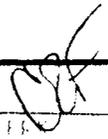


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THE SUPREME COURT
FOR THE STATE OF WASHINGTON

IN RE THE PERSON RESTRAINT PETITION OF:

DONALD T. MCCARTHY,

RESPONDENT.

SUPPLEMENTAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES.....ii

ASSIGNMENT OF ERROR.....1

STATEMENT OF THE CASE.....1

ARGUMENT3

A. COURT OF APPEALS DID NOT ERR WHEN IT FOUND THE PRISONERS SENTENCED UNDER RCW 9.94A.712 AND SUBJECT TO RELEASE HEARINGS UNDER 9.95.420 HAVE LIBERTY INTERESTS THAT ARE PROTECTED BY DUE PROCESS.....4

1. States May Create An Expectancy Of Release That Entitles Prisoners To Due Process Protection at parole release hearings.....5

2. ESSB 6151, the Washington Statutory Scheme establishing .420 hearings, Creates an Expectancy of Release resulting in due process entitlements for offenders who appear before the Board for a release hearing.....7

B. THE COURT OF APPEALS DID NOT ERR WHEN IT HELD THAT THE BOARD MUST EXERCISE ITS DISCRETION AND , IN THIS CASE, APPOINT AN ATTORNEY WHEN THE MENTALLY LIMITED OFFENDER WHO CANNOT REPRESENT HIMSELF REQUESTS ASSISTANCE OF COUNSEL.....11

1. The U.S. Supreme Court case law has clearly established that constitutional due process is a flexible concept that applies to parole and probation revocation hearings, in addition to transfer hearings, and that there are some cases where fundamental fairness, the touchstone

of due process, requires an attorney or advisor to be present.....	12
2. Washington Case Law Recognizes That Due Process Is A Flexible Concept And Has Not Established A Per Se Rule Regarding The Right To Counsel In Different Prison Hearing Settings.....	15
3. In this case, due to the inability of McCarthy to understand the nature and facts of the .420 hearing and to speak on his on behalf, the Board should have exercised its discretion and appointed counsel after McCarthy made the request for representation.....	19
CONCLUSION.....	22

TABLE OF AUTHORITIES

Cases

WASHINGTON STATE CASE

<i>Arment v Henry</i> 98 Wn.2d 775, 658 P.2d 663 (1983).....	16,17
<i>In Re Boone</i> 103 Wn.2d 224, 691 P.2d 964 (1984).....	17
<i>In Re McNeal</i> 99 Wn.App. 617, 944 P.2d 890 (2000).....	18,19

<i>In Re Sinka</i> 92 Wn.2d 555, 599 P.2d 1275 (1975).....	15,16
<i>In Re Whitesel</i> 111 Wn.2d 621, 631, 763 P.2d 199 (1988).....	17
<i>State v Ross</i> 129 Wn.2d 279, 916 P.2d 405 (1996).....	18
<i>State v Zeigenfuss</i> 118 Wn.App. 110, n.24, 74 P.3d 1205 (2003).....	18

FEDERAL CASES

<i>Board of Pardons v. Allen</i> , 482 U.S. 369, 107 S.Ct. 2415, 96 L.Ed.2d 303 (1987).....	6,7
<i>Cafeteria Workers v McElroy</i> , 367 U.S. 886, 895, 81 S. Ct. 1743, 6 L. Ed. 2d 1230 (1961).....	3,15
<i>Connecticut Board of Pardons v. Dumschat</i> , 452 U.S. 458, 463-64, 101 S.Ct. 2460, 69 L.Ed.2d 158 (1981).....	6
<i>Gagnon v Scarpelli</i> , 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973).....	4,12,13,14,17,19
<i>Greenholtz v. Inmates of Nebraska Penal and Corrections Complex</i> , 442 U.S. 1, 99 S.Ct. 2100, 60 L.Ed.2d 668 (1979).....	3,5,6,16,19
<i>Mathews v Eldridge</i> , 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18 (1976).....	3,15,16

<i>Morrissey v Brewer</i> , 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d484(1971).....	3,12,13,19
<i>Vitek v Jones</i> , 445 U.S. 480, 494-95, 100 S. Ct. 1254, 63 L. Ed. 2d 552 (1980).....	4,14,17
<i>Wolff v. McDonnell</i> 418 U.S. 539, 94 S.Ct. 2963 41 L.Ed.2d 935(1974).....	16

Statutes

2001 Final Legislative Report, 3EESB 6151.....	8
Laws of 2001,2001 2d Sp. Sess., ch.12.....	8
RCW 9.94A.535.....	9
RCW 9.94A.712.....	1,5,8,9,20
RCW 9.94A.712(6)(a)(c).....	9
RCW 9.94A.713.....	9
RCW 9.95.0001.....	9
RCW 9.95.011.....	8
RCW 9.95.011(2)(a).....	8
RCW 9.95.100.....	7,8
RCW 9.95.110.....	8
RCW 9.95.420.....	1,7,11,20

RCW 9.95.420(1)(a)9
RCW 9.95.420(3)(b)10
RCW 9.95.435(4)(d)11
RCW 72.09.335.....9
RCW 72.09.345.....10

Rule

DOC Policy 320.110.....10,20

I. ASSIGNMENT OF ERROR

A. ISSUE

Whether hearings pursuant to RCW 9.95.420 implicate due process, requiring the Indeterminate Sentence Review Board to exercise its discretion when an offender who lacks the capacity to effectively represent himself requests appointment of counsel.

