

Supreme Court No. 79747-1
(COA No. 56171-5-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IN RE: THE DETENTION OF:

ANDRE B. YOUNG

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

The Honorable Richard Jones

SUPPLEMENTAL BRIEF OF PETITIONER ANDRE B. YOUNG

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A. ISSUES PRESENTED FOR REVIEW

1. Sexually violent predator (SVP) proceedings are governed by civil court rules unless a statute or constitutional limitation requires otherwise. Pursuant to RCW 71.09.090(1) & (2), a person committed as an SVP is entitled to a new trial upon a showing that he no longer meets the criteria for commitment. RCW 71.09.090(3) permits the State to seek a mental examination in preparation for the new trial but is silent on the sanctions that may be imposed if a detainee refuses to submit to a new mental examination. Where the court rule governing discovery sanctions, CR 37, expressly prohibits the court from treating a party's refusal to submit to a mental examination as contempt of court, and there is no SVP statute inconsistent with this court rule, may the court disregard CR 37 and hold the party in contempt of court?

2. When a court has authority to hold a person in contempt of court, it may not do so without weighing the surrounding circumstances or by imposing an unreasonable or unfair sanction. Here, the court indefinitely stayed Mr. Young's SVP trial, thus leaving him indefinitely confined under a prior SVP commitment, even though many less drastic sanctions were available that would punish the discovery violation but not deprive Mr. Young of his right

to due process of law by denying him the opportunity to contest his custodial detention. Is the court's sanction unreasonable and does it deprive Mr. Young of his right to fundamental fairness and due process of law?

B. STATEMENT OF THE CASE

After being civilly committed under the sexually violent predator civil commitment laws since 1991, Andre Young presented a *prima facie* case that he no longer meets the criteria for indefinite confinement and the Court of Appeals ordered he receive a new trial pursuant to RCW 71.09.090. In re the Detention of Young, 120 Wn.App. 753, 755, 763, 86 P.3d 810, rev. denied, 152 Wn.2d 1007 (2004); CP 5-16.

Before trial, the court granted the State's request that Mr. Young submit to an unlimited and wide-ranging mental examination under RCW 71.09.090(3) as well as a videotaped deposition. CP 118-19.¹ Mr. Young declined to participate in the mental evaluation or deposition and in response, the court found him in contempt. 4/1/05RP 11-12; CP 159-62.

As a sanction for declining the mental examination and deposition, the court stayed Mr. Young's trial until he complied with

¹ Mr. Young filed a motion for discretionary review of the trial court's order imposing the mental examination and videotaped deposition. The Court of Appeals denied review and this Court declined to reverse that decision. COA

the court's order, thereby stopping him from seeking release from his indefinite civil commitment. CP 160; 4/1/05RP 15-16. The court ruled that Mr. Young's pretrial proceedings would resume only when he complied with the court-ordered mental evaluation. CP 160-61.

The facts are further set out in the Commissioner's Ruling at pages 1 to 4, and in the Appellant's Opening Brief at pages 2 to 3, and within the relevant argument sections. The facts as outlined in each of these pleadings are incorporated herein by this reference.

C. ARGUMENT

HOLDING MR. YOUNG IN CONTEMPT FOR DECLINING TO PARTICIPATE IN A PRETRIAL MENTAL EXAMINATION WAS UNAUTHORIZED AND UNJUSTIFIED

1. Court rules and statutes dictate a court's authority to over procedural matters. Procedural law is "the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them." Sibbach v. Wilson, 312 U.S. 1, 14, 61 S.Ct. 422, 85 L.Ed.2d 479 (1941). In Washington, the Supreme Court promulgates procedural rules governing all civil cases. CR 1.²

55988-5-I; S.Ct. No. 78087-1.

