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Court of Appeals  
Division III  
State of Washington

COA NO. 32396-0-III

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

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In re Detention of Anthony Rushton;

STATE OF WASHINGTON,

Appellant,

v.

ANTHONY RUSHTON,

Respondent.

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

The Honorable Michael P. Price, Judge

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BRIEF OF RESPONDENT

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**A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR**

1. Whether the State's annual review evaluation under chapter 71.09 RCW was untimely, in violation of statutory mandate and due process?

2. Whether the trial court properly exercised its authority to dismiss the case and order respondent's release from commitment as the remedy for the State's due process and statutory violations?

**B. STATEMENT OF THE CASE**

In November 2000, the trial court found per stipulation that Anthony Rushton met the criteria for commitment under chapter 71.09 RCW. CP 411-12 (FF 1, 2). Between the initial commitment and most recent review, an expert employed by the Department of Social and Health Services (DSHS) evaluated Rushton on 12 occasions to determine whether he continued to meet the commitment criteria.<sup>1</sup> CP 412 (FF 3). The report from the 2012 evaluation, filed in October 2012, addressed the period from July 2011 to August 2012.<sup>2</sup> CP 205-243, 412 (FF 3).

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<sup>1</sup> Rushton was informed of his right to petition the court for released from civil commitment at each annual review. CP 412 (FF 4). He never petitioned the court for release prior to the dismissal motion filed in February 2014, which initiated the order that provides the basis for the present appeal. CP 412 (FF 4).

<sup>2</sup> The report noted Rushton was in Phase 4 (out of 6) of the Special Commitment Center treatment program. CP 209.

In 2013, however, the State failed to produce an annual review. In February 2014, Rushton filed a motion to dismiss the State's 71.09 action or, in the alternative, to hold an unconditional release trial. CP 244-50. Rushton argued the State failed to comply with RCW 71.09.070(1), which states: "Each person committed under this chapter shall have a current examination of his or her mental condition made by the department of social and health services at least once every year." Id. Rushton maintained the State's failure violated his right to due process. CP 250.

The State then hired Dr. Hoberman, a Minnesota psychologist, to conduct the annual review. RP 22; CP 253, 336. Hoberman's report was filed February 25, 2014 and covered the period from "August 2012 – Sept. 1, 2013." CP 251-324. The report was completed sixteen months after the 2012 evaluation was completed and fifteen months after the twelfth anniversary of Rushton's commitment. CP 412 (FF 6, 7). In that report, Hoberman opined Rushton continued to meet the commitment criteria.<sup>3</sup> CP 280.

Rushton's case is not the only one where a person committed under chapter 71.09 RCW has not been evaluated for more than one year. CP 412 (FF 8). As admitted by forensic services manager Steven Marquez, the Special Commitment Center (SCC) had insufficient in-house staff to

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<sup>3</sup> Rushton was still in Phase 4 of the treatment program. CP 255.

timely conduct annual evaluations. CP 336. Marquez did not explain why the State failed to hire Hoberman at an earlier time. CP 336-37. Marquez instead admitted the backlog started "[a]pproximately two years ago" when DSHS reassigned two evaluators to Western State Hospital. CP 336. Marquez also asserted "[t]he loss of two qualified evaluators at the SCC in 2013 has contributed to delays in annual review reports." CP 336.

In its trial court pleadings, the State conceded the annual review "was tendered 6 months after the end of the review period[.]" CP 329. The State nonetheless argued the trial court lacked authority to dismiss the petition, or to grant Rushton any relief. CP 329-34. The State contended its conceded failure was "moot" because it ultimately produced a late report. CP 231.

In reply, Rushton pointed out the 16-month period between October 2012 and February 2014 was more than a year. CP 339. Nor was the State's delay unforeseeable or excusable. CP 343-44. As shown in a 2013 report by the Washington State Institute of Public Policy, the SCC was responsible for producing roughly 245 annual evaluations in 2012, but only succeeded in completing 144. CP 363-64. Because statutes involving the deprivation of liberty are strictly construed, and because the State's failure deprived Rushton of his right to due process, the proper remedy was relief from confinement and dismissal of the petition. CP

338-45. In the alternative, Rushton asked the court to grant a new trial. CP 345.

