

**FILED**  
FEB 12 2008  
CLERK OF SUPREME COURT  
STATE OF WASHINGTON

81201-2

Supreme Court No. \_\_\_\_\_  
(COA No. 58087-6-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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IN RE: THE DETENTION OF PAUL MOORE

STATE OF WASHINGTON,

Respondent,

v.

PAUL MOORE,

Petitioner.

FILED  
COURT OF APPEALS  
STATE OF WASHINGTON  
2008 JAN 29 PM 4:48

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

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PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Paul Moore, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition pursuant to RAP 13.3(a)(1) and RAP 13.4(b).

B. COURT OF APPEALS DECISION

Mr. Moore seeks review of the Court of Appeals' decision dated November 13, 2007, a copy of which is attached hereto as Appendix A. The Court of Appeals denied the State's motion to publish on January 2, 2008. See App. B (copy of ruling).

C. ISSUES PRESENTED FOR REVIEW

1. When a person facing indefinite civil commitment has a documented history of being incompetent to stand trial, and has been found only marginally competent by a court-appointed expert, does the court deny the individual his right to due process of law by accepting his attorney's stipulation to wide-ranging evidence essential to its case without conducting any inquiry of the accused person to see if he understands and knowingly waives his right to contest the State's case against him?

2. Does a trial attorney's representation constitute ineffective assistance of counsel when the attorney stipulates to the

evidence against the person facing indefinite civil commitment as a sexually violent predator, including otherwise inadmissible evidence, and does not meaningfully advocate on the client's behalf?

3. Does due process require the State to prove that an individual will reoffend within the foreseeable future in order to establish an individual's current dangerousness, and does this issue present a claim of substantial public importance?

#### D. STATEMENT OF THE CASE

Paul Moore has suffered from mental health problems throughout his life. Over the course of the last 20 years, Mr. Moore has been accused of various criminal offenses and his competency to stand trial questioned. See CP 35.

When the State filed an SVP petition in 2002, the court held a competency hearing based on representations about and observations of Mr. Moore's unstable behavior. 9/20/02RP 2; CP 218-53. Dr. Lee Gustafson evaluated Mr. Moore at the court's request and concluded he was marginally competent. 6/21/02RP 4, 7; 9/20/02RP 9-10. Dr. Gustafson warned that Mr. Moore's competence ebbed and flowed over time. 9/20/02RP 9-10; 15. The court found Mr. Moore competent to stand trial but noted it may not "always be the case" that he remains competent. Id. at 15.

Mr. Moore proceeded to his SVP trial without a jury. Defense counsel stipulated to the prosecution's fact witnesses and psychological evidence. CP 34-42. The State called a single witness, Dr. Richard Packard. Mr. Moore did not call any witnesses but offered a written evaluation by a psychologist who concluded Mr. Moore was both mentally ill and likely to commit sexually violent offenses in the future. Ex. 14. The defense expert argued Mr. Moore was better suited for civil commitment under chapter RCW 71.05, the mental health commitment proceedings, than an SVP commitment. Id.

The trial court found Mr. Moore met the criteria for SVP commitment and ordered him committed indefinitely. CP 32-33.

The facts are further set forth in the Court of Appeals opinion, pages 2-6, Appellant's Opening Brief, pages 4-5, and throughout the pertinent argument sections. The facts as discussed in each of these pleadings are incorporated by reference herein.

#### E. ARGUMENT

1. WHERE THE COURT CONDUCTED NO INQUIRY INTO THE STIPULATION OF ALL EVIDENCE ESSENTIAL TO CIVILLY COMMIT A MARGINALLY COMPETENT, THE PROCEDURES VIOLATED MR. MOORE'S RIGHT TO DUE PROCESS OF LAW

a. Due process requires the court to ensure a defendant understands he is waiving essential trial rights when the defendant is uncontestedly mentally ill. The right to due process of law condemns the deprivation of individual liberty without adequate procedural protections. “Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action.” Foucha v. Louisiana, 504 U.S. 71, 80, 112 S. Ct. 1780, 1785, 118 L. Ed. 2d 434 (1992); U.S. Const. amend. 14. Physical confinement in a mental institution entails a “massive curtailment of liberty.” Vitek v. Jones, 445 U.S. 480, 491-92, 100 S. Ct. 1254, 1262-63, 63 L. Ed. 2d 552 (1980). An individual’s liberty interest is fundamental in nature and due process protections apply. See United States v. Salerno, 481 U.S. 739, 750, 107 S. Ct. 2095, 2103, 95 L. Ed. 2d 697 (1987); In re Detention of Thorell, 149 Wn.2d 724, 72 P.3d 708 (2003); U.S. Const. amend. 14; Wash. Const, Art, I, section 3.

