the SVP definition.” Rather, if at the time of the show cause hearing (which never occurred in this case), the State fails to make its prima facie case, it means only that the SVP receives a new trial. RCW 71.09.090(2)(c).⁴ If, following trial, it is determined that the person no

⁴ RCW 71.09.090(2)(c) reads as follows: “If the court at the show cause hearing determines that either: (i) The state has failed to present prima facie evidence that the committed person continues to meet the definition of a sexually violent predator and that no proposed less restrictive alternative is in the best interest of the person and conditions cannot be imposed that would adequately protect the community; or (ii) probable cause exists to

longer meets commitment criteria and the trial court signs an order releasing the person, it is then and only then that the person is released. RCW 71.09.090(3)(c)⁵; RCW 71.09.060(1).⁶ It is the result of that trial, and not the failure of the State to make a prima facie case at the show cause hearing, which would entitle Rushton to release.

When the factors set forth in *Mathews* are applied to this case, it is clear that Rushton's rights to procedural due process were not violated.

B. Dismissal Is Neither Required Nor Appropriate in This Case

Rushton argues that the timing of the filing of the annual report mandates dismissal, urging that this remedy furthers various public policy goals, and is appropriate where DSHS "totally disregarded the requirements of the statute," Rsp. Br. at 18, citing *In re Detention of Swanson*, 115 Wn.2d 21, 31, 804 P.2d 1 (1990). This argument, however, is supported neither by the cases he cites, the facts of this case, nor any public policy considerations.

believe that the person's condition has so changed that: (A) The person no longer meets the definition of a sexually violent predator; or (B) 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, then the court shall set a hearing on either or both issues."

⁵ RCW 71.09.090(3)(c) reads as follows: "If the issue at the hearing is whether the person should be unconditionally discharged, the burden of proof shall be upon the state to prove beyond a reasonable doubt that the committed person's condition remains such that the person continues to meet the definition of a sexually violent predator. Evidence of the prior commitment trial and disposition is admissible. The recommitment proceeding shall otherwise proceed as set forth in RCW 71.09.050 and 71.09.060."

⁶ RCW 71.09.060 provides, in pertinent part, that "If the court or unanimous jury decides that the state has not met its burden of proving that the person is a sexually violent predator, the court shall direct the person's release."

1. Case Law Does Not Support Dismissal

Although Rushton argues that dismissal is both an available and an appropriate remedy in this case (Rsp. Br. at 15-22), he fails to point to a single case in which the civil commitment of a dangerously mentally ill person, much less a sexually violent predator, was dismissed because of an inadvertent failure to meet alleged statutory timelines. Indeed, to the extent this issue has been considered, this proposition has been rejected. This issue was first considered in *Young*, in which the court held that due process required that a person detained under RCW 71.09 be given an opportunity to appear in person within 72 hours for a determination of whether probable cause exists to believe he or she is a sexually violent predator. 122 Wn.2d at 45-47. While acknowledging that “this requirement was not complied with in *Young*’s case,” the court determined that “it had no bearing on the ultimate outcome of [*Young*’s trial], thus the omission in this instance does not require reversal.” *Id.* at 46-47. *Accord In re the Detention of Aqui*, 84 Wn. App. 88, 93, 929 P.2d 436 (1996) (denial of *Aqui*’s motion to dismiss for failure to have been given an probable cause within 72 hours of issuance *Young* mandate was harmless error where *Aqui* had since been determined beyond a reasonable doubt to be an SVP).

To the extent Rushton cites to cases in support of his argument, they are not helpful. The restitution cases he cites (*State v. Moen*, 129 Wn.2d 535, 919 P.2d 69 (1996); *State v. Minor*, 162 Wn.2d 796, 174 P.3d 1162 (2008);

State v. Mollichi, 132 Wn.2d 80, 936 P.2d 408 (1997)) are not helpful when deciding whether it is appropriate to release a person determined to be both mentally ill and dangerous into the public in the absence of any statutory authority to do so. Nor are *Swanson* and its progeny of assistance to Rushton. In *Swanson*, the patient argued that, because his hearing on a 72-hour hold under RCW 71.05 had occurred 20 minutes after the 72-hour period had expired and because “our civil commitment statute must be strictly construed,” the court had no jurisdiction other than to dismiss his case. 115 Wn.2d at 25. Rejecting this argument, the Supreme Court agreed that the 72-hour requirement must be strictly construed, but repeatedly turned to the purpose of the statute and the need to interpret its provisions in such a way as to avoid “absurd results.” *Id.* at 28, 29, 31. The goals of ensuring continuity of care and protection of the public, the court concluded, will not be well served by the release of a person, otherwise appropriate for detention, because of the vagaries of the trial court’s schedule. *Id.* at 31. If the hospital “had totally disregarded the requirements of the statute or had failed to establish legal grounds for Swanson’s commitment, certainly dismissal would have been proper,” but the court declined to dismiss because neither had been demonstrated in Swanson’s case. *Id.* at 31.