II. STATEMENT OF THE CASE

The following facts are presented in addition to the facts stated in the State's Statement of the case. Mr. McCarthy signed a Statement of Defendant on Plea of Guilty. (Personal Restraint Petition, Exhibit 8). He was informed that the standard range was 9-12 months and that total actual confinement was 9-12 months. In addition he was informed that the community custody range was 60 months and the maximum term was 5 years. Id. He was informed that the State's recommendation would be 12 months + 1 day. Id. The pretrial offer was for a stipulation to an exceptional sentence (Id. at appendix) and that "defendant shall be placed on community custody for the statutory maximum sentence (i.e. 60 months), less anytime spent in custody (RCW 9.94A.712)." Included among the stipulations for conditions on community custody is a requirement of "[participation] in Sexual Offender Treatment with a state

certified sex offender therapist as directed by your community corrections officer.” Id. On the Judgment and Sentence, the court imposed an exceptional sentence (PRP, Exhibit 1, section 2.4). Conditions of community custody included sex offender treatment as established by the community corrections officer and maintain mental health treatment and prescribed medications for any mental illness. Id. at sect. 4.6. At the .420 hearing held on August 15, 2003, the Board requested an array of psychological evaluations and treatment summaries and classification reports for the next hearing. The classification counselor is required to attend and shall have file materials and details of inmate behavior.” (PRP, Exhibit 3, Decision and Reasons). In the Decision and Reasons following the 8/5/03 hearing the Board stated that “the facts relied upon are an examination of the End of Sentence Review Committee Report, discussions with Mr. McCarthy today and a consideration of the nature of the behavior and its history.” Id. At the hearing, Mr. Austin, a panel member, advised Mr. McCarthy”...you’ve had an opportunity to review material that the End of Sentence Review Committee of the Department of Corrections looked at when they made their own finding, and that you’ve had a chance to talk briefly about the procedure with a legal services attorney..” Mr. Austin asked McCarthy, “...The material that Ms. Garrat and I’ll be looking at and talking to you about this morning I want to make

sure you had a chance to go over it. Did you?” McCarthy replied, “I read it over kinda fast because there wasn’t a lot of time for the people to be with me to read it.” (PRP Exhibit 4, Transcript of Hearing, 8/15/03). A subsequent .420 hearing was held on 9/8/04 and in the Decision issued on 10/6/04, the Board wrote” he was receiving SSI benefits for his mental health, he has short term memory loss .He continues to exhibit a highly anxious state, even with medications as he did at this morning’s hearing. He has the ability to intellectualize, but may lose focus and go off on a tangent relatively easily.” PRP, Exh. 9 Decision and Reasons at p.2

III. ARGUMENT

In Greenholtz v. Inmates of Nebraska Penal and Corrections Complex, 442 U.S. 1, 7, 99 S.Ct. 2100, 60 L.Ed.2d 668 (1979), the United State Supreme Court held that while there is no inherent right to parole, the States may create liberty interests that are entitled to the procedural protections of the due process clause of the fourteenth amendment. Due process is flexible and calls for such procedural protections as the particular situation demands. Morrissey v Brewer, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1971); Cafeteria Workers v McElroy, 367 U.S. 886, 895, 81 S. Ct. 1743, 6 L. Ed. 2d 1230 (1961); Mathews v Eldridge, 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18 (1976). There is no automatic appointment of counsel for indigent prisoners facing other

deprivations of liberty. But, counsel might be needed, when the prisoner is illiterate and uneducated for assistance in exercising their rights. , Gagnon v Scarpelli, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973); Vitek v Jones, 445 U.S. 480, 494-95, 100 S. Ct. 1254, 63 L. Ed. 2d 552 (1980). Two factors are considered in determining the requirement of counsel: 1) existence of factual dispute, or the complexity of the issues that are difficult to develop or present, 2) whether the person appears to be capable of speaking effectively for himself.