The constitutional right to procedural due process therefore requires, at a minimum, the right to counsel, to cross-examine witnesses, and to present witnesses at a civil commitment trial. Specht v. Patterson, 386 U.S. 605, 609-10, 87 S.Ct. 1209, 18 L.Ed.2d 326 (1967); see In re Detention of Stout, 159 Wn.2d 357, 371, 150 P.3d 86 (2007) (“ample opportunity to cross-examine”

witness at pretrial deposition satisfies due process in SVP proceeding). Additionally, Mr. Moore has a due process right to the same procedural protections afforded to involuntary mental committees. Baxstrom v. Herold, 383 U.S. 107, 110-11, 86 S.Ct. 760, 15 L.Ed.2d 620(1966); RCW 71.05.200(1)(d); RCW 71.05.250(2); RCW 71.05.310 (right to cross-examine witnesses at commitment hearings).

The Sixth Amendment to the federal constitution and Article I, section 22 of the Washington Constitution guarantee criminal defendants the rights to counsel, trial by jury, and confrontation of adverse witnesses. State v. Smith, 148 Wn.2d 122, 131, 59 P.3d 74 (2002). Although an indefinite commitment under sexually violent predator proceedings is considered civil in nature, it inherently implicates an individual's fundamental interest in liberty and thus requires many of the procedural protections afforded criminal defendants. See In re Detention of Young, 122 Wn.2d 1, 48, 857 P.2d 396 (1993) (due process protections of criminal cases apply where SVP statute indicates similar standards); see also In re Detention of Halgren, 156 Wn.2d 795, 809, 132 P.2d 714 (2006) (holding that same "constitutionally prescribed unanimity requirement" as required in criminal cases applies to SVP proceedings); RCW 71.09.050 (granting accused in SVP

proceeding rights to attorney, expert witnesses, and 12-person jury); RCW 71.09.060 (requiring State to prove SVP allegations beyond a reasonable doubt and “unanimous jury”).

While the Sixth Amendment right to confrontation does not govern an SVP civil commitment trial, the underlying principles of that constitutional provision shape the due process rights that must be afforded to a person facing indefinite and life-long custodial confinement. Stout, 159 Wn.2d at 369; see Crawford v. Washington, 541 U.S. 36, 42, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004) (right to confront witnesses is “bedrock procedural guarantee” of a fair trial).

Due process is a flexible concept, and what is fair depends on the particular context. Morrissey v. Brewer, 408 U.S. 471, 481, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972); Stout, 159 Wn.2d at 369; Young, 122 Wn.2d at 46. Determining the appropriate level of procedural protection requires balancing the interests of the individual and the government. The court must consider the following factors: (1) the private interests affected, (2) the risk of erroneous deprivation of that interest through the procedures used, (3) the probable value, if any, of substitute procedural safeguards, and (4) the government’s objectives and interest, including the burdens entailed by additional or different procedural requirements.

Mathews v. Eldridge, 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976); Young, 122 Wn.2d at 43-44.

b. The right to due process of law requires flexible safeguards to ensure an indefinitely detained person is accorded all available constitutional and statutory protections. The Court of Appeals reasoned that in a criminal case, a criminal defendant's stipulation to evidence is not tantamount to a guilty plea and requires no particular inquiry by the trial court, and thus, due process does not require any special safeguards for a person facing civil commitment. Opinion, at 6-7. However, the Court of Appeals implicitly recognizes that when the stipulation is akin to a guilty plea, a knowing waiver of trial rights is required, and, as this Court recognized in Stout, due process determinations depend upon the circumstances of the case. 159 Wn.2d at 369-70.

In Stout, a SVP detainee objected on appeal to the State's reliance on a witness's deposition in lieu of her live testimony at trial where the SVP detainee would have face-to-face confrontation. Weighing the due process rights at issue, the Court held that due process is satisfied in an SVP case where the SVP detainee's attorney has already "achieved" cross-examination of the witness and Stout and his attorney had the opportunity to review the recorded testimony and discuss inconsistencies, thus,

the procedural protections in place were adequate to ensure a fair proceeding. Id. at 370-71.

Here, as in Stout, Mr. Moore has a significant liberty interest at stake in an SVP commitment trial. Id. at 369. Accordingly, the first Mathews factor “weighs heavily” in Mr. Moore’s favor. Id.

Unlike Stout, neither Mr. Moore’s attorney nor the prosecutor confronted or questioned the majority of the State’s evidence. Instead offering “Stipulated Facts and Exhibits.” CP 35-42; CP 258-62 (Exhibit list). Mr. Moore did not sign this stipulation or otherwise indicate he understood the stipulation. The court did not explain to Mr. Moore that he was waiving his right to cross-examine the numerous witnesses by stipulating to their description of his behavior on prior occasions. The court also did not conduct any inquiry as to Mr. Moore’s knowing, intelligent, and voluntary waiver of his right to cross-examine the witnesses or to testify on his own behalf.

While a stipulated facts trial is permissible, the opposing party cannot challenge the witness’s veracity, document inconsistencies, or judge the witness’s demeanor. Stout, 159 Wn.2d at 370 (noting that confrontation is valuable procedure, as it exposes inconsistencies, explores witness’s veracity, and grants fact-finder opportunity to observe demeanor).