Rushton attempts to use the *Swanson* Court's "total disregard" language, reiterated in subsequent cases,⁷ to argue that dismissal is required in this case. This language has never, however, been applied to the sex predator context, nor should it, in that *Swanson* involved strict statutory deadlines within the context of a determinate commitment scheme. As subsequently noted in *In re Detention of C.W.*, 147 Wn.2d 259, 281, 53 P.3d 979 (2002), the fact that the statutory scheme analyzed in *Swanson* "specifically required the release of a patient if judicial proceeding was not held within 72 hours" means that *Swanson* "is not necessarily applicable" to cases in which no such requirement exists. Indeed, the *Swanson* Court itself noted that the holding in *Swanson* was "expressly limited" to its context, "recognizing that it rests upon, and is guided by, the stated intent of the civil commitment statute." *Id.*

2. DSHS Did Not "Totally Disregard" the Requirements of the Statute

Even if the *Swanson* Court's "total disregard" language were determined to be applicable to the sex predator context, the record does not support Rushton's claim that DSHS "totally disregarded the requirements of the statute." Rsp. Br. at 17. Rushton alleges that DSHS waited until Rushton filed his Motion to Dismiss (on February 21, 2014) (CP at 244) and "then hired Dr. Hoberman" to conduct the annual review. Rsp. Br. at 2. This is not accurate. As was made

⁷ *In re Detention of G.V.*, 124 Wn.2d 288, 877 P.2d 680 (1994); *In re Detention of C.W.*, 147 Wn.2d 259, 281, 53 P.3d 979 (2002).

clear by the declaration of Dr. Marquez, the SCC had been struggling with inadequate staffing levels due to a transfer of some of its staff to Western State Hospital for some time. CP at 336. Despite this staffing shortage, it appears that real efforts were made to file the report at a date closer to Rushton's anniversary date: Dr. Hoberman's February 16, 2014 report states that he met with Rushton on November 25, 2013 (CP at 264), and that he utilized records "made available to the SCC Records center as of 10/13," suggesting that materials were provided to Dr. Hoberman shortly after that date. CP at 254. Although it is unknown why the report took three months to complete, the fact of a referral to Dr. Hoberman at some time prior to November 25, 2013, does not support Rushton's assertion that DSHS "totally disregarded" either statutory or constitutional requirements. The sequence of events supports the trial court's comment, made after hearing argument of the parties regarding the SCC's efforts, that "[t]hey're clearly trying." VRP at 25.

3. Remedies Other Than Dismissal Are More Appropriate to This Case

Finally, dismissal is not a proper remedy in this case. Dismissal unnecessarily and inappropriately places the public—which bears no responsibility for the timing of the report's filing—at risk through the release of a dangerous and mentally ill sex offender. Even if a report is determined to be untimely, there are other available remedies, any of which are more appropriate here and none of which endanger the safety of the community.

It is undisputed that the Statute does not set forth a remedy in the event that DSHS does not submit a timely annual review pursuant to RCW 71.09.070. Rsp Br. at 16; App. Opening Br. at 8-9. This is in stark contrast to *Swanson*, for example, in which the statutory scheme “specifically required the release of a patient if a judicial proceeding was not held within 72 hours.” *C.W.*, 147 Wn.2d at 280-281 (citing RCW 71.05.200(1)). Moreover, there exists an underlying presumption in involuntary treatment cases “in favor of deciding issues on the merits.” *In re Detention of G.V.*, 124 Wn.2d 288, 296, 877 P.2d 680 (1994). “This presumption,” the court wrote, “furthers both public and private interests because the mental and physical well-being of individuals as well as public safety may be implicated by the decision to release an individual and discontinue his or her treatment.” *Id.*