The Washington Statutory scheme creates an expectation of release at .420 hearings that entitles prisoners to due process. Where the statute creates a presumption of release and the hearing involves complex issues and an equally complex record, an offender such as Mr. McCarthy, who lacks the mental capacity to understand the issues and speak on his own behalf, must be afforded the right to representation by counsel upon request and after the Board exercises its discretion upon that request. Existing case law does not preclude right to counsel at .420 hearings.

A. COURT OF APPEALS DID NOT ERR WHEN IT FOUND THE PRISONERS SENTENCED UNDER RCW 9.94A.712 AND SUBJECT TO RELEASE HEARINGS UNDER 9.95.420 HAVE LIBERTY INTERESTS THAT ARE PROTECTED BY DUE PROCESS

1. States May Create An Expectancy Of Release That Entitles Prisoners To Due Process Protection at parole release hearings.

The United State Supreme Court has held that prisoners have no liberty interest to be released before serving the maximum sentence, the states may create an expectancy of release that might be protected by due process. Under RCW 9.94A.712, the prisoners have an expectancy of release, and they have rights under due process.

In Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1, 99 S.Ct. 2100, 60 L.Ed.2d 668 (1979), the United State Supreme Court stated that “there is no constitutional right of a convicted person to be conditionally released before the expiration of a valid sentence; however, the Court held that a state parole-release statute may provide expectancy of release that would entitle the prisoners to some measure of constitutional protection. Whether a state statute creates a protectable entitlement must be decided on a case-by-case basis. Id. at 12. In Greenholtz, under the Nebraska statute, a prisoner becomes eligible for discretionary parole when the minimum term, less goodtime credits, had been served. Id. at 4. When it considers the release of a committed offender who is eligible for release on parole, the board shall order his release unless it is of the opinion that

his release should be deferred under one of the listed reasons. Id at 11. The parole board conducts an initial parole review hearing, where the prisoner's preconfinement and postconfinement records are examined. If the board finds a prisoner is a likely candidate for release, a final hearing is scheduled, and the prisoner may call witness and be represented by private counsel of his choice. In holding that due process applies, the Court reasoned that the Nebraska statute's unique structure and language created an expectancy of release and therefore provided a protectable entitlement. The court stressed that whether a statute creates such a protectible entitlement must be determined on a case-by-case basis. Id at 12.

In a subsequent case, the court described the decision in Greenholtz, stating, "In Greenholtz, far from spelling out any judicially divined 'entitlement,' we did no more than apply the unique Nebraska statute." Connecticut Board of Pardons v. Dumschat, 452 U.S. 458, 463-64, 101 S.Ct. 2460, 69 L.Ed.2d 158 (1981). Addressing due process in the context of commutation of a sentence, the court further explained, "this contrasts dramatically with the Nebraska statutory procedures in Greenholtz, which expressly mandated that the [parole board] 'shall' order the inmate's release 'unless' it decided that one of four specified reasons for denial was applicable." Id at 466. In Board of Pardons v. Allen, 482 U.S. 369, 107

S.Ct. 2415, 96 L.Ed.2d 303 (1987), the court referred to the Greenholtz decision, indicating that “ [in Greenholtz the Court recognized – even highlighted – that parole-release decisions are inherently subjective and predictive...but nonetheless found that the Nebraska inmates possessed a liberty interest in release.” Id at 374-5.

These cases hold that even if constitutional due process does not apply to release prior to expiration of a sentence, state statutes do create an expectancy of release, resulting in due process protection and the individual statutes must be examined on a case-by-case basis to determine the level of due process.

2. ESSB 6151, the Washington Statutory Scheme establishing .420 hearings, Creates an Expectancy of Release resulting in due process entitlements for offenders who appear before the Board for a release hearing.

Release hearings under RCW 9.95.420 differ profoundly from pre-SRA parole hearings under RCW 9.95.100. In contrast to pre-SRA parole hearings, RCW 9.95.420 requires the offender to participate in an extensive end of sentence review process. The Board is also statutorily required to obtain a complex set of records and reports from DOC and the offender has a limited right to review the reports. In addition, the offender is sentenced to a minimum term that closely resembles the SRA determinate sentence. In order to show how ESHB 6151 creates an

expectancy of release, while containing a rehabilitative component, an overview of the Act is provided below.

ESSB 6151 (Laws of 2001, 2001 2d Sp. Sess, ch 12), hereinafter, “Act,” created a comprehensive new statutory scheme to deal with sex offenders. This statutory scheme imposes indeterminate sentences for certain sex offenders, changes the rules and procedures for community custody revocation and creates the new .420 hearing. The legislation creates an expectancy of release at the .420 hearings.