The parties appeared on March 20, 2014, for a hearing on the motion. RP.<sup>4</sup> At that hearing, the State adhered to its position that the annual review evaluation was untimely, telling the court "clearly the statute wasn't followed" and Rushton got a "raw deal," while describing the situation as "outrageous." RP 19-20, 25, 27, 32. But it argued Rushton was not entitled to a remedy for the violation. RP 21, 27-28, 32-33.

The trial court disagreed and entered an order dismissing the RCW 71.09 petition and releasing Rushton from confinement at the SCC. CP 413-14. The court concluded budgetary or staffing concerns did not excuse the lapse of more than one year between evaluations. CP 413 (CL 7). It further concluded Rushton's liberty interest is directly affected by a late evaluation, in violation of due process. CP 413 (CL 8); RP 47-48, 50. The belated evaluation in 2014 did not preclude relief. CP 413 (CL 6). The State's failure to comply with its statutory obligation, coupled with the effect on Rushton's liberty interests, justified dismissal of the petition and

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<sup>4</sup> The verbatim report of proceedings is referenced as follows: RP - 3/20/14.

the release of Rushton. CP 413-14 (CL 5, 6, 8). The State appeals from the order of dismissal.<sup>5</sup> CP 415-19.

C. **ARGUMENT**

1. **THE LATE EVALUATION VIOLATED RUSHTON'S STATUTORY AND DUE PROCESS RIGHTS, AND THE TRIAL COURT APPROPRIATELY EXERCISED ITS DISCRETION TO ENTER AN ORDER OF DISMISSAL AS THE REMEDY FOR THE VIOLATION.**

The State failed to timely evaluate Rushton at the annual review stage to determine whether he continued to meet the criteria for civil commitment. That failure violated the mandatory procedure in RCW 71.09.070(1) as well as Rushton's right to due process. U.S. Const. amend. XIV; Wash. Const. art. I, § 3. The trial court did not abuse its discretion in ordering dismissal and release from commitment as the remedy for the State's disregard of its statutory and constitutional obligations.

a. **The annual review evaluation is untimely, and the State's belated repudiation of its position taken before the trial court should not be countenanced.**

Chapter 71.09 RCW governs the civil commitments of those found to meet the definition of a sexually violent predator (SVP). RCW 71.09.040-.060. Such commitments last "until such time as: (a) The

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<sup>5</sup> The trial court stayed execution of the release order for 45 days. CP 414. The Court of Appeals subsequently granted the State's motion to stay execution of the order pending the appeal.

person's condition has so changed that the person no longer meets the definition of a sexually violent predator; or (b) conditional release to a less restrictive alternative as set forth in RCW 71.09.092 is in the best interest of the person and conditions can be imposed that would adequately protect the community." RCW 71.09.060(1).

"Once an individual has been committed, he is entitled to a written annual review by a qualified professional to ensure that he continues to meet the criteria for confinement." State v. McCuiston, 174 Wn.2d 369, 379, 275 P.3d 1092 (2012), cert. denied, 133 S. Ct. 1460, 185 L. Ed. 2d 368 (2013). RCW 71.09.070(1) thus provides:

Each person committed under this chapter shall have a current examination of his or her mental condition made by the department of social and health services at least once every year. The annual report shall include consideration of whether the committed person currently meets the definition of a sexually violent predator and whether conditional release to a less restrictive alternative is in the best interest of the person and conditions can be imposed that would adequately protect the community. The department of social and health services shall file this periodic report with the court that committed the person under this chapter. The report shall be in the form of a declaration or certification in compliance with the requirements of RCW 9A.72.085 and shall be prepared by a professionally qualified person as defined by rules adopted by the secretary. A copy of the report shall be served on the prosecuting agency involved in the initial commitment and upon the committed person and his or her counsel. The committed person may retain, or if he or she is indigent and so requests, the court may appoint a qualified expert or a professional person to examine him or

her, and such expert or professional person shall have access to all records concerning the person.