² CR 1 provides:

These rules govern the procedure in the superior court in all suits of a civil nature whether cognizable as cases at law or in equity with the exceptions

SVP proceedings are civil proceedings that must follow civil court rules unless a statute expressly provides for different procedures. CR 81;³ In re the Detention of Williams, 147 Wn.2d 476, 488, 55 P.3d 597 (2002); see In re Detention of Petersen, 145 Wn.2d 789, 801, 42 P.3d 952 (2002) (CR 26 governs discovery in SVP proceeding since statute not inconsistent with civil rule); see also In re Detention of Ward, 125 Wn.App. 374, 379, 104 P.3d 751 (2005) (civil rules govern post-trial motions for relief since no statute provides otherwise); In re Detention of Mathers, 100 Wn.App. 336, 998 P.2d 336 (2000) (summary judgment civil rules apply to SVP proceedings despite heightened burden of proof since statute not expressly inconsistent).

2. CR 37 governs the appropriate sanctions in the case at bar. CR 37 is the court rule governing sanctions that may be imposed for discovery violations. CR 37 provides a long list of sanctions the court may impose for various discovery violations. (full text attached as Appendix A). CR 37(2) states that when a party fails to comply with an order, the court may issue sanctions, but may not treat the failure to submit to a mental examination as

stated in rule 81. They shall be construed and administered to secure the just, speedy, and inexpensive determination of every action.

³ CR 81 (a) provides, in relevant part, that "except where inconsistent with rules or statutes applicable to special proceedings, these rules shall govern all

contempt. The rule says that when imposing sanctions for failure to comply with discovery orders, the court may enter:

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to physical or mental examination.

(Emphasis added.) CR 37(2)(D).

In Sibbach, a plaintiff in a suit for damages due to bodily injuries refused a trial court's order that she submit to a physical examination under Fed. R. Civ. P. 35.⁴ 312 U.S. at 6. The trial court treated the plaintiff's refusal to submit to the court-ordered physical examination as contempt of court. Id. at 7.

The Supreme Court ruled that the rules of civil procedure required the plaintiff to comply with the court order of a physical examination. Id. at 14-15. However, the court in Sibbach reversed the contempt order. The court held, "Rule 37 exempts from punishment as for contempt the refusal to obey an order that a party submit to a physical or mental examination. The District Court was in error in going counter to this express exemption." Id. at 16. The sanctions that could be imposed were limited to those remedies designated in the court rule. Id.

civil proceedings."

⁴ Similarly to CR 35, Fed. R. Civ. P. 35 provides that a court may order a physical or mental examination of a party if it involves an issue that is in controversy and there is good cause for such an examination.

Similarly to the federal rule of civil procedure discussed in Sibbach, CR 37 is the court rule governing sanctions that may be imposed for discovery violations. CR 37(2)(D) precludes contempt as a sanction for a party's failure to obey an order to submit to a mental examination. The trial court erred by going counter to this express exemption. Sibbach, 312 U.S. at 16.

3. The SVP statutes are not inconsistent with CR 37. A court rule will govern trial court procedures in SVP cases unless it is inconsistent with a statute. Williams, 147 Wn.2d at 488; CR 81. As mentioned above, court rules govern a host of procedural matters in SVP cases. See Petersen, 145 Wn.2d at 801 (CR 26 governs discovery in SVP proceeding); Ward, 125 Wn.App. at 379 (CR 60 governs post-trial motions for relief); Mathers, 100 Wn.App. at 340 (court rules for summary judgment apply to SVP proceedings notwithstanding heightened standard of proof).

Here, there is no conflict between CR 37 and a statute. RCW 71.09.090(3)(a) permits the State to seek a mental examination of a person committed as an SVP by its own chosen expert when preparing for a recommitment trial, thereby bypassing the "good cause" requirement of CR 35. Williams, 147 Wn.2d at 489-90.⁵ But the statute is silent as to what sanctions the court

⁵ RCW 71.09.090 is attached as Appendix B. The statute was amended,

may impose if the civil committee refuses to obey an order to submit to a mental examination.

