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STATE OF WASHINGTON

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NO. 81644-1

THE SUPREME COURT OF THE STATE OF WASHINGTON  
BY RONALD R. CARPENTER

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CLERK

IN RE: DETENTION OF D.M.

STATE OF WASHINGTON,

Respondent,

v.

D.M.,

Petitioner.

**FILED**  
DEC 19 2008  
CLERK OF SUPREME COURT  
STATE OF WASHINGTON  
*CCP*

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

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PETITIONER'S SUPPLEMENTAL BRIEF

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A. ISSUES FOR WHICH REVIEW WAS GRANTED

1. Whether the 2005 amendments to RCW 71.09.090, altering the type of evidence and nature of proof required to have the chance for a re-commitment trial, violate due process of law and separation of powers?

2. Whether the trial court improperly weighed evidence and erroneously denied David McCuistion a new commitment trial?

B. STATEMENT OF THE CASE.

Since 1998, David McCuistion has been confined at the Special Commitment Center (SCC), pursuant to a sexually violent predator (SVP) commitment proceeding. In 2004 and 2005, McCuistion petitioned for a show cause hearing seeking a trial on his continued indefinite commitment based on his current condition.

Department of Social and Health Services (DSHS) psychologists stated McCuistion continued to meet the criteria for commitment because he had a mental disorder; under previous risk assessment tests he presented a likelihood of reoffending; and his criminal history alone would make reoffending likely. CP 18-25 (Carole DeMarco Report); CP 66-71 (Carla van Dam Report).

McCuistion offered a report by psychiatrist Lee Coleman finding he did not have a diagnosable mental disorder and there

was no evidence he lacked control over his behavior due to a congenital or acquired condition. CP 616-24. Dr. Coleman addressed "whether there is current evidence that Mr. McCuiston continues to meet the statutory requirement for SVP status." CP 616. He found no support for a current mental abnormality as defined by statute. CP 616-17. He criticized the State's evaluations for flawed applications of the standard diagnostic manual and relying on unchangeable criminal history. CP 617-23.

McCuiston also offered evidence showing his substantial behavioral control. Four SCC supervisors attested to McCuiston's responsible behavior at SCC. CP 638-49. By way of contrast, McCuiston presented evidence that a number of SVP detainees engage in inappropriate behavior while confined.

The court denied McCuiston any further hearing on his continued confinement, finding he did not prove Dr. Coleman's opinion was the "correct one" and had not sufficiently rebutted the State's evidence. CP 585-86.

C. ARGUMENT.

1. LEGISLATIVE CHANGES TO THE SVP ANNUAL REVIEW PROCEEDINGS VIOLATE DUE PROCESS BY ALLOWING FOR INDEFINITE COMMITMENT EVEN IF A DETAINEE IS NOT CURRENTLY MENTAL DISORDERED OR DANGEROUS

Indefinite, and potentially life-long, civil commitment is constitutional only for as long as the committed individual has a current mental disorder rendering him sufficiently dangerous. This constitutional requirement is enforced by mandating periodic review, allowing the detainee to seek release through established periodic review procedures, and placing the burden of proving the individual remains subject to commitment on the State. The 2005 amendments to SVP review proceedings undermine the Act's due process protections by divorcing the ability to gain a new trial from question of the person's current mental state and dangerousness.

a. The constitutionality of SVP civil commitment hinges on the availability of meaningful annual review of a person's current condition. Civil commitment is a massive curtailment of the fundamental right to liberty protected by the right to due process of law. In re Detention of Thorell, 149 Wn.2d 724, 732, 72 P.3d 708 (2003); U.S. Const. amend. 14; Wash. Const, Art, I, § 3.

Commitment for any reason constitutes a significant deprivation of liberty triggering due process protection. Foucha v. Louisiana, 504 U.S. 71, 80, 112 S. Ct. 1780, 1785, 118 L. Ed. 2d 434 (1992).

Due process requires state laws impinging on the fundamental right to liberty must advance compelling state interests and be “narrowly drawn to serve those interests.” In re Detention of Young, 122 Wn.2d 1, 26, 857 P.2d 396 (1993). It violates due process to continue to confine a person who is mentally ill but not dangerous to himself or others. O'Connor v. Donaldson, 422 U.S. 563, 574-75, 95 S.Ct 2486, 45 L.Ed.2d 396 (1975).

“[E]ven if [a detainee’s] involuntary confinement was initially permissible, it could not constitutionally continue after that basis no longer existed.” O'Connor, 422 U.S. at 575; see also Kansas v. Hendricks, 521 U.S. 346, 364, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997) (upholding sexual offender civil commitment because “Kansas does not intend an individual committed pursuant to the Act to remain confined any longer than he suffers from a mental abnormality rendering him unable to control his dangerousness.”); Jones v. United States, 463 U.S. 354, 368, 103 S.Ct. 3043, 77 L.Ed.2d 3043 (1984) (“periodic review of the patient’s suitability for release” is essential for the constitutionality of civil commitment).

While the fact of an initial commitment order may allow a court to infer basis of the commitment continues, “that inference does not last indefinitely.” State v. Sommerville, 86 Wn.App. 700, 710, 937 P.2d 1317 (1997). Where there is no evidence of a current mental illness, commitment simply may not continue. Id. at 710-11.