The annual review evaluation is mandatory. See Clark County Sheriff v. Dep't of Soc. & Health Servs., 95 Wn.2d 445, 448, 626 P.2d 6 (1981) ("Presumptively, the use of the word 'shall' in a statute is imperative and operates to create a duty rather than to confer discretion."). The State does not dispute the trial court's conclusion of law on the matter. CP 413 (CL 4). The State failed its obligation to annually review Rushton's status under RCW 71.09.070. It admitted this violation before the trial court. RP 19-20, 27, 32.

Now, for the first time on appeal, the State argues Dr. Hoberman's 2014 evaluation was timely. Brief of Appellant (BOA) at 12-16. This Court disregards a theory or argument not presented at the trial court level. Pellino v. Brink's Inc., 164 Wn. App. 668, 685 n.8, 267 P.3d 383 (2011); State v. Gosby, 11 Wn. App. 844, 847, 526 P.2d 70 (1974). One purpose of this rule is to afford the trial court an opportunity to correct errors, thereby avoiding unnecessary appeals. Demelash v. Ross Stores, Inc., 105 Wn. App. 508, 527, 20 P.3d 447 (2001). "An even more important factor, however, is the consideration that the opposing parties should have an opportunity at trial to respond to possible claims of error, and to shape their cases to issues and theories, at the trial level, rather than facing

newly-asserted errors or new theories and issues for the first time on appeal." In re Detention of Audett, 158 Wn.2d 712, 725-26, 147 P.3d 982 (2006) (quoting 2A Karl B. Tegland, *Washington Practice: Rules Practice* RAP 2.5 author's cmts. at 192 (6th ed. 2004)).

Here, the State did not merely fail to raise a theory that the annual review evaluation was untimely before the trial court. On the contrary, the State affirmatively represented to the trial court that the evaluation was untimely. RP 19-20, 27, 32. On appeal, the State takes a position that is clearly inconsistent with the position it took before the trial court. This Court should not entertain a new theory on appeal that contradicts the theory presented below.

Even if this Court entertains the State's belated claim regarding the timing of the annual review evaluation, its claim fails. In the cover memorandum for the State's 2012 "annual review," the SCC forensic services manager admits that DSHS "must annually evaluate [Rushton's] mental condition" "pursuant to RCW 71.09.070." CP 206. Dr. Carter, author of the 2012 "annual review," noted the report was for the period "July 2011 - August 2012." CP 208. Dr. Hoberman, author of the report filed in 2014, identified the annual review period as "August 2012 – September 1, 2013." CP 254.

The State also offered the declaration of Marquez, the current forensic services manager at the SCC. CP 336. He stated the loss of two evaluators in 2013 "contributed to delays in annual review reports." CP 336. He admitted there was a "backlog of forensic evaluations" at the SCC. CP 336. He stated "[t]he delay in completing Mr. Rushton's annual review was not the result of neglect or inexcusable delay, but instead because of lack of qualified personnel." CP 337.

Not surprisingly, the State admitted to the trial court that the annual review "was tendered 6 months after the end of the review period[.]" CP 329. The State's own submissions show this annual review was late. It was nearly six months past the anniversary date of the earlier review period and two months into calendar year 2014. The trial court was correct in finding the review evaluation in Rushton's case was untimely because Rushton did not have a current examination of his mental condition "at least once a year." CP 413 (FF 13).

Yet the State on appeal claims annual review is not required "on the anniversary of commitment" or any other deadline. BOA at 10. Rather, according to the State, the evaluation is timely so long as it occurs sometime within a given calendar year, without regard to what time in the year it occurs. BOA at 15. The State's newfound theory would lead to absurd results. Under the State's current theory, the SCC could submit a

review evaluation on January 1, 2014, and not conduct another until December 31, 2015. Even though this constitutes a period of 23 months and 30 days, under the State's theory it is still "annual." At the trial level, the State appropriately took the position that getting a hearing every 23 months "clearly can't be what they had in mind." RP 19-20. Statutes must be construed to avoid unlikely, absurd, or strained consequences. City of Seattle v. Fuller, 177 Wn.2d 263, 270, 300 P.3d 340 (2013).