This precise issue was considered by the Wisconsin State Supreme Court in *State ex rel. Marberry v. Macht*, 262 Wis.2d 720, 665 N.W.2d 155 (2003), a case arising within the context of Wisconsin’s Sexually Violent Predator Act. Under the terms of Wisconsin’s statute, a committed individual is entitled to an evaluation by the Department of Health and Family Services within six months of the initial commitment, and then on a yearly basis thereafter.⁸ Eleven months after his commitment, having not received this

⁸ Wis. Stat. §980.06 provides in pertinent part that the Department of Health and Family Services “shall conduct an examination of his or her mental condition within 6 months after an initial commitment ...and again thereafter at least once each 12 months for the purpose of determining whether the person has made sufficient progress for the court to consider whether the person should be placed on supervised release or discharged.”

initial evaluation, Marberry filed a petition for writ of habeas corpus in the trial court, seeking discharge and release. The trial court denied his petition, but ordered the Department to “promptly conduct the reexamination.” *Id.*, 262 Wis.2d at 724. Nine months later, and almost two years after the initial commitment, the Department finally submitted the required evaluation, concluding that “Marberry’s mental disorder had not abated.” *Id.*

On appeal, the Court of Appeals determined that the six-month time frame set for the in the statute was mandatory and ordered Marberry’s release. 262 Wis.2d at 724. The Wisconsin Supreme Court reversed. While agreeing that the time frame was mandatory rather than “directory,” the court determined that this conclusion did not require release as a remedy for noncompliance with the statutory timeframes. Although the court’s discussion of remedy occurs within the context of the habeas framework, its decision hinged ultimately on the fact that Marberry had not demonstrated that there were no other adequate remedies available in the law. *Id.* at 733. The court noted that “[i]t is undeniably true that ... the department was in prolonged and inexcusable noncompliance with its mandatory duties under Wis. Stat. §980.07.” *Id.* at 734. After discussing alternatives peculiar to the Wisconsin statute that could trigger review, the court noted that, where such statutory vehicles were not available,

[t]here is, in such circumstances, another remedy: a writ of mandamus to compel an initial or periodic reexamination, backed up by contempt, with a fine or jail as a sanction. ...

Because Wis. Stat. § 980.07 imposes a mandatory duty upon the department, mandamus to compel performance of that duty is an appropriate and available remedy.

Id. at 735. In reaching this conclusion, the court cited with approval a passage in the partial dissent from the Court of Appeals' decision, noting that such a remedy "would be an effective tool precisely because it focuses on the particular persons who have the authority to ensure that procedures are established to carry out the requirements of the statute." *Id.* at 735, citing *Marberry*, 254 Wis.2d 690, ¶ 52 (Brown, J., concurring in part, dissenting in part).

Explaining their decision to deny release, the Wisconsin Supreme Court observed that "[r]elease and discharge from commitment" for failure to conduct a timely reexamination "would jeopardize public safety and contradict the express statutory criteria for supervised release and discharge." 262 Wis.2d 735. Wisconsin's sex predator statute, the court continued, "provides that a person committed may be released on supervision or discharged from commitment only after a court finds that he or she is no longer a sexually violent person and that it is no longer substantially probable that he or she will commit acts of sexual violence." *Id.* at 735. Release absent this substantive determination by a court would compromise both of the law's principal purposes—treatment and public protection—"because, until a circuit court finds otherwise, the committed person remains in need of treatment and at high risk to reoffend." *Id.* at 736. Instead, "mandamus and contempt are more appropriate to the purposes of the statute."

If the purpose is to provide a sanction that will force state officials to follow the law, contempt is the better sanction than release [of the committed person]. Release is an excessive sanction because the costs are way too high. Contempt is workable and gets the message out to the people who are really and finally responsible for violating the legislature's mandatory time periods for reexamination. The cost is visited upon these flagrant violators and not the public. If someone at [the department] knew he or she could go to jail for ignoring a mandamus, he or she would take extra care to make sure the individual received his or her reexamination.

Id., at 736, citing *Marberry*, 254 Wis.2d 690, ¶ 54.

