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SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON

In re the Detention of: David W. McCuiston,

Petitioner,

v.

State of Washington,

Respondent.

**BRIEF OF AMICUS CURIAE KELLY CUNNINGHAM,
SUPERINTENDENT OF THE SPECIAL COMMITMENT
CENTER, IN SUPPORT OF MOTION TO RECONSIDER**

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TABLE OF CONTENTS

I. INTEREST OF AMICUS CURIAE1

II. ISSUES PRESENTED.....2

III. ARGUMENT.....3

 A. Overview Of The SCC’s Mission.....4

 B. The SCC’s Annual Review Evaluators Conduct The Reviews Using The Initial Commitment Criteria In Determining Whether The Person Continues To Be A Sexually Violent Predator Under RCW 71.09.020(17)7

 C. The Court’s Opinion Will Likely Have The Unintended Consequence Of Reducing The Incentive For SVPs To Participate In Sex Offender Treatment, Thereby Undermining The Government’s Compelling Interests In Treating Sex Predators And Protecting The Public From Those Persons8

IV. CONCLUSION.....10

CERTIFICATE OF SERVICE
APPENDIX

TABLE OF AUTHORITIES

Statutes

Laws of 2005, ch. 344, § 1	9
RCW 18.19	5
RCW 18.155	5
RCW 71.05	4
RCW ch. 71.09.....	1, 5
RCW 71.09.010	4
RCW 71.09.020(17).....	1, 2, 7, 8, 10
RCW 71.09.070	1, 6
RCW 71.09.090	2, 3

Other Authorities

American Psychological Association, <i>Ethical Principles of Psychologists and Code of Conduct, Standard 2.04</i> (2010)	7
<i>Practice Standards and Guidelines for Members of the Association for the Treatment of Sexual Abusers</i> (2004), 12-18.....	7

Rules

WAC 246-930-320(2).....	7
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I. INTEREST OF AMICUS CURIAE

Kelly Cunningham is the Superintendent of the Special Commitment Center (SCC), the secure mental health facility at which persons detained pursuant to RCW chapter 71.09 are held. Declaration of Kelly Cunningham attached hereto as Appendix A. He has worked in various capacities at the SCC since March, 1998 and has been the Superintendent since August, 2009. *Id.* at ¶¶ 1-2.

The SCC is responsible for housing and making treatment available to all persons detained or committed under RCW 71.09. *Id.* at ¶¶ 4-5. The goal of the SCC's treatment program is to reduce the risk these mentally disordered and dangerous persons pose to the community, and to manage the safe and gradual reintegration back into the community for those civilly committed persons whose risk has, in fact, reduced. *Id.* at ¶ 6.

In addition, the SCC is responsible for conducting annual evaluations of persons committed as sexually violent predators (SVPs) to determine if those persons continue to be mentally disordered and dangerous and, hence, continue to meet the criteria for commitment as defined by RCW 71.09.020(17). RCW 71.09.070. These reports are conducted by SCC professional staff under the superintendent's

supervision and are provided to the superior courts throughout Washington that oversee the commitment of the SVPs. *Id.* at ¶ 13.

The Court's decision in this matter directly affects both the annual review evaluations required of the SCC, as well as the SCC's provision of treatment services. Given the superintendent's intimate knowledge and understanding of the annual review and treatment procedure, the superintendent is submitting this amicus brief to assist the Court in understanding factual issues surrounding its ruling, and to demonstrate the ruling's potential negative impact on the number of committed persons likely to continue to engage in sex offender treatment.

II. ISSUES PRESENTED

The amended annual review procedures of RCW 71.09.090 disapproved of in the Court's decision does not permit or result in the continued detention of civilly committed persons who are no longer mentally ill and dangerous. The statutorily mandated annual review evaluation conducted by SCC staff can be relied upon to consider all relevant evidence on the issue of whether a person committed as an SVP continues to meet commitment criteria under RCW 71.09.020(17). *Id.* at ¶ 13.