The court must insure an SVP detainee receives due process of law based on the particular facts of the case. Accepting the wide-ranging stipulation absent any assurance that Mr. Moore understood this stipulation results in a substantial risk that Mr. Moore unknowingly waived this bedrock procedural protection.

Because of Mr. Moore's long-term history of marginal competency to stand trial that ebbed and flowed on a weekly basis, his ability to enter into a wide-ranging stipulation to evidence should have been scrutinized by the trial court. Mr. Moore had been previously found incompetent to stand trial and had his competency questioned and evaluated on numerous occasions, including during the case at bar. CP 35-38; CP 214-16. Dr. Lee Gustafson explained to the court that Mr. Moore's competency "varies substantially week-to-week," and his condition today does not mean it will remain the case. 9/20/02RP 9-10. In a written evaluation filed with the court, Dr. Gustafson explained that Mr. Moore was "marginally competent," and had been incompetent on other occasions. CP 293 (Psychological Evaluation, p. 5); 9/20/02RP 5.

At trial, Dr. Packard testified that Mr. Moore suffered from grossly disorganized thought, occasionally catatonic behavior, disturbed interpersonal relations, and regressed behavior.

3/7/06RP 89-90, 93. His psychotic behavior fluctuated. 3/7/06RP 90. Dr. Packard illustrated Mr. Moore's inability to understand basic concepts. For example, when Dr. Packard had asked Mr. Moore to name things he was afraid of, and Mr. Moore said, "cold weather . . . pain . . . hideous looking robots, yeah, I guess that's all." Ex. 6, p. 52 (ellipses in original). There is no indication these answers involved any attempt at humor.

When asked about possible sexual activity within his family, Mr. Moore described having sex with his mother, yet when pressed for details, he revealed that when he shook his mother's hand and she made an "ahh" sound, he thought the experience was sexual to her. Id. at 37-38.

When a person is not competent to stand trial for criminal charges, the Legislature requires heightened procedural protections before those criminal allegations may be used as the basis of an SVP commitment. RCW 71.09.060(2) directs a trial court to conduct rigorous testing of accusations underlying an SVP petition when the detainee has been found incompetent to stand trial for the underlying criminal charges.<sup>1</sup>

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<sup>1</sup> RCW 71.09.060(2) provides that when the State files an SVP petition for a person who has been found incompetent to stand trial and is about to be released from confinement,

the court shall first hear evidence and determine whether the person did commit the act or acts charged if the court did not enter a finding prior to

In light of the well-documented history of Mr. Moore's difficulty understanding legal proceedings or assisting his attorney, and his difficulty understanding concepts that require any degree of complex thought, the court should have taken measures to insure Mr. Moore understood the nature of the rights he was waiving. Instead, Mr. Moore essentially stipulated to the case against him. Dr. Packard's two written evaluations were admitted as stipulated evidence. Exs. 11, 12. Stipulated Exhibit 6 included a cover sheet, also admitted as substantive evidence, documenting the prosecutor's belief that Mr. Moore met all criteria for commitment. Ex.6. Additionally, the stipulated facts included detailed descriptions of allegations from witnesses in other criminal cases, even where Mr. Moore had not been convicted. CP 34-38.

Mr. Moore had been found incompetent to stand trial in a

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dismissal under RCW 10.77.090(4) that the person committed the act or acts charged. The hearing on this issue must comply with all the procedures specified in this section. In addition, the rules of evidence applicable in criminal cases shall apply, and all constitutional rights available to defendants at criminal trials, other than the right not to be tried while incompetent, shall apply. After hearing evidence on this issue, the court shall make specific findings on whether the person did commit the act or acts charged, the extent to which the person's incompetence or developmental disability affected the outcome of the hearing, including its effect on the person's ability to consult with and assist counsel and to testify on his or her own behalf, the extent to which the evidence could be reconstructed without the assistance of the person, and the strength of the prosecution's case. If, after the conclusion of the hearing on this issue, the court finds, beyond a reasonable doubt, that the person did commit the act or acts charged, it shall enter a final order, appealable by the person, on that issue, and may proceed to consider whether the person should be committed pursuant to this section.

prior case but the substance of the allegations against him in that case were admitted without any additional inquiries by the court as would be required under RCW 71.09.060(2) if those criminal charges were the source of the SVP petition.

The State's interest in speedy and low-cost commitment trials cannot trump the very important right to cross-examine witnesses or to contest the veracity of evidence given Mr. Moore's limited reasoning and analytic skills.

Finally, the value of further procedural safeguards is plain. By taking steps to guarantee Mr. Moore understood that he was giving up the right to confront and cross-examine witnesses, and was agreeing to the admission of otherwise inadmissible psychological evaluations, the court could simply and readily document Mr. Moore's comprehension of the fundamental procedures that he was afforded when he faced a life-long deprivation of liberty.