The legislature could have used more specific language establishing the parameters of the mental examination. For example, RCW 71.09.040 and RCW 71.09.050 set forth the procedures for an initial commitment trial. Williams, 147 Wn.2d at 49; see RCW 71.09.040 (3).⁶ RCW 71.09.040 directs the Department of Social and Health Services to promulgate rules under which the pretrial mental examination will be conducted. Id.; see WAC 388-880-030, *et seq.* (establishing rules for expert evaluation qualifications, criteria, and procedure).⁷

Unlike RCW 71.09.040, RCW 71.09.090(3) makes no mention of the procedural guidelines for the mental examination. It does not say that the examination should be bound by any particular rules or operate under any special constraints.

The Legislature was aware that civil court rules, including

effective May 9, 2005, but these amendments do not substantively alter the pertinent portion of the statute. Laws 2005, ch. 344.

⁶ RCW 71.09.040(4) provides in pertinent part:

If the probable cause determination is made, the judge shall direct that the person be transferred to an appropriate facility for an evaluation as to whether the person is a sexually violent predator. The evaluation shall be conducted by a person deemed to be professionally qualified to conduct such an examination pursuant to rules developed by the department of social and health services. In adopting such rules, the department of social and health services shall consult with the department of health and the department of corrections.

⁷ The Washington Administrative Code (WAC) rules are available at: <http://apps.leg.wa.gov/WAC/default.aspx?cite=388-880> (last accessed Dec. 3,

CR 37, would apply to the SVP proceeding unless the SVP statute was expressly inconsistent, as many prior cases have established this point of law. See Williams, 147 Wn.2d at 488; see also State v. Bobic, 140 Wn.2d 250, 264, 996 P.2d 610 (2000) (Legislature presumed to be aware of judicial interpretations of statutes). By failing to specify that any special rules govern the mental examination, the court rule therefore governs any issues that arise in the process of completing the mental examination. The Legislature did not craft any special remedies in the statute and accordingly left the court rules to address such issues.

In the case at bar, the Commissioner from the Court of Appeals found that civil rules simply do not apply to SVP proceedings. Commissioner's Ruling, at 5. But this ruling conspicuously omitted the additional and necessary requirement that civil rules are only superceded by statute when there is a specific conflict with a statute involving a special proceeding. Williams, 147 Wn.2d at 488. The civil discovery rule must be "inconsistent with provisions for special proceedings under chapter 71.09 RCW" in order for the rule not to apply. Id. at 489; see also In re the Detention of Audett, 158 Wn.2d 712, 147 P.3d 982 (2006). Courts try to avoid finding inconsistencies where possible.

State v. Blilie, 132 Wn.2d 484, 491, 939 P.2d 691 (1997); see Audett, 158 Wn.2d at 720 (explaining efforts to harmonize interaction between statute and court rule). The Commissioner did not identify any inconsistency between CR 37 and RCW 71.09.090(3).

While CR 37 prohibits the contempt sanction used by the court in the case at bar, it leaves a wide range of other sanctions available to the court. For example, the court may restrict evidence or deliver instructions to the jury, and these sanctions would adequately address the State's inability to obtain a recent mental examination when the State had over 15 years of daily monitoring of Mr. Young's behavior. CR 37(2).

CR 37 recognizes the special intrusiveness of court-compelled mental or physical examinations and thus treats a litigant's desire to refrain from participating in such an invasive procedure differently than a litigant's refusal to obey an order to provide documents or other types of discovery. See Sibbach, 312 U.S. at 19 (Frankfurter, J., dissenting) (compelled examinations are "an invasion of the person," which thus "stand on a very different footing from [other discovery issues]."); see also Schlagenhauf v. Holder, 379 U.S. 104, 122, 85 S.Ct. 234, 13 L.Ed.2d 152 (1964)

(noting recognition in court rules of particular invasiveness of physical and mental examinations). While a party will suffer consequences for refusing to comply with a legitimately ordered physical or mental examination, the sanction should not be contempt.

Because CR 37 specifically addresses the type of conduct involved in the case at bar, and there is no SVP statute that requires the court to impose discovery sanctions in a manner different from CR 37, the court erred by treating Mr. Young's refusal to submit to a mental examination as contempt of court.