The “Act” differs from the pre-SRA. Under the pre-SRA sentencing scheme, the Court sets a minimum term that is ‘reasonably consistent with the purposes, standards, and sentencing ranges {of the SRA}... [upon expiration of the minimum term]...the board may consider the convicted person for parole under 9.95.100 and RCW 9.95.110. and chapter 72.04A...Nothing in this section affects the board’s authority to reduce or increase the minimum term...” RCW 9.95.011 In contrast, offenders “sentenced under RCW 9.94A.712, the Board shall review the person for conditional release to community custody as provided in RCW 9.95.420” RCW 9.95.011(2)(a), (section 320)¹. There is no reference to

¹ Section numbers refer to the section in Ch. 12, Laws of 2001, correlating with the codified RCW.

the Board being able to adjust the minimum term. Under RCW 9.94A.712, the minimum term shall be “either within the standard range for the offense or outside the standard range pursuant to RCW 9.94A.535, if the offender is otherwise eligible for such a sentence. Id, (sect.303). In other words, when sentenced under the Act, the offender is sentenced to a minimum term as if he were being sentenced to a determinate sentence. Under the Act, “the Court may also order the offender to participate in rehabilitative programs or otherwise perform affirmative conduct...” RCW 9.94A.712(6)(a)(i) see RCW 9.94A.713(1) (sect. 304).

The Act also differentiates community custody from parole. Parole is defined as time on conditional release subject to the Board, while community custody is defined as where the offender is subject to controls including affirmative conditions ...based on risk to the community safety. See RCW 9.95.0001 (sect. 317) The Act stresses treatment and community safety over straight punishment.

With respect to the 420 hearing, the statute requires the offender to participate in the Department of Corrections’ “end of sentence review” process, which includes review of all records, including, but not limited to, police reports, psychological evaluations, psychiatric hospital records and sex offender treatment reports. RCW 9.95.420(1)(a), citing RCW 72.09.345 (End of sentence review committee—assessment). The Board

may consider the failure to participate in the end of sentence review process when making a decision on release. RCW 9.95.420(3)(b) (sect.306) The Board receives the end of sentence review results. Id. RCW 72.09.335 (sect. 305) requires DOC to provide the opportunity for Sexual Offender Treatment program for offenders sentenced under the Act. Again, the focus is on treatment and the .420 hearing includes psychological, psychiatric and other complex and/or technical data.

DOC policy 320.110 (Appendix A) requires all CCB² offenders to be screened and given priority for treatment. In addition, the DOC must prepare a summary and referral packet to forward to the Board for the .420 hearing. The offender is allowed to review the packet, but can only take handwritten notes. Unspecified staff will assist if necessary. Id. At the .420 hearing, the presumption is that the offender will be released, “unless the board determines by a preponderance of the evidence that despite such conditions, it is more likely than not the the offender will commit sex offenses if released...” RCW 9.95.420(3)(b)

Another way of stating the above procedure is to say that once the offender is sentenced to a minimum term identical to the determinate since under the SRA, and after he has been given priority for treatment and

² DOC's term for the Board when dealing with .420 hearing offenders.

given a brief chance to review the detailed packet of technical material, he sees the Board for a .420 hearing, at which time it is presumed that he will be released as per the court imposed sentence, unless the Board makes a finding by a preponderance of the evidence that the offender is more like than not to reoffend sexually. RCW 9.95.420

If an offender is released to community custody and the commits a violation, at the community hearing the "Act" also increased the offender's due process rights upon release. The offender is required to have an attorney appointed if revocation is probable. RCW 9.95.435(4)(d).(section 309)

The above discussed statutory and regulatory scheme revised the previous community custody provisions under the SRA, with an emphasis on treatment followed by a hearing at which the numerous factors, including all reports, evaluations and an in-face meeting the offender are considered.

B. THE COURT OF APPEALS DID NOT ERR WHEN IT HELD THAT THE BOARD MUST EXERCISE ITS DISCRETION AND , IN THIS CASE, APPOINT AN ATTORNEY WHEN THE MENTALLY LIMITED OFFENDER WHO CANNOT REPRESENT HIMSELF REQUESTS ASSISTANCE OF COUNSEL

1. **The U.S. Supreme Court case law has clearly established that constitutional due process is a flexible concept that applies to parole and probation revocation hearings, in addition to transfer hearings, and that there are some cases where fundamental fairness, the touchstone of due process, requires an attorney or advisor to be present.**