Further, "statutes that involve a deprivation of liberty must be strictly construed." In re Detention of Hawkins, 169 Wn.2d 796, 801, 238 P.3d 1175 (2010). "Strict construction requires that, 'given a choice between a narrow, restrictive construction and a broad, more liberal interpretation, we must choose the first option.'" Hawkins, 169 Wn.2d at 801 (quoting Pac. Nw. Annual Conference of United Methodist Church v. Walla Walla County, 82 Wn.2d 138, 141, 508 P.2d 1361 (1973)).

A strict construction of RCW 71.09.070(1) dictates annual review evaluations are due on a yearly basis — either on the anniversary date of commitment or one year after the end of the previous review period. This makes sense because the purpose of annual review is to ensure no person remains committed if he is no longer mentally ill or likely to reoffend. McCuiation, 174 Wn.2d at 388, 392. That purpose is frustrated when no annual review evaluation is produced for the period covering the previous

year until well after that period is over. The State's contrary interpretation jettisons strict construction in favor of the loosest interpretation of "annual review" imaginable. It should be rejected.

The State argues the evaluator in Rushton's case eventually found him to meet the SVP definition, but that is of no significance in interpreting the meaning of the annual review provision in RCW 71.09.070. The meaning of a statute does not turn on the particular facts of a case. A statute means the same thing in all cases. So other scenarios must be taken into account in determining legislative intent.

The civil commitment statute has two primary objectives: protection of the public and treatment of persons with dangerous mental disorders. In re Detention of Greenwood, 130 Wn. App. 277, 285, 122 P.3d 747 (2005), review denied, 158 Wn.2d 1010, 143 P.3d 830 (2006). Untimely annual reviews frustrate the treatment objective and may keep persons who are no longer a danger to the public in institutionalized care longer than necessary. One can easily imagine a case where an evaluator produces an evaluation months after the current review period has ended and concludes the committed person no longer meets the SVP definition. Indeed, both the trial court and the State at the trial level envisioned that scenario. RP 31, 49-50. Annual review evaluators do not know before conducting the evaluation whether a person continues to meet the criteria

for commitment. The evaluation must therefore be promptly completed on the anniversary date of commitment or at least once the review period covering the previous year has run its course. This avoids the situation where a person remains committed despite ceasing to meet the SVP definition solely because the annual review evaluation is tardy. The State's loose interpretation of the annual review scheme provides a safe harbor for a fundamentally unfair outcome. The legislature could not have intended such a laissez faire approach to the timing of annual reviews because it results in committed people being held in confinement without any statutory or constitutional basis.

**b. The right to annual review implicates substantive due process protection.**

The State claims the right to annual review is nothing more than a statutory right and that Rushton, in failing to receive a timely annual examination, suffered no due process violation. BOA at 16-19. The State is mistaken. "Because civil commitment involves a massive deprivation of liberty, it must meet the demands of substantive due process." McCuiston, 174 Wn.2d at 387. Washington courts have looked to the annual review process in determining whether an individual's indefinite commitment complies with due process.

Washington's SVP law survived past constitutional challenge because the opportunity for periodic review of the committed individual's current mental condition and continuing dangerousness to the community ensures that "the commitment is tailored to the nature and duration of the mental illness." In re Pers. Restraint of Young, 122 Wn.2d 1, 39, 857 P.2d 989 (1993). "In Young I this court held that the SVP commitment scheme satisfies substantive due process because it requires the State to prove beyond a reasonable doubt that the SVP is mentally ill and dangerous at the initial commitment hearing and that the State justify continued incarceration through an annual review." McCouston, 174 Wn.2d at 388. (citing Young, 122 Wn.2d at 26, 39). "This statutory scheme comports with substantive due process because it does not permit continued involuntary commitment of a person who is no longer mentally ill and dangerous." McCouston, 174 Wn.2d at 388.