In light of Mr. Moore's documented history of suffering from severe mental illness that varied in how debilitating it was, the court's failure to inquire into whether Mr. Moore understood the nature of the stipulation represents a significant diminishment in the procedural process required to protect Mr. Moore's significant

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liberty interest at stake in the trial. Because Mr. Moore contested the validity of his prior convictions and the underlying accusations and since he had limited ability to understand the proceedings, the court should not have merely stood by while counsel stipulated to the case. Further procedural protections were necessary and not unduly burdensome to provide Mr. Moore with the fundamental fairness required in the case at bar. The court's failure to conduct any colloquy before accepting and relying upon the stipulated facts and exhibits denied Mr. Moore his right to due process of law.

2. BY FAILING TO CHALLENGE THE STATE'S EVIDENCE, MR. MOORE WAS DEPRIVED OF EFFECTIVE ASSISTANCE OF COUNSEL

a. Mr. Moore had a right to effective assistance of counsel. A person facing commitment under the sexually violent predator laws maintains the same right to effective assistance of counsel as held by a defendant in a criminal case. Stout, 159 Wn.2d at 377; RCW 71.09.050(1).

The appellate court reviewing a claim of ineffective assistance of counsel must ask (1) was the attorney's performance below objective standards of reasonable representation, and if so, (2) did counsel's deficient performance prejudice the respondent. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Stout, 159 Wn.2d at 377. An attorney renders

constitutionally inadequate representation when he or she engages in conduct for which there is no legitimate strategic or tactical reason. State v. McFarland, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1998). A decision is not tactical or strategic if it is not reasonable. Roe v. Flores-Ortega, 528 U.S. 470, 481, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000); see also Wiggins v. Smith, 539 U.S. 510, 123 S.Ct. 2527, 2535, 156 L.Ed.2d 471 (2003) (“[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms,” quoting Strickland, 466 U.S. at 688).

b. Mr. Moore’s constitutional right to counsel was violated because his attorney did not act as an advocate as required by due process. The adversarial process requires both sides be represented by attorneys who perform as advocates. Cronic, 446 U.S. at 656; Strickland, 466 U.S. at 685; see Plumlee v. Del Papa, 465 F.3d 910, 919 (9<sup>th</sup> Cir. 2006) (right to counsel includes right to “effective advocate”). When counsel does not perform his or her function, it is the equivalent of the complete denial of counsel and the respondent need not show prejudice to prevail. Cronic, 466 U.S. at 659; Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed.2d 158 (1932).

In re: Dependency of G.A.R, 137 Wn.App. 1, 150 P.3d 643

(2007), is an example of the deprivation of counsel due to the failure to act as an effective advocate. The attorney in this parental termination case appeared in court on his client's behalf and argued that the mother's rights should not be terminated, but did little else. Id. at 7. The attorney did not object to any of the State's exhibits, including written reports from experts. The State called a single witness, a social worker with experience as a mental health therapist, who repeated what he learned from others about the parents' parental deficiencies. Id. at 2-3. Defense counsel asked no questions of the State's witness and made little argument on the client's behalf. Id. at 5-6.

The G.A.R. Court was highly critical of the attorney's failure to test the evidence relied on by the State. Id. at 7. It rejected the State's claim that challenging the State's evidence may only have elicited more damaging information, as it is the attorney's job to test "the authenticity and truth of the matters asserted in the reports and the witness's testimony." Id.

[The] attorney's job was to test the authenticity of the reports and the accounts (much of it hearsay) related by the State's witness. Without having these reports or accounts put to the test, "[w]e can only speculate as to what weaknesses in the State's case or strengths in [the mother's] case might have been revealed by competent counsel."

Id. citing In re Dependency of J.M., 130 Wn.App. 912, 125

P.3d 245 (2005). The court reversed the termination order based on counsel's failure to challenge the evidence presented by the State.

A similar lack of advocacy occurred in the case at bar. Counsel stipulated to testimony by critical witnesses who established Mr. Moore's prior acts of sexual violence. CP 34-42. Counsel waived Mr. Moore's right to cross-examine these witnesses, and thus test their veracity or challenge their version of events. Counsel stipulated to the admission of two written psychological evaluations by Dr. Packard, as well as a letter from the prosecutor documenting the State's opinion that all of the statutory criteria for commitment has been met. Exs. 6, 11, 12. Counsel did not call any witnesses on Mr. Moore's behalf, but offered a written evaluation by a defense expert who agreed Mr. Moore was mentally ill and likely to reoffend, but argued he should be civilly committed under RCW 71.05 rather than RCW 71.09, as such mental health commitments would better serve his treatment needs. Ex. 14.