4. The court did not properly exercise "inherent authority" in holding Mr. Young in contempt. The State may assert that the trial court has inherent authority to hold any party in contempt of court for a discovery violation, notwithstanding the express terms of CR 37. The Sibbach Court rejected any such proper exercise of court authority. 312 U.S. at 16.

Moreover, courts have long recognized that inherent powers must be exercised "with great caution." Ex parte Burr, 22 U.S. 529, 9 Wheat. 529, 531, 6 L.Ed. 152 (1824); see Roadway Express v. Piper, 447 U.S. 752, 764, 100 S.Ct. 752, 65 L.Ed.2d 488 (1980) (resort to inherent authority "must be exercised with restraint and

discretion” because it necessarily circumvents the usual restraints on the democratic process); see also Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts*, 84 Colum. L. Rev. 1433, 1469 (1984) (Supreme Court has suggested that “courts have implied authority only if that authority is indispensable to the exercise of judicial power, not merely helpful or beneficial.”).

In any event, the exercise of inherent authority is reserved for situations where the trial court finds that the conduct at issue is not adequately covered by the sanctioning provisions of a court rule or statute. Chambers v. NASCO, Inc., 501 U.S. 32, 50, 111 S.Ct. 2123, 115 L.Ed. 27 (1991). Even if the inherent power of the court permitted sanctions, “[t]he inherent power of the court should not be resorted to where rules adequately address the problem.” Wash. State Physicians Ins. Exch. & Ass’n v. Fisons Corp., 122 Wn.2d 299, 340, 858 P.2d 1045 (1993); see also Main, *Judicial Discretion to Condition*, 79 Temp. L.Rev. 1075, 1113 (2006) (promulgation of court rule limiting court’s actions “may preempt the exercise of inherent authority.”).

A civil contempt order may become punitive when it is clear that it will not result in compliance. See In re Grand Jury

Investigation, 600 F.2d 420, 424-25 (3rd Cir. 1979) (“when it becomes manifest that continued imprisonment will not result in compliance, the confinement then becomes punitive in character and the contemnor must be released.”). If contempt sanctions lose their remedial nature due to their ineffectiveness at securing compliance, the contempt may no longer be treated as civil in nature and the accused person must be afforded the procedural protections of a criminal prosecution. Although the contempt order issued in the case at bar is designed to coerce compliance and therefore considered civil, its failure to secure compliance could render the order of contempt against Mr. Young criminal in nature.

Here, the trial court did not find that special circumstances existed requiring it to apply a sanction unauthorized by CR 37. It did not consider CR 37(2)(D)’s express exemption for treating a refusal to submit to a mental examination as contempt of court. Sibbach, 312 U.S. at 16. Because the trial court did not consider whether the court rules should be deferred to as adequately addressing the problem, the court improperly resorted to its inherent authority.

CR 37 balances the court’s interest in regulating trial procedure by weighing the fair, necessary, and appropriate

response to a party's refusal to submit to an invasive physical or mental examination. The court rule adequately addresses the discovery violation. It should not be summarily disregarded as it was in the case at bar.

5. The trial court abused its authority by issuing a severely harsh contempt sanction. Both CR 37 and the court's "inherent authority" to impose a contempt order require the court to first consider all of the surrounding circumstances in imposing civil contempt sanction. Fisons, 122 Wn.2d at 338. Specifically, the United States Supreme Court has ruled that the court must "consider the character and magnitude of the harm threatened by continued contumacy," as well as the probable effectiveness of the sanction in bringing about the desired result. United States v. United Mine Workers, 330 U.S. 258, 304, 67 S.Ct. 677, 91 L.Ed. 884 (1947). The record must reflect that these factors were considered. Lamar Financial Corp. v. Adams, 918 F.2d 564, 567 (5th Cir. 1990).

In the case at bar, the court did not address the importance of a mental examination prior to holding Mr. Young in contempt and staying the proceedings. 4/1/05RP 11-17. The trial court presumed that failure to submit to the court's order was *per se*

contempt of court. 3/21/05RP 42; 4/1/05RP 11-16. The court's sanction keeps Mr. Young civilly committed as a sexually violent predator until he submits to the evaluation and a deposition.⁸ CP 160-61; 4/1/05RP 15-16.