The number of SCC residents involved in treatment has increased significantly. *Id.* at ¶ 20. One of the results of increased sex offender

treatment participation has been that the number of residents conditionally released to less restrictive placements has more than doubled. *Id.* at ¶ 19. The superintendent believes that the Court's decision in this case will have an unintended consequence of impairing this progress in treatment participation. *Id.* at ¶ 23. A reduction in treatment participation can be expected to undermine the State's compelling interest in treating SVPs and protecting the public from them. *Id.*

III. ARGUMENT

The amended annual review procedures of RCW 71.09.090 disapproved of in the Court's decision does not permit or result in the continued detention of civilly committed persons who are no longer mentally ill and dangerous. The statutorily mandated annual review evaluation conducted by SCC staff can be relied upon to consider all relevant evidence on the issue of whether a person committed as an SVP continues to meet commitment criteria. Since 2005, the year the annual review procedure was amended, SCC's evaluators who conduct the annual reviews found that 21 persons committed as SVPs no longer met commitment criteria and thus recommended their release. *Id.* at ¶ 18.

In addition, since the 2005 amendments, the number of SCC residents involved in treatment has increased significantly. *Id.* at ¶ 20. One of the results of increased sex offender treatment participation has

been that the number of residents conditionally released to less restrictive placements has more than doubled. *Id.* at ¶ 19. The superintendent believes that the Court's decision in this case will have an unintended consequence of impairing this progress in treatment participation. *Id.* at ¶ 23. A reduction in treatment participation can be expected to undermine the State's compelling interest in treating SVPs and protecting the public from them. The Court's decision severs the link between treatment progress and release into the community and in doing so removes an important incentive for treatment. *Id.*

A. Overview Of The SCC's Mission

As the Legislature recognized in passing the Community Protection Act the mental disorders that prevent persons from controlling sexually violent urges are qualitatively different than those disorders amenable to treatment under RCW 71.05, the Involuntary Treatment Act (ITA). RCW 71.09.010. In practical terms, the mental disorders that impair SVPs' ability to control sexually violent urges are not treatable solely or even primarily with pharmacological interventions. Instead, the standard and generally accepted protocol for treating the disorders that drive sexual offending is long-term psychological treatment using a cognitive-behavioral approach that includes a relapse prevention component. *Id.* at ¶ 7.

When a person arrives at the SCC after a commitment petition is filed, an intake evaluation is conducted and the person is assigned a treatment team consisting of medical, clinical and residential staff. *Id.* at ¶¶ 11-12. The treatment team is responsible for drawing up an individualized treatment plan with the person that, once completed, is reviewed with the person detained. *Id.* at ¶ 12. The SCC resident, therefore, understands the five-phase treatment program at the SCC, which is designed to lead the person through treatment milestones and a gradual and safe reintegration back into the community. *Id.* at ¶ 9. All persons – whether pre- or post-commitment – are offered the opportunity to become involved in treatment at the SCC. *Id.* at ¶ 5.

The SCC currently employs 420 persons. *Id.* at ¶ 8. Of this number, two are psychiatrists, 11 are psychologists, and 12 are Masters level psychologists certified under RCW 18.19. *Id.* at ¶ 8. Importantly, four are certified sex offender treatment providers (SOTPs) licensed by the State of Washington pursuant to RCW 18.155. *Id.* at ¶ 8. Additionally, SCC contracts with independent SOTPs to provide treatment for persons committed as SVPs but who have advanced through treatment to reside in a less restrictive alternatives to placement at the total confinement facility.

The SCC currently houses approximately 281 residents who are either committed or detained pursuant to RCW chapter 71.09. *Id.* at ¶ 14.