In Morrissey v Brewer, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1971), the Court held that due process is flexible and calls for such procedural protections as the particular situation demands. Id at 481. The function of due process is to minimize the risk of erroneous decisions, by ensuring accurate fact-finding and fairness of the proceeding. Gagnon v Scarpelli, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973). In Scarpelli, the Court held that appointment of counsel should be done in case-by-case basis, by the state authority charged with responsibility for administering the probation and parole system. Id at 788. Furthermore, the Court provided two factors that govern the decision to provide counsel. In Scarpelli, the Court had to decide whether an indigent probationer or parolee has a due process right to be represented by appointed counsel at a parole revocation hearing. Relying on Morrissey, the Court pointed out that the parole agent ordinarily defines his role as representing his client's best interest as long as these do not constitute a threat to public safety. Scarpelli at 783. While the parole officer might serve as the parolee's advocate when the parole is working successfully, the Court recognizes

that the officer's attitude is likely to change once the officer decided to recommend revocation. Id at 785. In other words, once the parole officer decides to recommend revocation of parole, he no longer serves his client's interest. When the officer's view of parolee's conduct differs fundamentally from the parolee's view, due process is needed to insure accurate fact-finding and informed use of discretion, so that all parties' interests are protected. It is against this backdrop that the Court mandated minimum due process in Morrissey. Scarpelli at 786. However, as the Court in Scarpelli pointed out, the effectiveness of the rights guaranteed by Morrissey may in some circumstances depend on the use of skills which the probationer or parolee is unlikely to possess. Scarpelli at 786. Even though a revocation hearing is informal and far less technical than a criminal trial, an unskilled or uneducated probationer or parolee may still have difficulty in preparing and presenting his version of the event, examining witnesses, or offering and dissenting complex documentary evidence. Id. For these reasons, the Court, in Scarpelli, found no "justification for an inflexible constitutional rule with respect to the requirement of counsel." Id at 790. The Court recognized that although the presence and participation of counsel will probably be both undesirable and constitutionally unnecessary in most revocation hearings, there will remain certain cases in which fundamental fairness – the touchstone of

due process – will require that the State provide at its expense counsel for indigent probationers or parolees. Id. The Court laid out two factors that govern the decision to provide counsel: (1) the existence of factual disputes or issues which are complex or otherwise difficult to develop or present, and (2) whether the probationer appears to be capable of speaking effectively for himself.. Id. at 790-791, quoted by Justice Powell in Vitek v Jones, 445 U.S. 480, 498; 100 S.Ct. 1254, 63 L.Ed.2d 552 (1980).

The U.S. Supreme Court revisited right to counsel in another type of hearing in Vitek v Jones, 445 U.S. 480, 100 S.Ct. 1254, 63 L. Ed.2d 552 (1980). After the Court held that Due Process Clause of the Fourteenth Amendment is invoked when a prisoner is transferred involuntarily to a state mental hospital for treatment of a mental disease or defect, Id. at 494-496, the Court, applying Scarpelli, held that a prisoner thought to be suffering from a mental disease or defect requiring involuntary treatment probably has an even greater need for legal assistance than an illiterate or uneducated parolee, for such a prisoner is more likely to be unable to understand or exercise his rights. Vitek at 496-497. To reiterate the point that due process is flexible, Justice Powell, whose concurring opinion is adopted by the majority, stated that the counsel need not be a licensed lawyer, since the subject of the hearing is not legal, and a psychiatrist is probably far more helpful, given the nature

of the issue involved in the transfer hearing. Id at 499-501. As Justice Powell pointed out, the essence of procedural due process is a fair hearing, and that does not require participation by lawyers to determine a medical issue. Id.

As these cases demonstrate, due process requires flexibility, and needs to adapt to the particular situation. If a prisoner is unable to prepare for a hearing due to lack of skill or education, fundamental fairness requires the state to appoint counsel to assist the prisoner. “Due process, unlike some legal rules, is not a technical concept with a fixed content unrelated to time, place and circumstance.” Cafeteria Workers v. McElroy, 367 U.S. 886, 895, 81 S. Ct. 1743, 6 L. Ed. 2d 1230 (1961), cited in Mathews v. Eldridge, 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18 (1976).

2. Washington Case Law Recognizes That Due Process Is A Flexible Concept And Has Not Established A Per Se Rule Regarding The Right To Counsel In Different Prison Hearing Settings.

Washington courts have not instituted a per se rule regarding due process in a variety of settings. For example, in In re Sinka, 92 Wn.2d 555, 599 P.2d 1275 (1975), the court determined what due process is required in the setting of a minimum term. The court recognized that

under Greenholtz, a state statute could create a liberty interest. Id at 563. In determining what process is due, the court indicated that three factors are considered, citing to Mathews v. Eldridge, 424 U.S. 319, 335, 47 L.Ed.2d 18, 96 S.Ct. 893 (1975). The factors are (1), private interest that will be affected by the official action; (2) risk of erroneous deprivation and (3) the government's interest . Id at 565. In Sinka, where under Board rules, the data on which the Board acts is not developed through an adversary hearing, the inmate must be allowed to inspect the information used against him to prevent erroneous evidence from being used against him. Id at 568. In Arment v. Henry, 98 Wn.2d 775, 658 P.2d 663, the court refused to apply a per se rule to appointment of counsel at disciplinary hearings where the inmates minimum terms were to be redetermined under RCW 9.95.080. Although the court held that the hearing was comparable to a disciplinary hearing under Wolff v. McDonnell³, it acknowledged the due process considerations of Morrissey and Scarpelli for parole and probation revocation hearings. Id at 778. It also quoted from Vitek (supra), the case dealing with transfer of mentally ill prisoners from prison to hospital, indicating that "...we have recognized that prisoners who are illiterate and uneducated have a