The court did not acknowledge that Mr. Young had been in the State's custody as an SVP civil committee since 1990. The State had 15 years of routine, daily observation of Mr. Young, and is required to maintain detailed records of all detainees' care and treatment both before and while at the Special Commitment Center (SCC).⁹ At the show cause hearing, the State's expert persuaded the trial court that Mr. Young did not even make a prima facie case that conditions had changed. Young, 120 Wn.App. at 758-59. Mr. Young received a new trial only because the trial court was not allowed to weigh the evidence presented in the show cause

⁸ To the extent the civil rules govern the refusal to submit to a deposition, contempt is a permissible finding for a refusal, as long as the deposition request is not conducted in bad faith or in an effort to embarrass, annoy, or oppress the deponent. CR 37(a) (permitting contempt finding); CR 30(d) (permitting termination or limitation on deposition). Mr. Young asserts such a motive in the instant case, based upon the amount of information already available to the State and the highly intrusive nature of the deposition. Moreover, if only the deposition were at issue, it is not clear that Mr. Young would continue to object to this ordered discovery.

⁹ WAC 388-880-042(1) provides that the SCC "shall" maintain the following records for any detainee:

(a) All evaluations, records, reports, and other documents obtained from other agencies relating to the person prior to the person's detention and/or commitment to the SCC;

(b) All evaluations, clinical examinations, forensic measures, charts, files, reports, and other information made for or prepared by SCC personnel, contracted professionals, or others which relate to the

hearing. Id. At a recommitment trial, the State may also introduce evidence “of the prior commitment trial” so the jury would know that Mr. Young had been found to meet the criteria for commitment by another jury. RCW 71.09.090(3)(b). It is inconceivable that the State does not have vast information upon which it may proceed to re-trial, and it may receive the benefit of favorable instructions and evidentiary rulings as a consequence of Mr. Young’s failure to submit to an evaluation.

In addition, CR 37(2) requires the court to consider a range of sanctions and commands it utilize the least severe sanction that will induce the party to comply with the court order. The inherent authority to order contempt must also be exercised sparingly, when “indispensable to the exercise of judicial power, not merely helpful or beneficial.” 84 Colum. L. Rev. at 1469.

The court adopted an extremely harsh sanction as well as one that is not likely to be successful. Other sanctions available would allow the trial to proceed but would penalize Mr. Young. CP 146-48. For example, the jury could be instructed that Mr. Young’s refusal to submit to an evaluation or deposition, or it could be told that it must not hold the State’s failure to have a recent evaluation of Mr. Young against the State. The court could limit Mr. Young

from calling his own expert at trial, or bar Mr. Young from introducing recent evaluations of his mental state. See Carlson v. Lake Chelan Cnty. Hosp., 116 Wn.App. 718, 737, 75 P.3d 533 (2003) (exclusion of testimony is “extreme sanction” for discovery violation, quoting In re Estate of Foster, 55 Wn.App. 545, 548, 779 P.2d 272 (1989)). The exclusion of testimony is a permissible sanction for a willful violation of a court order. Id.

Under the facts of this case, court’s refusal to adopt alternative sanctions that would allow the trial to proceed is untenable. The indefinite stay of proceedings is grossly unfair and should not be countenanced as a punishment for Mr. Young’s disinclination to submit to extremely invasive psychological testing.