"[C]ivil commitment statutes are constitutional only when both initial *and continued confinement* are predicated on the individual's mental abnormality and dangerousness." Id. at 387 (emphasis added). Substantive due process thus requires that the State "conduct periodic review of the patient's suitability for release." Id. at 385. The State must provide an evaluation "on a yearly basis" showing the committed person continues to meet the SVP definition. Id. at 386, 392. The Supreme Court

described the annual review scheme as "constitutionally critical." Id. at 388. The State's attempt to reduce the annual review scheme to one of non-constitutional dimension is not well taken.

Moreover, the United States Supreme Court has "repeatedly held that state statutes may create liberty interests that are entitled to the procedural protections of the Due Process Clause of the Fourteenth Amendment." Vitek v. Jones, 445 U.S. 480, 488, 100 S. Ct. 1254, 63 L. Ed. 2d 552 (1980). "Once a state has granted a liberty interest by statute, 'due process protections are necessary to insure that the state-created right is not arbitrarily abrogated.'" State ex rel. T.B. v. CPC Fairfax Hosp., 129 Wn.2d 439, 453, 918 P.2d 497 (1996) (addressing a civilly committed child's statutory rights to demand release and to access counsel under chapter 71.34 RCW) (quoting Jones, 445 U.S. at 489) (internal quotation marks omitted). The annual re-examination of the committed person's condition is a safeguard against arbitrary confinement.

"[C]ivil incarceration that is noncompliant with the process due under the statute which authorizes civil incarceration affects a person's substantial rights, namely depriving basic liberty without the process due." In re Detention of Martin, 163 Wn.2d 501, 511, 182 P.3d 951 (2008) (holding RCW 71.09.030 authorizes a specific prosecutor to initiate commitment proceedings). By failing to file a timely report, the State

failed to timely present prima facie evidence that Rushton continued to meet the criteria for confinement. It thereby violated the process due to Rushton.

Rushton is not asking for an additional process to protect his liberty interests. There is no need to engage in a Mathews<sup>6</sup> balancing test to determine what process is due. The balance has already been struck. The process due Rushton is spelled out in RCW 71.09.070 and the case law addressing that provision. The process due is a timely annual review evaluation. Rushton did not get it. His constitutional right to substantive due process was therefore violated. U.S. Const. amend. XIV; Wash. Const. art. I, § 3.

- c. Courts have authority to provide a remedy for the State's failure to comply with statutory and constitutional mandate, and the trial court here did not abuse its discretion in providing the remedy of dismissal and release from confinement.**

The State argues for de novo review of the trial court's decision to order dismissal and Rushton's release, likening it to the standard applicable to summary judgment cases. BOA at 8. That is not the correct standard of review. There is a closer analogy. A trial court has inherent power to dismiss an action for want of prosecution. Stickney v. Port of

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<sup>6</sup> Mathews v. Eldridge, 424 U.S. 319, 334, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976) (setting forth factors to consider in determining whether the due process clause requires an additional procedure to be put in place).

Olympia, 35 Wn.2d 239, 241, 212 P.2d 821 (1950). That decision is reviewed for abuse of discretion. Snohomish County v. Thorp Meats, 110 Wn.2d 163, 167, 750 P.2d 1251 (1988). The want of prosecution situation is more analogous to what we have here, where the trial court entered an order of dismissal because the annual review evaluation was untimely. Abuse of discretion is the appropriate standard of review.

Discretion is abused "only if no reasonable person would take the view adopted by the trial court." State v. Huelett, 92 Wn.2d 967, 969, 603 P.2d 1258 (1979). "Where reasonable persons could take differing views regarding the propriety of the trial court's actions, the trial court has not abused its discretion." State v. Demery, 144 Wn.2d 753, 758, 30 P.3d 1278 (2001). The question, then, is whether no reasonable person would take the view that dismissal and release is the appropriate remedy for a violation of the annual review requirement.