Of this number, 66 are pre-commitment and awaiting their initial commitment trial. The remaining 215 residents have been committed as SVPs. In addition to the 215 residents of the inpatient SCC facility, there are currently 22 persons who have been committed but who are on court-ordered less restrictive alternative placements to total confinement.¹ *Id.* Measured either by the number of residents or the number of staff, the SCC is one of the largest inpatient secure mental health facilities for mentally disordered sexually dangerous persons in the United States. *Id.* at ¶ 16.

The SCC is responsible for conducting annual review evaluations of persons committed as SVPs. RCW 71.09.070. In 2010, the SCC will conduct and submit to the trial courts 215 such evaluations. *Id.* at ¶¶ 13-14. Since the enactment of the 2005 amendments at issue in this case, the SCC has recommended in its annual reviews the unconditional release of 21 persons. *Id.* at ¶ 18. In addition, in that time the number of residents released to less restrictive placements has more than doubled. *Id.* at ¶ 19.

¹ Less restrictive alternative (LRA) placements can be either placement in a halfway house type facility run by the Department of Social and Health Services (DSHS) or a placement in a similar facility or a private home.

B. The SCC's Annual Review Evaluators Conduct The Reviews Using The Initial Commitment Criteria In Determining Whether The Person Continues To Be A Sexually Violent Predator Under RCW 71.09.020(17)

The SCC is an entity that is independent of both prosecutors and counsel for respondents in SVP commitment actions. SCC's professional staff has both an ethical and legal obligation to consider all relevant evidence in determining whether a person continues to meet commitment criteria under RCW 71.09.020(17). For example, the Association for the Treatment of Sexual Abusers, the world's largest organization of mental health professionals who evaluate and treat sex offenders, requires evaluators to use a broad array of relevant information in conducting evaluations. *Practice Standards and Guidelines for Members of the Association for the Treatment of Sexual Abusers* (2004) at 12-18; see also American Psychological Association, *Ethical Principles of Psychologists and Code of Conduct, Standard 2.04* (2010). In addition, SCC professional staff who are also certified sex offender treatment providers are legally obligated to consider all relevant information. See e.g., WAC 246-930-320(2).

Past practice demonstrates both the independence of the SCC staff, as well as that SCC staff have considered all relevant factors bearing on the issue of whether a person remains mentally ill and dangerous

according to RCW 71.09.020(17) in recommending that persons no longer meet commitment criteria. Since 2005, the SCC annual evaluators have recommended that 21 civilly committed persons be unconditionally released. *Id.* at ¶ 18.

C. The Court's Opinion Will Likely Have The Unintended Consequence Of Reducing The Incentive For SVPs To Participate In Sex Offender Treatment, Thereby Undermining The Government's Compelling Interests In Treating Sex Predators And Protecting The Public From Those Persons

For the first 15 years of its existence, the SCC experienced very low levels of treatment participation. Up until 2005 resident treatment participation was at 30% or lower. The low rate of treatment participation was attributable to multiple factors. *Id.* at ¶ 21. High on this list was the perception by SCC residents that their release could be gained through litigation rather than actual change in risk. As each of the major cases involving the constitutionality of the SVP programs has been decided and the expectation of release through litigation has dimmed, treatment participation has increased. *Id.* The termination of litigation was also accompanied by a major overhaul of SCC treatment program in 2005. *Id.* at ¶ 22. Over the ensuing five years, residents have been able to see their peers progress through the program and gain release. *Id.*

Finally, and importantly, the amendments to the annual review procedure were enacted in 2005. These amendments were designed to

accomplish two goals. First, they ensure that an unconditional release trial will be ordered only where there is evidence of genuine and meaningful changes in committed person's condition. Laws of 2005, ch. 344, § 1.

In addition, the amendments were intended to underscore and reinforce a fundamental goal of the statute: Treatment. Specifically, the 2005 amendments tie reintegration into the community to treatment progress, a factor that, unlike others cited by some residents' experts, has been scientifically demonstrated to reduce the risk of sexual recidivism. *Id.* at ¶ 7.