Finally, the State mentioned in its briefing below that the court memorialized its contempt order in written findings of fact and because Mr. Young did not assign error to the court’s written findings regarding the appropriateness of the sanction, he cannot challenge this determination on appeal. State’s Response Brief, p. 13. Yet it is undisputed that Mr. Young discussed this issue in his assignments of error, complained of the court’s sanction in the issues pertaining to the assignments of error, and argued the

pertinent facts and law in the body of the brief.¹⁰ The Court of Appeals Commissioner addressed the merits of Mr. Young's claims without any mention of a failure to assign error to a finding of fact. Because this issue was "clearly disclosed" in the briefing and addressed by the parties and the court below, the failure to assign error does not preclude this Court's review. RAP 10.3(a)(3); see State v. Olsen, 126 Wn.2d 315, 320-21, 893 P.2d 629 (1995) (technical noncompliance with assignment of error rule does not preclude review except "in the context of a complete failure of the appellant to raise the issue in any way at all -- neither in the assignments of error, in the argument portion of the brief, nor in the requested relief.").¹¹ Mr. Young presented argument and legal citation to support his claim that the court imposed an inappropriate sanction, the State responded to this argument, and the Court of Appeals ruled on its merits. Accordingly the issue is properly before this Court.

In sum, the State had substantial information on which it could argue at trial that Mr. Young should continue to be confined.

¹⁰ See Appellant's Opening Brief: p. 1 (Assignment of Error 2), p. 2 (Issues Pertaining to Assignment of Error 3 and 4), p. 10-13 (Argument); see also Appellant's Reply Brief: p. 5-6; Motion for Discretionary Review: p. 2 (Issue Presented for Review 2, p. 8-13 (Argument).

¹¹ See also Daughtry v. Jet Aeration Co., 91 Wn.2d 704, 710, 592 P.2d 631 (1979) (Pursuant to RAP 1.2, "where the nature of the challenge is perfectly clear" and discussed in the appellate brief, court will consider the merits even if there is

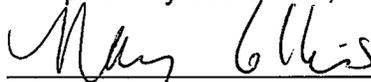
The State never even made any particularized claim that it needed information from Mr. Young to proceed, it merely asserted its right to have him evaluated by its own expert and argued that only contempt would coerce compliance. 4/1/05RP 3, 5. Lesser sanctions are entirely appropriate given the substantial liberty interests at stake and the unlikelihood that a new evaluation would provide the State with any significant ammunition to use in its effort to continue to confine Mr. Young considering the vast amount of information about Mr. Young's mental state that the State already possesses. Accordingly, the court's sanction should be reversed and a less severe sanction ordered.

D. CONCLUSION

Petitioner Andre Young respectfully requests that this Court reverse the trial court's order holding him in contempt for refusing to submit to a mental examination and indefinitely staying the court proceedings.

DATED this 3rd day of December 2007.

Respectfully submitted,



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APPENDIX A

Requests for admission shall not be combined in the same document with any other form of discovery.

Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within 30 days after service of the request, or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by his attorney, but, unless the court shortens the time, a defendant shall not be required to serve answers or objections before the expiration of 40 days after service of the summons and complaint upon him. If objection is made, the reasons therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify his answer or deny only a part of the matter of which an admission is requested, he shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless he states that he has made reasonable inquiry and that the information known or readily obtainable by him is insufficient to enable him to admit or deny. A party who considers that a matter of which an admission has been requested presents a genuine issue for trial or a central fact in dispute may not, on that ground alone, object to the request; he may, subject to the provisions of rule 37(c), deny the matter or set forth reasons why he cannot admit or deny it.

The party who has requested the admissions may move to determine the sufficiency of the answers or objections. Unless the court determines that an objection is justified, it shall order that an answer be served. If the court determines that an answer does not comply with the requirements of this rule, it may order either that the matter is admitted or that an amended answer be served. The court may, in lieu of these orders, determine that final disposition of the request be made at a pretrial conference or at a designated time prior to trial. The provisions of rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(b) **Effect of Admission.** Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. Subject to the provisions of rule 16 governing amendment of a pretrial order, the court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice him in maintaining his action or defense on the merits. Any admission made by a party under this rule is for the purpose of the pending action only and is not an

admission by him for any other purpose nor may it be used against him in any other proceeding.
[Amended effective July 1, 1972; September 1, 1985; September 1, 1989.]