Chapter 71.09 RCW does not address what happens if the State fails to submit an annual review as required under RCW 71.09.070. According to the State, there can be no remedy for violation of a statute when the statute does not provide for one. In the State's view, trial courts are little more than a tickler system to inform the State when it violates due process and fails to comply with its obligation under RCW 71.09.070.

Courts, however, are capable of fashioning appropriate relief where a statute does not specify a remedy for its violation. See, e.g., State v. Moen, 129 Wn.2d 535, 537, 548, 919 P.2d 69 (1996) (vacating untimely restitution order even though statute provided no remedy for time limit violation; declining to require showing of prejudice to obtain relief); State v. Minor, 162 Wn.2d 796, 803-04, 174 P.3d 1162 (2008) (reversing conviction for unlawful possession of firearm where statute requiring notice of prohibition was violated, even though the statute provided no remedy for its violation).<sup>7</sup>

The State's insistence that Rushton must show prejudice before he is entitled to a remedy mocks the statutory and constitutional requirement of annual review. See State v. Mollichi, 132 Wn.2d 80, 93 n.7, 936 P.2d 408 (1997) (rejecting the State's argument that the restitution order was proper because Mollichi must show prejudice from its untimeliness: "We decline to endorse so cavalier a treatment of the statutory requirements."). If the State's filing of a late report cures any prior violation, it could

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<sup>7</sup> The Court of Appeals had declined to reverse the conviction: "We agree with Minor that this reading of RCW 9.41.047 imposes no sanction for the court's failure to comply with the statute's express oral and written notice requirements. But we can find no consequence the legislature spelled out for violating this statute. It is not a judicial function but, rather, a legislative task to prescribe a remedy for failing to inform a convicted felon of the loss of the right to possess firearms." State v. Minor, 133 Wn. App. 636, 645, 137 P.3d 872 (2006), rev'd, 162 Wn.2d 796, 174 P.3d 1162 (2008).

always wait to review the committed person's condition until he sought dismissal. This would relieve the State of its burden to annually prove that continued confinement of the individual is warranted and the statute would cease to be "tailored to the nature and duration of the mental illness." Young, 122 Wn.2d at 39.

The State seeks to minimize the length of the delay and the reasons for it. BOA at 1-2. But this Court should not be led astray. The beating heart of the State's argument is that it does not matter how late the evaluation is completed nor does it matter why because there is no remedy for the violation. An evaluation could be six weeks, six months or six years late and it would make no difference under the State's theory.

Courts have the inherent power to impose the sanction of dismissal in a proper case. In re Detention of G.V., 124 Wn.2d 288, 298, 877 P.2d 680 (1994). The trial court here appropriately exercised its discretion in ordering dismissal because the SCC, a State entity, totally disregarded the statutory and constitutional requirement to provide a timely annual review.

In re Detention of Swanson, 115 Wn.2d 21, 804 P.2d 1 (1990) provides guidance. Swanson involved a 72-hour emergency detention under chapter 71.05 RCW. Swanson, 115 Wn.2d at 22, 26. The statutory scheme contemplated an initial detention period not to exceed 72 hours, with a judicial hearing required before any more lengthy commitment. Id.

at 26. The statute did not provide for the remedy of dismissal, or any remedy for its violation. Swanson's initial detention did not exceed 72 hours. Id. at 28-29. But because statutes involving a deprivation of liberty are to be construed strictly, the Court pointed out "If Harborview 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." Id. at 31; see also G.V., 124 Wn.2d at 296 ("We held in In re Swanson that after the expiration of an initial 72-hour detention period stipulated by RCW 71.05.180, a petition by the State to commit the individual must be dismissed.").