³ 418 U.S. 539, 41 L.Ed.2d 935, 94 S.Ct. 2963 (1974)

greater need for assistance in exercising their rights...[and in the circumstances of transfer for mental health reasons] it is appropriate that counsel be provided to indigent prisoners whom the state seeks to treat.” Arment at 778, citing Vitek.” As noted above, Vitek recognized that in a parole release setting, the State could create a sufficient expectancy to parole to entitle offenders to some measure of constitutional protection with respect to parole decisions.” Vitek at 489. Although Arment held that there was no right to counsel in this situation, the court acknowledged the Scarpelli rule on case-by-case determination of the requirement of representation by counsel. In addition, the court did not rule out the possibility of application of Morrissey and Scarpelli to other types of hearings governed by other statutory schemes. See also, In re Boone, 103 Wn.2d 224, 691 P.2d 964 (1984), where court rule provides right to counsel at probation revocation hearings and the Scarpelli case-by-case rule would apply. Id at 229-30. In In re Whitesel, 111 Wn.2d 621, 631, 763 P.2d 199 (1988), in a minimum term redetermination setting, under RCW 9.95.009, the court stated that, “In Arment v. Henry (citation omitted), we recognized the [Scarpelli rule on right to counsel in a case by case basis] and declined to adopt a per se rule mandating the right of counsel at disciplinary proceedings before the parole board. We

similarly conclude that inmates have no right to attorney during [the minimum term redetermination hearing].”

In In re Personal Restraint of McNeal, 99 Wn.App. 617, 944 P.2d 890 (2000), the court addressed right to counsel at a community custody revocation hearing under the old statutory scheme. Although the court held that minimal due process applies under Morrissey, with respect to right to counsel, the case-by-case rule of Scarpelli does not apply, because community custody is primarily punitive and therefore counsel is not needed to “insure that the rehabilitation effort is not interrupted.” *Id.* at 632-33. McNeal, as indicated, addressed a different statute than is at issue in McCarthy’s case. See, *State v. Ziegenfuss*, 118 Wn.App. 110, n.24, 74 P.3d 1205 (2003) (McNeal was decided when community custody referred only to DOC supervision in lieu of early release.”). Again, it should be noted that, as opposed to the procedure McNeal addressed, a Community Custody revocation hearing for offenders sentenced under the “Act” requires appointment of counsel. It is also clear that State v. Ross, 129 Wn.2d 279, 916 P.2d 405 (1996), on which McNeal relied to find that community custody was primarily punitive, did not address the same issue as McNeal. Ross was primarily concerned with community placement as a direct consequence of a guilty plea.

It should also be noted that the majority in McNeal failed to consider the underlying reasoning for the holding in Scarpelli: that the due process rights are only effective when the person actually has the ability to use them. As Judge Webster pointed out in the dissenting opinion, even in the community custody revocation setting, the “unskilled or uneducated individual may no doubt have difficulty in presenting his version of disputed facts where it requires the examination or cross examination of witnesses or presentation of documentary evidence.” McNeal at 637. In short, the right to counsel hinges upon the two factors presented in Scarpelli: the complexity of the issue to be presented, and the capability of the prisoner.

As the above cases show, Washington case law recognizes that due process is flexible and the question of right to counsel must be addressed on a case-by case basis, following the reasoning of Scarpelli. ESSB 6151 has established a yet another type of hearing under RCW 9.95.420, to which the rules addressed in Morrissey, Scarpelli and Greenholtz must be extended.

- 3. In this case, due to the inability of McCarthy to understand the nature and facts of the .420 hearing and to speak on his on behalf, the Board should have exercised its discretion and appointed counsel after McCarthy made the request for representation.**

Under RCW 9.94A.712, McCarthy was offered a plea bargain for a 12 month and 1 day sentence. PRP Ex. 8. The sentence constituted a stipulated exceptional sentence under the SRA. McCarthy was told that he must participate in outside sex offender treatment. He was also informed that community custody would run up to 60 months. Id.

McCarthy has mental health and capability issues, but this sentence clearly appeared to be a presumed 12 months and 1 day, the stipulated sentence. Prior to his first .420 hearing, pursuant to the RCW 9.95.420 and DOC policy 320.110 (Appendix A), McCarthy briefly looked at all the psychological, psychiatric and other material which DOC had put together and which he was supposed to participate in. PRP Ex. 4. The end of sentence review packet was sent to the Board and contained detailed and technical data. McCarthy, in the Board's own words, was childlike, had focus problems and clearly was not able to comprehend the information contained in the packet. A person of his mental capacity and capabilities could not possibly understand the material, especially where he was not represented and had not had a chance to review the material.