RULE 37. FAILURE TO MAKE DISCOVERY: SANCTIONS

(a) **Motion for Order Compelling Discovery.** A party, upon reasonable notice to other parties and all persons affected thereby, and upon a showing of compliance with rule 26(i), may apply to the court in the county where the deposition was taken, or in the county where the action is pending, for an order compelling discovery as follows:

(1) *Appropriate Court.* An application for an order to a party may be made to the court in which the action is pending, or on matters relating to a deposition, to the court in the county where the deposition is being taken. An application for an order to a deponent who is not a party shall be made to the court in the county where the deposition is being taken.

(2) *Motion.* If a deponent fails to answer a question propounded or submitted under rules 30 or 31, or a corporation or other entity fails to make a designation under rule 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted under rule 33, or if a party, in response to a request for inspection submitted under rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, any party may move for an order compelling an answer or a designation, or an order compelling inspection in accordance with the request. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before he applies for an order.

If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to rule 26(c).

(3) *Evasive or Incomplete Answer.* For purposes of this section an evasive or incomplete answer is to be treated as a failure to answer.

(4) *Award of Expenses of Motion.* If the motion is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is denied, the court shall, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney fees, unless the court finds that the

making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

(b) Failure to Comply With Order.

(1) *Sanctions by Court in County Where Deposition Is Taken.* If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the county in which the deposition is being taken, the failure may be considered a contempt of that court.

(2) *Sanctions by Court in Which Action Is Pending.* If a party or an officer, director, or managing agent of a party or a person designated under rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under section (a) of this rule or rule 35, or if a party fails to obey an order entered under rule 26(f), the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceedings or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to physical or mental examination;

(E) Where a party has failed to comply with an order under rule 35(a) requiring him to produce another for examination such orders as are listed in sections (A), (B), and (C) of this subsection, unless the party failing to comply shows that he is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney fees, caused by the failure, unless the court finds that the failure was

substantially justified or that other circumstances make an award of expenses unjust.

(c) **Expenses on Failure to Admit.** If a party fails to admit the genuineness of any document or the truth of any matter as requested under rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney fees. The court shall make the order unless it finds that (1) the request was held objectionable pursuant to rule 36(a), or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had reasonable ground to believe the fact was not true or the document was not genuine, or (4) there was other good reason for the failure to admit.

(d) **Failure of Party to Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request for Production or Inspection.** If a party or an officer, director, or managing agent of a party or a person designated under rule 30(b)(6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take his or her deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for production of documents or inspection submitted under rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under sections (A), (B), and (C) of subsection (b)(2) of this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising the party or both to pay the reasonable expenses, including attorney fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this subsection may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by rule 26(c). For purposes of this section, an evasive or misleading answer is to be treated as a failure to answer.

(e) **Failure to Participate in the Framing of a Discovery Plan.** If a party or his attorney fails to participate in good faith in the framing of a discovery plan by agreement as is required by rule 26(f), the court may, after opportunity for hearing, require such party or his attorney to pay to any other party the reasonable expenses, including attorney fees, caused by the failure.

[Amended effective July 1, 1972; September 1, 1985; September 1, 1992; September 1, 1993.]

APPENDIX B

Effective until May 9, 2005

Rev. Code Wash. (ARCW) § 71.09.090

ANNOTATED REVISED CODE OF WASHINGTON
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*** ARCHIVE DATA ***

TITLE 71. MENTAL ILLNESS
CHAPTER 71.09. SEXUALLY VIOLENT PREDATORS

Rev. Code Wash. (ARCW) § 71.09.090 (2004)

§ 71.09.090. Petition for conditional release to less restrictive alternative or unconditional discharge -- Procedures

(1) If the secretary determines that either: (a) The 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 is in the best interest of the person and conditions can be imposed that adequately protect the community, the secretary shall authorize the person to petition the court for conditional release to a less restrictive alternative or unconditional discharge. The petition shall be filed with the court and served upon the prosecuting agency responsible for the initial commitment. The court, upon receipt of the petition for conditional release to a less restrictive alternative or unconditional discharge, shall within forty-five days order a hearing.