While such a far-ranging stipulation might not necessarily amount to deficient performance in all cases, Mr. Moore was in the unusual position of having been severely mentally ill at the time the prior events occurred. In one case, the charges were dismissed

after he was found incompetent to stand trial. Competency questions arose during almost all of the prior proceedings. CP 35-38. Rather than challenge the conclusion that Mr. Moore committed a sexually violent act on that prior occasion, counsel stipulated to the admission of testimony from the trial for that offense, including testimony from the complaining witness as well as other witnesses. CP 37; see e.g., RCW 71.09.060(2) (setting heightened procedural protections for person found incompetent to stand trial). Counsel did not make an opening statement, despite claiming she would, and made a closing argument that was seven pages long in the transcript, as opposed to the 30 pages the State's attorney argued. 3/7/06RP 53; 3/9/06RP 2-38.

Counsel entered into this stipulation without insuring that Mr. Moore understood its consequences. While counsel had filed detailed motions in limine trying to exclude evidence such as the offenses for which Mr. Moore was not convicted, when the court ruled the underlying acts and charges admissible, counsel ceased mounting any challenge to these allegations. 3/7/06RP 9-49.

Counsel's stipulation included admissions of guilt Mr. Moore allegedly made to others even though Mr. Moore was either incompetent or of questionable competence at the time of these earlier incidents. CP 35-38. Moreover, there was no particular

benefit to Mr. Moore in stipulating to disputed facts or agreeing to the testimony of the witnesses against him. He could not be rewarded by a more lenient sentence in exchange for sparing the various complaining witnesses from testifying. The fact that witnesses did not testify would not make it harder for the prosecution to prove any elements of commitment since the stipulation included numerous admissions of sexually violent conduct. Reducing the potential emotional impact of the victims' testimony would not redound to his benefit, as the court's only options were to order commitment or reject commitment. By making it easier for the prosecution to prove its case, Mr. Moore received no benefit other than shortening the trial. An attorney's role is not to make it easier for the prosecution to prove its case. By failing to advocate on Mr. Moore's behalf in a meaningful fashion, Mr. Moore was denied the assistance of counsel.

c. Counsel's deficient performance requires reversal.

Mr. Moore was prejudiced by his counsel's deficient performance. He was unable to mount any defense to the State's allegations once his attorney agreed to the prosecution's evidence and submitted an expert's evaluation that offered such little assistance to Mr. Moore that counsel did not even ask the psychologist to testify. Counsel's failure to act as an effective advocate rendered

the proceedings fundamentally unfair and deprived Mr. Moore of his right to counsel.

3. THIS COURT SHOULD ADDRESS  
WHETHER PREDICTIONS OF FUTURE  
DANGEROUSNESS MUST BE TIED TO THE  
NEAR FUTURE

Mr. Moore argued in the Court of Appeals that in a case where the SVP statute does not require proof of a recent overt act, principles of due process require proof of current dangerousness as evidenced by predicting dangerousness in the foreseeable future. See Appellant's Opening Brief, p. 28-37. Substantive due process requires the state to prove that an individual is both mentally ill *and* currently dangerous in order to be committed. Young, 122 Wn.2d at 27 (citing Addington v. Texas, 441 U.S. 418, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979)); Foucha, 504 U.S. 71; O'Connor v. Donaldson, 422 U.S. 563, 575, 95 S.Ct. 2486, 45 L.Ed.2d 396 (1975); U.S. Const. amend. 14. In Young, this Court did not specifically address this issue, because it focused its ruling on the recent overt act requirement and the statute was changed after Young. 122 Wn.2d at 41, 59.

In the case at bar, the Court of Appeals summarily rejected Mr. Moore's substantive due process argument by citing its decision in In re Detention of Wright, 138 Wn.App. 582, 155 P.3d

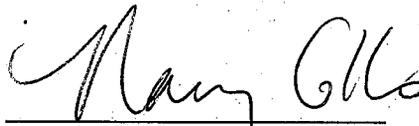
945 (2007). Yet Wright misrepresents the degree to which Young resolved this issue. As discussed in detail in Appellant's Opening Brief, Young did not speak to the constitutionality of the lack of proof of current dangerousness in a context like the case at bar, where Mr. Moore has been continually confined. There must be some level of immediacy to the likelihood of reoffending, in order to satisfy due process when indefinitely confining an individual. This Court should accept review to clarify an issue that is of substantial public interest and essential to the constitutionality of the commitment.

F. CONCLUSION

For the reasons stated above, this Court should accept review under RAP 13.4(b)(2), (3) and (4).

Dated this 29<sup>th</sup> day of January 2008.

Respectfully submitted,



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## **APPENDIX A**

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE**

IN THE MATTER OF THE DETENTION )  
OF: )

No. 58087-6-1

PAUL MOORE, )

Appellant. )

UNPUBLISHED OPINION

FILED: November 13, 2007

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PER CURIAM — In this appeal from a decision committing Paul Moore as a sexually violent predator, Moore contends he was denied due process when the court accepted a factual stipulation without ensuring that he voluntarily, knowingly, and intelligently waived his rights to confrontation and cross-examination. But even in a criminal case, a factual stipulation does not trigger such due process protections unless it is tantamount to a guilty plea. Assuming without deciding that this standard applies in a civil commitment proceeding, we conclude there was no due process violation in this case because counsel's stipulation was not tantamount to a concession that Moore meets the criteria for commitment under RCW 71.09. Given our conclusion, and because Moore fails to demonstrate that his trial counsel was ineffective for entering into the stipulation, we affirm his commitment.