At the hearing, McCarthy appeared childlike and to have a short-term memory problem. PRP Ex. 9 His counselor appeared as a fact witness. PRP Ex. 4 The Board had an array of psychological and other

reports to use to overcome the presumption of release. The statutory scheme, meanwhile, contained conspicuous references to treatment in prison and treatment in the community.

Where McCarthy plea bargained for a 366-day sentence and had little time to review the end of sentence review committee packet, had no one on his side to represent or assist him, the hearing was not conducted in a fair manner. Treatment counselors were not there to support Mr. McCarthy. This was a hearing at which the statute had created a presumption of release on a minimum term that Mr. McCarthy had plea bargained for.

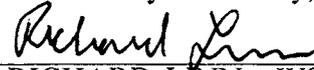
Clearly, Mr. McCarthy is the kind of individual the Scarpelli court was concerned about. The issue surrounding the hearing is complex, and Mr. McCarthy lacks the mental capacity to exercise his rights under due process. He lacks the ability to dissect the lengthy materials the Board uses to determine his suitability for release. These materials include the court records, the Sex Offender Treatment Program report, the Department of Correction record, and any other documents contained in the end of sentence review packet and other materials at the disposal of the Board.. Mr. McCarthy was unable to represent himself during the hearing. At times, Mr. McCarthy has difficulty follow the course of the conversation. Given that fundamental fairness is the cornerstone of due process, Mr.

McCarthy certainly needed assistance to prepare for and present himself at the hearing. The Board should have exercised its discretion to determine whether Mr. McCarthy requires counsel. The Court of Appeals did not err when it recognized that due process requires the Board to exercise discretion in Mr. McCarthy's case.

IV. CONCLUSION

Based on the above, Respondent respectfully requests the court to affirm the decision of the Court of Appeals

Dated this 24th day of January, 2007



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**FILED AS ATTACHMENT
TO E-MAIL**

Appendix A

STATE OF WASHINGTON DEPARTMENT OF CORRECTIONS  POLICY DIRECTIVE <input checked="" type="checkbox"/> Offender Manual <input type="checkbox"/> Spanish	PRISON/PRE-RELEASE/ WORK RELEASE/FIELD	NUMBER DOC 320.110
	SIGNATURE  DATE	EFFECTIVE DATE 9/19/05
	HAROLD W. CLARKE, SECRETARY TITLE	PAGE NUMBER 1 of 4
COMMUNITY CUSTODY BOARD (CCB)/.420 HEARINGS		

SUPERSESSION:

DOC 320.110 effective 5/27/04

REFERENCES:

DOC 100.100 is hereby incorporated into this policy directive; RCW 9.94A.030; RCW 9.94A.712; RCW 9.95; WAC 381-10; DOC 350.200 Transition and Release of Offenders to the Community; DOC 350.500 End of Sentence Review/Post Confinement Review; DOC 380.240 Field Contacts; DOC 390.300 Victim/Witness Notification

POLICY:

- I. Per RCW 9.94A.712 and/or RCW 9.94A.030, the Indeterminate Sentencing Review Board (ISRB) has jurisdiction over certain sex offenders who commit crimes on or after September 1, 2001, from the date of release from custody to the maximum expiration date. These offenders will be referred to as Community Custody Board (CCB) offenders.
- II. The Department will assess CCB offenders for the ISRB and provide appropriate reports and information for .420 Hearings.

DIRECTIVE:

- I. General Requirements
 - A. Reception Center records staff will identify newly-received offenders who are CCB cases upon their arrival at Washington Corrections Center (WCC)/ Washington Corrections Center for Women (WCCW).
 1. CCB offenders with a court imposed minimum sentence of less than one year will be immediately referred to the Community Protection Unit (CPU) for an End of Sentence Review (ESR) per DOC 350.500 End of Sentence Review/Post Confinement Review.
 2. CCB offenders with a court imposed minimum sentence of over one year will be referred for an ESR 12 months prior to the earliest release date.
 - B. All sex offenders will be screened for the Sex Offender Treatment Program (SOTP). If deemed amenable, CCB offenders will be given priority for entry into that program.