(2) (a) Nothing contained in this chapter shall prohibit the person from otherwise petitioning the court for conditional release to a less restrictive alternative or unconditional discharge without the secretary's approval. The secretary shall provide the committed person with an annual written notice of the person's right to petition the court for conditional release to a less restrictive alternative or unconditional discharge over the secretary's objection. The notice shall contain a waiver of rights. The secretary shall file the notice and waiver form and the annual report with the court. If the person does not affirmatively waive the right to petition, the court shall set a show cause hearing to determine whether probable cause exists to warrant a hearing on whether: (i) The person's condition has so changed that he or she no longer meets the definition of a sexually violent predator; or (ii) conditional release to a less restrictive alternative would be in the best interest of the person and conditions can be imposed that would adequately protect the community.

(b) The committed person shall have a right to have an attorney represent him or her at the show cause hearing, which may be conducted solely on the basis of affidavits or declarations, but the person is not entitled to be present

at the show cause hearing. At the show cause hearing, the prosecuting attorney or attorney general shall present prima facie evidence establishing that the committed person continues to meet the definition of a sexually violent predator and that a less restrictive alternative is not in the best interest of the person and conditions cannot be imposed that adequately protect the community. In making this showing, the state may rely exclusively upon the annual report prepared pursuant to RCW 71.09.070. The committed person may present responsive affidavits or declarations to which the state may reply.

(c) 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 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 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.

(d) If the court has not previously considered the issue of release to a less restrictive alternative, either through a trial on the merits or through the procedures set forth in RCW 71.09.094(1), the court shall consider whether release to a less restrictive alternative would be in the best interests of the person and conditions can be imposed that would adequately protect the community, without considering whether the person's condition has changed.

(3) (a) At the hearing resulting from subsection (1) or (2) of this section, the committed person shall be entitled to be present and to the benefit of all constitutional protections that were afforded to the person at the initial commitment proceeding. The prosecuting agency or the attorney general if requested by the county shall represent the state and shall have a right to a jury trial and to have the committed person evaluated by experts chosen by the state. The committed person shall also have the right to a jury trial and the right to have experts evaluate him or her on his or her behalf and the court shall appoint an expert if the person is indigent and requests an appointment.

(b) 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.

(c) If the issue at the hearing is whether the person should be conditionally released to a less restrictive alternative, the burden of proof at the hearing shall be upon the state to prove beyond a reasonable doubt that conditional release to any proposed less restrictive alternative either: (i) Is not in the best interest of the committed person; or (ii) does not include conditions that would adequately protect the community. Evidence of the prior commitment

trial and disposition is admissible.

(4) The jurisdiction of the court over a person civilly committed pursuant to this chapter continues until such time as the person is unconditionally discharged.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IN RE THE DETENTION OF ANDRE YOUNG)
STATE OF WASHINGTON,)
)
RESPONDENT,)
)
v.) NO. 79747-1
)
ANDRE B. YOUNG,)
)
PETITIONER.)

DECLARATION OF SERVICE

I, MARIA RILEY, CERTIFY THAT ON THE 3RD DAY OF DECEMBER, 2007, I CAUSED A TRUE AND CORRECT COPY OF THIS **SUPPLEMENTAL BRIEF OF PETITIONER** TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] DAVID HACKETT, DPA		
KING COUNTY PROSECUTOR'S OFFICE	(X)	U.S. MAIL
APPELLATE UNIT	()	HAND DELIVERY
KING COUNTY COURTHOUSE	()	_____
516 THIRD AVENUE, W-554		
SEATTLE, WA 98104		
[X] ANDRE YOUNG	(X)	U.S. MAIL
DSHS SPECIAL COMMITMENT CENTER	()	HAND DELIVERY
PO BOX 88600	()	_____
STEILACOOM, WA 98388		

SIGNED IN SEATTLE, WASHINGTON THIS 3RD DAY OF DECEMBER, 2007.

X _____ *gmi*

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STATE OF WASHINGTON
2007 DEC -3 PM 4:58