The Legislature, however, also recognized that there may be other, non-treatment related factors that may be sufficient to show a resident no longer meets commitment criteria. The amendments can be properly seen as the Legislature's attempt to strike a careful balance between encouraging persons found to be mentally ill and dangerous to engage in treatment while still permitting factors relevant to the issue of continued to commitment to be addressed through the SCC's independent annual review or by the residents through their ability to independently petition the court for unconditional or conditional release.

The 2005 amendments have, in fact, contributed to achieving the Legislature's goal of increasing the number of residents in treatment. A recent report conducted by mental health professionals independent of the

SCC concluded that between 2007 and 2010 the percentage of SCC residents involved in treatment has increased from approximately one-third to over 50%. *Id.* at ¶ 20.

This increase in the number of persons engaged in treatment has led to an increase in the number of persons released – as a result of treatment progress – to less restrictive alternative placements. *Id.* at ¶ 19. In September 2005, there were ten residents in less restrictive placements. In September 2010, that number has more than doubled to 22 residents in such placements with several more such releases anticipated in the coming year. *Id.* The gradual reintegration of civilly committed persons into the community under the supervision of the SCC and in compliance with risk-related release conditions serves both the rehabilitation and public safety interests of the SVP statute.

IV. CONCLUSION

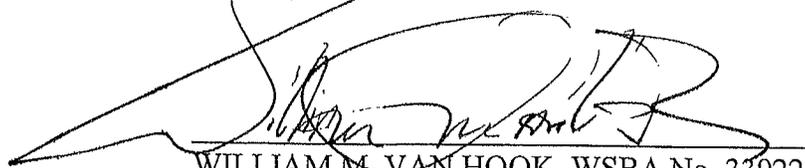
The SCC evaluators' annual reviews adequately reflect all generally accepted evidence and factors bearing on the question of whether a person found to be an SVP continues to meet commitment criteria pursuant to RCW 71.09.020(17).

The Court's decision, by severing any link between treatment progress and a release trial obtained through the annual review process, will likely have the unintended consequence of reducing the incentive for

committed persons to participate in treatment. This will have the effect of undermining the State's compelling interest in encouraging mentally disordered and dangerous sex predators to participate in treatment and the State's interest in protecting the community from sexually violent crimes. The Superintendent of the SCC, therefore, respectfully requests that this Court reconsider its opinion and decision in this matter.

RESPECTFULLY SUBMITTED this 21st day of September, 2010.

ROBERT M. MCKENNA
Attorney General

A large, stylized handwritten signature in black ink, appearing to read 'William M. Van Hook', is written over a horizontal line.

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CERTIFICATE OF SERVICE

Jeffrey S. Nelson, states and declares as follows:

I am a citizen of the United States of America and over the age of 18 years and I am competent to testify to the matters set forth herein. I hereby certify that on the 29th day of September 2010, service of a true and correct copy of this **BRIEF OF AMICUS CURIAE KELLY CUNNINGHAM, SUPERINTENDENT OF THE SPECIAL COMMITMENT CENTER, IN SUPPORT OF MOTION TO RECONSIDER** and this **CERTIFICATE OF SERVICE** was made on each of the following parties to this action, as indicated below:

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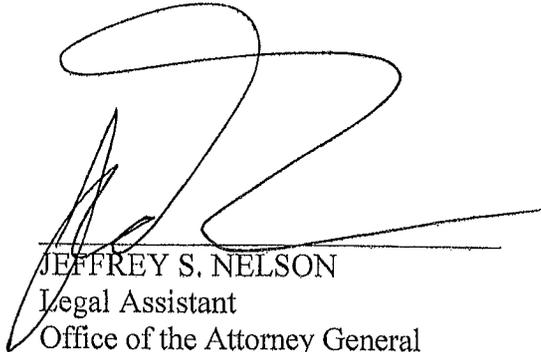
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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

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