FACTS

In May 2002, the State filed a petition seeking Moore's commitment as a sexually violent predator (SVP). At a pretrial competency hearing, Dr. Lee Gustafson testified that he had evaluated Moore's competency approximately four times in the preceding 10 years. Although he had sometimes found him incompetent, Moore had not been taking his anti-psychotic medication on those occasions. Dr. Gustafson had observed Moore immediately prior to the hearing and testified that he was cooperative and talking with this attorney. Moore "clearly understood what his attorney was saying, and he responded appropriately and cooperatively in his conversations with her." Dr. Gustafson concluded that Moore was "capable of understanding the basic issues in a civil commitment proceeding" and was "marginally competent."

On September 20, 2002, the court found Moore competent to stand trial. But because Dr. Gustafson testified that Moore's competency could vary substantially from week to week, the court appointed a standby guardian ad litem in case Moore's status changed.

In May 2003, following an interview with Moore, Dr. Richard Packard reported that Moore appeared "to be better compensated in his mental health than he has [been] for a number of years. . . . He related much better, had much improved hygiene, was much more cooperative, and was cognitively more focused and capable."

In March 2006, the SVP petition was tried to the bench. Defense counsel filed motions in limine on a variety of evidentiary matters. Among other things, she sought to exclude witness testimony from Moore's 2005 acquittal for indecent liberties with forcible compulsion. The prosecutor argued that the testimony was admissible and that she intended to call them in the commitment proceeding. She added that the parties had discussed the possibility of stipulating to admission of the testimony via transcripts from the 2005 proceedings. The court ruled that the testimony from the 2005 trial was admissible as substantive evidence.

The State called Dr. Richard Packard as the first witness. He testified that Moore suffers from a mental abnormality made up of several disorders, including paraphilia involving nonconsenting sex with adult females. Dr. Packard stated that Moore's paraphilia is the driving force behind his sex offenses. His mental abnormality also causes him serious difficulty in controlling his behavior and makes him likely to commit predatory acts of sexual violence if he is not confined.

Part way through Dr. Packard's testimony, the parties agreed to stipulate to certain facts and exhibits, including the facts surrounding Moore's prior sexual offenses. The parties stipulated that a 1985 first degree rape and a 1990 attempted second degree rape were sexually violent offenses under RCW 71.09.020. They also stipulated that several other offenses were not sexually violent offenses. The parties agreed that the court could consider documents

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establishing the prior convictions, a transcript of Moore's interview with Dr. Packard, transcripts of the testimony in the 2005 indecent liberties trial, a report and addendum prepared by Dr. Packard, and a report prepared by defense expert Dr. Theodore Donaldson. Moore was present but did not sign the stipulation and the court did not advise him of the rights he was waiving. After entering into the stipulation, the State called no other witnesses at trial.

The defense called no witnesses at trial. But Dr. Donaldson in his report, disagreed with Dr. Packard's central diagnostic conclusion, i.e., that Moore has paraphilia and desires nonconsensual sex with adult females. Dr. Donaldson concluded that Moore does not have a preference for nonconsensual sex, and "does not currently suffer from sexual psychopathology or any other condition that causes him to be a sexually violent predatory offender." While Dr. Donaldson believed that Moore is "the classic individual for ordinary civil commitment," he concluded that Moore "does not meet the requirements for commitment under RCW 71.09."

In closing, defense counsel argued that the State had failed to prove a mental disorder or abnormality specified in its petition, i.e., "paraphilia, not otherwise specified, (non-consent)," beyond a reasonable doubt. Relying on Dr. Donaldson's report, counsel argued that this abnormality required proof that Moore preferred nonconsensual sex. She pointed out that Dr. Packard ignored evidence that Moore's prior acts were motivated by something other than a

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preference for nonconsensual sex. Moore had indicated that he committed the 1985 rape because he had no shelter and wanted to go to prison, and because he could not afford a prostitute. Moore also stated that he thought the victim of the 1990 attempted rape wanted to have sex with him. Moore told Dr. Packard that if he were released, he would not rape again but would instead visit prostitutes or masturbate. This evidence, counsel asserted, did not show that Moore desired nonconsensual sex; rather it showed "that he just wants sex in some manner. And possibly he is so disturbed or so mentally ill that he does not know how to go about this." Counsel argued that while the evidence might support a civil commitment, it did not satisfy the requirements for an SVP commitment.