In so holding, the court distinguished sex predator cases, in which “significant danger to others is the only justification for commitment,” from other types of civil commitment “that do not, by definition, involve dangerous persons” (*Id.* at 736), and suggested that, “had the legislature intended to provide for release when the time limits for the reexamination hearing were violated, it likely ‘would have expressly stated its intention in order to alert the circuit courts of the extreme consequences for failing to comply with the time limitations.’” *Id.*, citing *State v. R.R.E.*, 162 Wis.2d 698, 706–07, 470 N.W.2d 283 (1991).⁹

⁹ Washington courts have taken the same approach in the context of delays in criminal sentencing, and have repeatedly rejected the proposition that a violation of statutory time limits related to sentencing requires dismissal of a case where there is no demonstrated prejudice to the defendant. See e.g. *State v. Martin*, 137 Wn.2d 149, 158, 969 P.2d 450 (1999) (absent a showing of prejudice, failure to hold a timely disposition hearing did not extinguish the court's right to enter judgment); *In re Petition of Cress*, 13 Wn.2d 7, 123 P.2d 767 (1942) (rejecting “monstrous doctrine” that a person, whose guilt has been established, “is to escape punishment altogether, because the court committed an error in passing the sentence”); *State v. Carlson*, 65 Wn. App. 153, 164–65, 828 P.2d 30 (1992) (concluding that, in case involving “the constitutional right to speedy sentencing,” “in the absence of prejudice, vacation of the order or dismissal of the charges was not required” and noting that,

The Wisconsin State Supreme Court's reasoning in *Marberry* is compelling and the facts of the case virtually identical to those here. Just as in Wisconsin, the Superior Court may issue a writ of mandamus, and could have done so here had Rushton requested it do so. *See* Const. art. IV, sec. 6.¹⁰ Applying that reasoning, such an approach would “get the message out to the people who are really and finally responsible for violating the legislature’s mandatory time periods for reexamination,” and avoid a sanction that the trial court in this case recognized would “significantly impac[t]” the State’s interest in public safety. CP at 413.

C. Dismissal Wastes Judicial Resources and Imposes Risks on the Public

Finally, dismissal is a waste of scarce judicial resources. Even if this Court were to uphold the trial court’s dismissal of the State’s petition against Rushton, the State would simply re-file its sex predator petition and, once again, set the matter for trial. *See Aqui*, 84 Wn. App. at 93. This, however, is not a proper resolution of this case, and involves both a significant waste of judicial and state resources and risk to the public.¹¹ The trial court has already

had State Supreme Court and Legislature intended strict compliance or dismissal with respect to the statutory provisions and rules in question, “the Supreme Court and the Legislature presumably would have so provided.”). *See also United States v. Montalvo–Murillo*, 495 U.S. 711, 716-17, 110 S.Ct. 2072, 109 L.Ed.2d 720 (1990) (failure to comply with the Bail Reform Act’s prompt hearing provision does not require release of a person who should otherwise be detained).

¹⁰ Article IV, section 6 provides in pertinent part that the superior courts “shall have power to issue writ of mandamus ... on petition by or on behalf of any person in actual custody in their respective counties.”

¹¹ This precise remedy was proposed—and rejected—in *Swanson* 115 Wn.2d at 31.

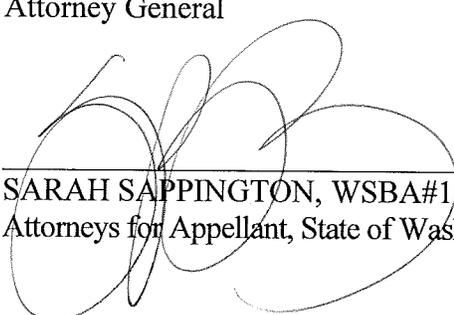
determined, beyond a reasonable doubt, that Rushton is a sexually violent predator, and should not be required to make that showing again where there is absolutely no evidence that his condition has changed such that he no longer meets commitment criteria. Moreover, this solution places the public at risk. It is entirely possible, 14 years later, that critical evidence in this case—such as the testimony of victims—is no longer available, or is completely stale.

III. CONCLUSION

The order releasing Rushton should be reversed.

RESPECTFULLY SUBMITTED this 21st day of January, 2015.

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NO. 32396-0

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

In re the Detention of:

Anthony Rushton,

Respondent.

DECLARATION OF
SERVICE

I, Allison Martin, declare as follows:

On January 21, 2015, I sent via electronic mail and United States mail true and correct copy of Appellant's Reply Brief and Declaration of Service, postage affixed, addressed as follows:

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

DATED this 21st day of January, 2015, at Seattle, Washington.


ALLISON MARTIN