In re Detention of C.W., 147 Wn.2d 259, 53 P.3d 979 (2002) reaffirmed the proposition that total disregard of a statutory requirement involving civil commitment is grounds for dismissal. C.W. involved the emergent detention of mentally ill persons by a hospital. C.W., 147 Wn.2d at 262-63. The Court held that RCW 71.05.050 permits a hospital to detain an alleged mentally ill person for six hours from the time the hospital professional staff determines that it is necessary to contact a County Designated Mental Health Professional (CDMHP). Id. at 263. It further held dismissal will not usually be the appropriate remedy for violations of RCW 71.05.050. Id. However, it also recognized "dismissal may be appropriate in the few cases where hospital staff or the CDMHP

'totally disregarded the requirements of the statute.'" Id. at 283 (quoting Swanson, 115 Wn.2d at 31). The statute did not provide for the remedy of dismissal, or any remedy for its violation. But "allowing dismissal in cases where the professional staff totally disregarded the statutory requirements serves as a general safeguard against abuse." Id.

Allowing dismissal of SVP cases where the SCC totally disregards the statutory and constitutional requirement of timely annual review of the committed person's condition likewise serves as a general safeguard against abuse. Late annual evaluations are a systemic problem. The SCC was responsible for producing roughly 245 annual evaluations in 2012, but only succeeded in completing 144. CP 363-64. The problem remains. The SCC forensic services manager admitted there was a "backlog of forensic evaluations" at the SCC. CP 336. The SCC lost two qualified evaluators to Western State Hospital *two years ago*. CP 336. He stated "[t]he delay in completing Mr. Rushton's annual review was not the result of neglect or inexcusable delay, but instead because of lack of qualified personnel." CP 337. But as shown by this case, the SCC is quite capable of hiring outside contractors to perform these evaluations. Dr. Hoberman, the author of the untimely evaluation in this case, is an example. RP 22; CP 253, 336. Yet nowhere is there an explanation for why Hoberman was not hired earlier so that Rushton's evaluation could be completed when it

was supposed to be completed. As the problem with late evaluations has been ongoing, the late evaluation in Rushton's case was foreseeable. And it is inexcusable. The State, instead of allocating resources to meet its obligations to provide timely annual evaluations, has let the problem metastasize. Rushton is only the latest in a long line of people to get a "raw deal." RP 32.

The State completely disregarded its obligation under RCW 71.09.090 and the due process clause to provide a timely evaluation to Rushton. It knew the systemic problem existed. It knew the annual review was late. But it did nothing until prompted by Rushton's motion to dismiss. Total disregard of a statutory requirement involving civil commitment is grounds for dismissal. C.W., 147 Wn.2d at 283; Swanson, 115 Wn.2d at 31. Here, we have a total disregard of both a statutory and a constitutional requirement.

The legislature recognizes that those committed under chapter 71.09 have long-term treatment needs. McCouston, 174 Wn.2d at 389-90. The trial court, in exercising its discretion, acknowledged Rushton's release would impact the State's interest in public safety. CP 413 (CL 9). But it also recognized the liberty interest involved. CP 413 (CL 8). In light of that interest and the State's disregard of its obligation to provide a timely annual review evaluation, it cannot be said no reasonable person

would take the action that the trial court took here. Huelett, 92 Wn.2d at 969; Demery, 144 Wn.2d at 758. The court therefore did not abuse its discretion in entering its dismissal order.

**d. The issue of whether a trial court can order an unconditional release trial as the remedy for an untimely annual review evaluation is not properly before this Court.**

The State drops this line towards the end of its brief: "Given the State's detailed evidence showing he continued to meet the SVP criteria, and no evidence from Rushton, the trial court was without authority to even order a release trial under RCW 71.09.090." BOR at 19.

Whether a trial court has authority to order a release trial when the State files an untimely annual review evaluation is not an issue that is before this Court. The State's invitation to sew dicta into this Court's decision should be disregarded.