Counsel also argued that there was insufficient evidence that Moore's acts were predatory. Defining "predatory" as offending against strangers, the attorney asserted that Moore's sexual assaults did not involve strangers:

We would argue that for Paul Moore who has been in custody since he was 18, for over 20 years, that these relationships which might seem casual or professional to someone else are the only relationships Paul Moore has. He doesn't have anyone else who's visiting him in prison or any relationships with other inmates. Everyone has said he's a loner [sic] he spends most of his time alone. So the staff at the prison or the Special Commitment Center or the chaplain or the therapist who drops in once a week, those are the significant personal relationships for Paul Moore. And we would argue that they're not strangers, they weren't relationships that were created for the primary purpose of offending against . . . . And, therefore, he would not meet the requirement that these be predatory."

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The trial court found the statutory criteria had been satisfied and ordered Moore's commitment. He appeals.

### DECISION

Moore first contends his commitment trial violated due process because the court failed to ensure that he understood the rights he was waiving when his counsel stipulated to certain facts. He argues that given the nature of the proceedings, the rights at stake, and his marginal competency, due process required the court to ensure that he understood the effect of the stipulation on his rights to confrontation and cross-examination. We disagree.

Even in criminal cases, due process does not require courts to ensure that a defendant understands the rights waived by a factual stipulation so long as the stipulation is not tantamount to a guilty plea. Adams v. Peterson, 968 F.2d 835, 843 (9th Cir. 1992) (en banc), cert. denied, 113 S. Ct. 1818, 123 L. Ed. 2d 448 (1993); State v. Johnson, 104 Wn.2d 338, 705 P.2d 773 (1985); State v. Jacobson, 33 Wn. App. 529, 656 P.2d 1103 (1982); State v. Harper, 33 Wn. App. 507, 510, 655 P.2d 1199 (1982); cf. State v. Woods, 143 Wn.2d 561, 608-09, 23 P.3d 1046 (2001). A stipulation is typically only an admission "that if the State's witnesses were called, they would testify in accordance with the summary presented by the prosecutor." State v. Wiley, 26 Wn. App. 422, 425, 613 P.2d 549 (1980). The court still determines the defendant's guilt or innocence, the State must prove guilt beyond a reasonable doubt, and the defendant may offer

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evidence or cross-examine witnesses. State v. Johnson, 104 Wn.2d 338, 342, 705 P.2d 773 (1985).

Assuming without deciding that the standard for criminal cases applies in a civil commitment under RCW 71.09,<sup>1</sup> there was no due process violation in this case because counsel's stipulation in no way conceded that the State had met its burden of proof. On the contrary, a review of the record shows that counsel vigorously contested the sexually violent predator petition.

Prior to trial, counsel filed a motion in limine regarding fifteen evidentiary issues. Only after the court denied Moore's attempt to exclude certain evidence, including the testimony from the 2005 proceedings, did his counsel agree to enter into the stipulation. When the court accepted the stipulation, counsel requested and received a continuing objection based on the pretrial motions. Moore's attorney then successfully objected to portions of the State's expert's testimony, cross-examined the expert at some length, and contested the sufficiency of the State's proof in closing argument. In short, the stipulation in this case was not tantamount to an admission that Moore was a sexually violent

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<sup>1</sup> Although Moore attempts to equate his commitment proceeding with a criminal prosecution, our State Supreme Court has made it clear that SVP commitment proceedings are civil, not criminal in nature, and that the due process protections required in criminal prosecutions are not necessarily required in a commitment trial. In re Stout, 159 Wn.2d 357, 369-74, 150 P.3d 86 (2007).

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predator. It was not, therefore, the kind of stipulation that triggers full due process protections.<sup>2</sup>

Moore argues, however, that his mental health issues created a substantial risk of an erroneous deprivation of his rights, and therefore due process required the court to ensure that he “understood the nature of the rights he was waiving.” We fail to see how Moore’s mental state is relevant to whether the stipulation was the type of trial decision requiring a voluntary, knowing, and intelligent waiver of rights. But even assuming it is, the record does not support Moore’s claims regarding his mental state at trial. Moore makes much of the fact that he “had been previously found incompetent to stand trial and has his competency questioned and evaluated on numerous occasions.” But a history of incompetence or marginal competence does not require additional inquiry by the court; rather, only evidence that the defendant is incompetent at the time of the waiver potentially warrants further inquiry. State v. Modica, 136 Wn. App. 434, 445, 149 P.3d 446 (2006) (quoting United States v. Erskine, 355 F.3d 1161, 1169-71 (9th Cir. 2004)). As noted above, the court found Moore competent to

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<sup>2</sup> Due process *does* require that a stipulation be voluntarily and knowingly agreed to. United States v. Larson, 302 F.3d 1016, 1020-1021 (9th Cir. 2002). Moore’s due process argument, however, appears to be limited to the analytically distinct claim, addressed above, that the court and counsel were required *to ensure he understood the rights he was waiving*. In any event, to the extent Moore also claims the stipulation violated due process because counsel failed to ensure that he understood and agreed to the stipulation, this claim involves matters outside the record (Moore’s communications with counsel) that can only be raised in a personal restraint petition. State v. McFarland, 127 Wn.2d 322, 337-38, 899 P.2d 1251 (1995).