NUMBER	TITLE	EFFECTIVE DATE	PAGE NUMBER
DOC 320.110	COMMUNITY CUSTODY BOARD (CCB)/.420 HEARINGS	9/19/05	2 of 4

- C. As part of the ESR, the CCB offender will participate in an examination to assess sexual dangerousness, to include a prediction of the probability that s/he will engage in sex offenses if released.
1. The Counselor will notify the CCB offender of the requirement to participate in the evaluation and polygraph, and the consequences of failing to do so, using Notice to Community Custody Board Offenders (attached).
 2. Counselors will contact Intelligence and Investigation staff to schedule a sexual history polygraph through an approved Department vendor.
 3. Upon receipt of the sexual history polygraph, the CPU Notification Specialists will complete the Actuarial Risk Assessments.
 4. CPU staff will request a forensic psychological evaluation only if Actuarial Risk Assessments demonstrate a greater than 50 percent chance of sexual re-offense on any Risk Assessment for the time frames included for that Risk Assessment.

II. End of Sentence Review

- A. The CPU Notification Specialists will complete an ISRB report for the purpose of the End of Sentence Review Committee (ESRC). This report will summarize the offender's:
1. Criminal History,
 2. Infractions,
 3. Treatment(s),
 4. Community adjustment,
 5. Psychological reports,
 6. Sexual history,
 7. Polygraph,
 8. Actuarial Risk Assessments,
 9. Forensic psychological (if requested), and
 10. Release planning.
- B. The ESRC will review the ISRB report and ESR/CPU referral packet. They will determine the level of notification and if the CCB offender is more/less likely to sexually re-offend if released.
- C. Once the ESRC has determined their decisions and recommendations, CPU staff will update the ISRB report and forward it to the ISRB along with the ESRC packet.

III. Offender Review

NUMBER	TITLE	EFFECTIVE DATE	PAGE NUMBER
DOC 320.110	COMMUNITY CUSTODY BOARD (CCB)/.420 HEARINGS	9/19/05	3 of 4

- A. CPU staff will prepare and forward the ISRB report and a redacted copy of the ESR/CPU referral packet to the facility for the offender's review in preparation for the .420 Hearing.
- B. Within 48 hours of receipt at the facility, the ISRB report and related documents will be available to the CCB offender. When a literacy, language, or competency problem exists, staff will assist the offender in understanding the material.
- C. The CCB offender will sign DOC 19-078 ESRC Report Receipt Acknowledgment prior to review of the ISRB report and related documents.
- D. The CCB offender may take handwritten notes during this review; however, no document copies will be made.
- E. The CCB offender has an option to prepare a written statement using Your Statement (attached) and/or give a verbal statement at the .420 Hearing for ISRB consideration.

IV. .420 Hearing Decision

- A. The ISRB will conduct a .420 Hearing.
- B. If the ISRB determines the CCB offender will not be released, a new minimum term will be set, not to exceed 2 years, and a new .420 Hearing will be scheduled 90 days prior to the new Earned Release Date (ERD).
 - 1. CPU staff will update the DI50 screen.
 - 2. The Counselor will forward a new ESR referral 6 months prior to the new ERD. The ESR referral will only include information since the last ESR was submitted.
- C. If the ISRB determines the CCB offender will be released, the Counselor will work with the offender to immediately develop a Community Release Referral (CRR) and Offender Accountability Plan with Transition Plan (OAP w/TP) to be forwarded to the field for investigation.
- D. The CCO will complete the OAP w/TP and the CRR.
 - 1. In the risk analysis narrative of the OAP w/TP, the CCO will recommend for or against the plan, including conditions of release.
 - a. The CCO will recommend the following condition of release: "Must consent to allow home visits by the Department to monitor compliance with supervision. Home visits include access for purposes of visual inspection of all areas of the residence in which the offender lives or has exclusive or joint control or access." Home visits will be conducted per DOC 380.240 Field Contacts.

NUMBER	TITLE	EFFECTIVE DATE	PAGE NUMBER
DOC 320.110	COMMUNITY CUSTODY BOARD (CCB).420 HEARINGS	9/19/05	4 of 4

- b. If the ISRB establishes the condition, it will be included in the OAP as a verification strategy under a targeted risk.
2. If the CCO approves the plan s/he will print and forward a copy of the approved OAP to the ISRB, along with DOC 09-115 Board – Transition Plan Investigation.
3. If the CCO denies the plan s/he will print and forward a copy of the denied OAP w/TP to the ISRB. The CCO and Counselor will immediately identify release plan alternatives per DOC 350.200 Transition and Release of Offenders to the Community.

DEFINITIONS:

Words/terms appearing in this policy directive may be defined in the glossary section of the Policy Directive Manual.

ATTACHMENTS:

Notice to Community Custody Board Offenders
Your Statement

DOC FORMS (See Appendix):

DOC 09-115 Board – Transition Plan Investigation
DOC 19-078 ESRC Report Receipt Acknowledgment

CERTIFICATE OF SERVICE

On this day, the undersigned sent to the Attorneys of Record for the Indeterminate Sentence Review Board and the State of Washington a copy of this document via Mail, 1st class prepaid. I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Richard Linn 1/24/07 Seattle, WA
Signed Date Place