The State appeals from the trial court's order dismissing the State's petition and releasing Rushton from custody. CP 415-19. That is the only order before this Court on appeal. The trial court issued no order and made no ruling on whether an unconditional release trial would be an appropriate remedy under the circumstances. As a result, resolution of that issue is premature and should not be reached as part of this appeal. Appellate courts are not in the business of deciding an issue that has not

reached fruition at the trial level. See, e.g., State v. Rowland, 174 Wn.2d 150, 156, 272 P.3d 242 (2012) (declining to reach sentencing issue based on trial court's expressed intent to impose an exceptional sentence if the offender score were different: "since no action has yet been taken by the trial court, it is premature."); Perry v. Moran, 111 Wn.2d 885, 887, 766 P.2d 1096, (declining to address issue of whether contract clause was unreasonable because the trial court had not made a determination on the issue), cert. denied, 492 U.S. 911, 109 S. Ct. 3228, 106 L. Ed. 2d 577 (1989).

Anything this Court has to say on the matter would be pure dicta. Moreover, resolution of this issue on the merits would constitute an improper advisory opinion. See Applewood Estates Homeowners Ass'n v. City of Richland, 166 Wn. App. 161, 170-71, 269 P.3d 388 (2012) ("it is unnecessary to address the other contentions raised by the parties noted above as the same would be, at best, dicta or amount to an undesirable advisory opinion."); State v. Eggleston, 164 Wn.2d 61, 76-77, 187 P.3d 233 (2008) (declining to reach issue concerning proceedings on remand because it was speculative whether the issue would actually arise); State v. Davis, 163 Wn.2d 606, 616, 184 P.3d 639 (2008) (declining to reach issue that might arise at resentencing, giving the trial court the first opportunity to pass on its applicability and constitutionality); State v. Roberts, 77 Wn.

App. 678, 683, 894 P.2d 1340 (1995) (declining to render advisory opinion on a sentencing deviation the trial court might adopt on remand).

Furthermore, the State has not developed its argument that a release trial would be an unlawful remedy. "Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration." Palmer v. Jensen, 81 Wn. App. 148, 153, 913 P.2d 413 (1996), remanded on other grounds, 132 Wn.2d 193, 937 P.2d 597 (1997). And a reply brief comes too late to develop an argument. See Fosbre v. State, 70 Wn.2d 578, 583, 424 P.2d 901 (1967) (points not argued and discussed in opening brief are not open to consideration on their merits) Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) ("An issue raised and argued for the first time in a reply brief is too late to warrant consideration.").<sup>8</sup>

For these reasons, the issue of whether a release trial is an appropriate remedy for an untimely annual review evaluation is not

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<sup>8</sup> The State recently lost a motion for discretionary review of a trial court's order that granted a release trial as the remedy for an untimely annual review evaluation. In re Detention of Martin, 46027-1-II. The parties and the court discussed this case at the trial level. RP 12-14, 22-23; CP 409-10. Rushton does not cite that case as authority on appeal, but mentions it to illustrate that the State in Rushton's case is attempting to bypass the discretionary review stage by casually bootstrapping the issue into this appeal. Nonetheless, if the Court wants the parties to brief the issue, then it has the power to order supplemental briefing under RAP 12.1(b).

properly before this Court and should not be addressed as part of this appeal.

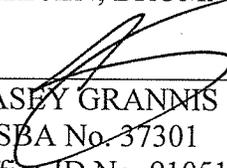
**D. CONCLUSION**

For the reasons stated, Rushton requests that this Court affirm the trial court's order of dismissal and release.

DATED this 4<sup>th</sup> day of December 2014

Respectfully Submitted,

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In Re Detention of Anthony Rushton, 32396-0-III

Certificate of Service

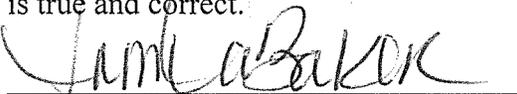
Today I filed & E-served per agreement the following documents:

Brief of Respondent, in In Re Detention of Anthony Rushton, 32396-0-III in the Court of Appeals, Division III, for the state of Washington, to:

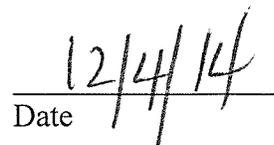
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I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Jamila Baker  
Done in Seattle, Washington

  
Date