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stand trial. Nothing in the record indicates he was no longer competent when the court accepted the stipulation.

Moore also contends his trial counsel was ineffective for entering into the stipulation. To establish ineffective assistance of counsel, Moore must show both deficient performance and resulting prejudice. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); In re T.A.H.L., 123 Wn. App. 172, 97 P.3d 767 (2004). Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705-06, 940 P.2d 1239 (1997). Prejudice occurs if, but for the deficient performance, there is a reasonable probability that the outcome of the proceedings would have been different. State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). There is a strong presumption of effective assistance, and the defendant bears the burden of demonstrating the absence in the record of a strategic basis for the challenged conduct. State v. McFarland, 129 Wn.2d at 335-36. A stipulation as to facts may represent a tactical decision by counsel. State v. Mierz, 127 Wn.2d 460, 476, 901 P.2d 286 (1995).

Moore contends "there was no particular benefit to . . . stipulating to disputed facts or agreeing to the testimony of the witnesses against him" and that defense counsel simply made the prosecution's job easier without gaining any strategic advantage. But as the State points out, the stipulation had the

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advantage of avoiding the emotional impact of live testimony from the witnesses in the 2005 indecent liberties proceedings. In addition, defense counsel used portions of Dr. Packard's stipulated reports to support her theory that Moore's prior acts were not motivated by a desire for nonconsensual sex. And because the stipulation required Dr. Packard to testify but not Dr. Donaldson, it allowed the defense to cross-examine Dr. Packard about his report while shielding Dr. Donaldson from all questioning.<sup>3</sup> Thus, contrary to Moore's assertions, the stipulation did produce benefits for the defense.

Moore makes several specific criticisms of the stipulation, but in each case he fails to establish either deficient performance or prejudice. He contends defense counsel was deficient for giving up his right to cross-examine the witnesses in the 2005 proceedings, but he disregards the court's decision to admit that testimony and fails to demonstrate what could have been gained from cross-examining them. He also ignores the fact that those witnesses had already been cross-examined during the 2005 trial and that the stipulated transcripts included that cross-examination. Furthermore, as previously noted, stipulating to admission of the transcripts avoided the emotional impact of live testimony.

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<sup>3</sup> Moore criticizes trial counsel for presenting Dr. Donaldson's report without also calling him to testify at trial. This criticism assumes that Dr. Donaldson was available and would have made a good live witness. Not only is there nothing in the record to support those assumptions, but it ignores the general rule that decisions to call witnesses are presumed to be a matter of trial strategy. In re Davis, 152 Wn.2d 647, 742, 101 P.3d 1 (2004).

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Moore argues that trial counsel should have contested, rather than stipulated to, the validity of his prior convictions and admissions based on his questionable competence at the time of the offenses and admissions as well as his explanations for his conduct. But an SVP defendant cannot attack the validity of a conviction that is constitutionally valid on its face. In re Young, 122 Wn.2d 1, 54-55, 857 P.2d 989 (1993). And counsel did not stipulate that Moore was guilty of any prior charges that had not resulted in a conviction. Counsel did, however, make good use of Moore's explanations, arguing that they showed benign motives for his acts and undermined Dr. Packard's conclusion that his acts were motivated by a desire to have sex with nonconsenting females.

Moore also claims that his trial counsel was deficient for stipulating to the admission of otherwise inadmissible reports prepared by Dr. Packard. But Moore nowhere addresses the fact that the Dr. Donaldson's report was also admitted stipulation. And, unlike Dr. Packard, Dr. Donaldson did not have to testify and was therefore shielded from cross-examination. Viewed in context, the stipulation to Dr. Packard's report was not deficient performance.

We also reject Moore's broader claims of deficient performance based on counsel's alleged failure to act as an effective advocate. Faced with the virtually overwhelming evidence against Moore, defense counsel made the best of a difficult case. Moore's attorney developed a coherent strategy and vigorously

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asserted it through pretrial motions, stipulations, cross-examination, and argument. Moore received effective advocacy.

Finally, Moore contends due process requires the State to prove that an incarcerated SVP candidate is likely to reoffend within the reasonably foreseeable future. This argument is controlled by our decision in In re Detention of Wright, 138 Wn. App. 582, 155 P.3d 945 (2007).

For the Court:

Schindler, ACF

Grosse, J

Columan, J

## **APPENDIX B**







**DECLARATION OF MAILING OR DELIVERY**

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, a true copy of the document filed under **Court of Appeals No. 58087-6-I** (for transmittal to the Supreme Court) to which this declaration is affixed/attached, was mailed or caused to be delivered to each attorney or party or record for  respondent **Sarah Sappington – Office of the Attorney General**,  appellant and/or  other party, at the regular office or residence or drop-off box at the prosecutor's office.

  
MARIA ARRANZA RILEY, Legal Assistant  
Washington Appellate Project

Date: January 29, 2008

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