Adequate release procedures are a critical component of the constitutionality of the SVP commitment scheme. In Hendricks, the Supreme Court upheld a civil commitment scheme similar to Washington’s because it required the State to prove, every year, “that the detainee satisfies the same standards as required for the initial confinement.” 521 U.S. at 364.

Likewise, in Young, this Court ruled that the SVP statute’s release procedures distinguish Washington’s commitment scheme from the “procedural infirmities” found unconstitutional in Foucha. 122 Wn.2d at 38. Where the Louisiana scheme in Foucha allowed for continued confinement without proof of current dangerousness, “the Washington Statute makes proof of a *current* mental disorder a condition of commitment.” Id. (emphasis in original). Moreover, Washington places the burden of proving continued, current dangerousness on the State, not on the defendant as in Foucha. Id. “[T]he opportunity for periodic review of the committed

individual's current mental condition and continuing dangerousness to the community" cements the constitutionality of the Washington scheme, because it assures the confinement is "closely tailored" to the detainee's continuing dangerousness. Id. at 38-39.

Indeed, a statute labeled "civil" may be unduly punitive and therefore rendered "criminal" in nature if the commitment's duration lasts beyond a time when the detainee has a mental abnormality making him dangerous beyond his control. Hendricks, 521 U.S. at 363. The statutory entitlement to release when the detainee does not meet the criteria for confinement separates permissible, civil commitment from punitive, criminal confinement. Id. at 363-64.

RCW 71.09.070 mandates the State annually review a detainee's current condition, and determine "whether the committed person currently meets the definition of a sexually violent predator."<sup>1</sup> RCW 71.09.090 sets out the procedures for a committed individual to obtain a trial where the State must prove the individual currently meets the conditions of civil commitment.

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<sup>1</sup> "Sexually violent predator" is defined in RCW 71.09.030(20) to mean: any person who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility.

b. The 2005 changes to annual review proceedings cannot be read to impose heightened burdens on the detainee seeking annual review. In 2005, the Legislature amended the standards under which a court may order a new commitment trial upon annual review, pursuant to RCW 71.09.090.<sup>2</sup> The amendments resulted from the Legislature's "displeasure" with two Court of Appeals decisions finding *prima facie* evidence the detainees no longer met the criteria for confinement. In re Detention of Ambers, 160 Wn.2d 543, 549, 158 P.3d 1144 (2007).<sup>3</sup> In Young, an expert opined that the detainee's advancing age decreased his risk of reoffending, and in Ward, an expert stated that new diagnostic procedures altered the detainee's risk of reoffending. Id. The 2005 amendments prohibit a court from finding *prima facie* evidence that a detainee no longer meets the definition of a sexually violent predator for any reason other than permanent physiological incapacity or success stemming from continued treatment. RCW 71.09.090(4)(b).

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<sup>2</sup> The full text of RCW 71.09.090 is attached as Appendix A; a statement of legislative intent is available at Laws 2005, ch. 344 § 1.

<sup>3</sup> Citing In re Det. of Young, 120 Wn.App. 753, 755, 86 P.3d 810, rev. denied, 153 Wn.2d 1035 (2004); and In re Det. Of Ward, 125 Wn.App. 381, 383, 104 P.3d 747 (2005).

In Ambers, the court analyzed the 2005 amendments to RCW 71.09.090 but did not reach the constitutional question. 160 Wn.2d at 559 n.7. This Court rejected the State's contention that the amendments substantively alter the standards for annual review. Based on principles of statutory construction, the court found that the amendment must not be read to impose new obligations or heightened standards of proof on a detainee seeking a re-commitment trial on annual review. Ambers, 160 Wn.2d at 555, 557. The Ambers Court ruled that a person must merely show that he or she no longer "meets the definition of an SVP" in order to obtain further review of the commitment order. 160 Wn.2d at 557.

Because the petitioner in Ambers presented a *prima facie* case that he had changed due to his treatment progress, the Court ordered he receive a re-commitment trial without addressing the constitutionality of the 2005 amendments to RCW 71.09.090. Id.

c. The statute violates due process by limiting the type of evidence the court may consider in reviewing the constitutionality of the commitment. In both the current and former versions of annual review, a detainee is entitled to a re-commitment trial if he offers *prima facie* evidence that he "no longer meets the definition of a sexually violent predator," or if the State

fails to offer *prima facie* evidence that he continues to meet the SVP definition. RCW 71.09.090(1), (2).<sup>4</sup> The court “must” hold a trial at which the State must prove the detainee presently meets the criteria for commitment any time the court finds the required *prima facie* evidence. Ambers, 160 Wn.2d at 554.

In 2005, the Legislature added restrictions on the type of evidence that may be used to secure a re-commitment trial. RCW 71.09.090(4); Laws 2005 ch. 344. Although the first portion of the amendment adds a new definition to the probable cause needed for a re-commitment trial, in construing and harmonizing the statute, Ambers interpreted this section to set a consistent standard as that used in RCW 71.09.090(1), (2). 160 Wn.2d at 554; RCW 71.09.090(4)(a).

But the statute further limits the evidence the court may consider to order a new trial. RCW 71.09.090(4). A substantial change in condition must be based on either extreme physical incapacity or present success in treatment. Id. The statute identifies the predicate conditions as either:

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<sup>4</sup> The same procedures apply to detainee seeking release to a less restrictive alternative upon a showing that conditional release, “would be in the best interest of the person and conditions can be imposed that would adequately protect the community.” RCW 71.09.090(1), (2).

- (i) An identified physiological change to the person, such as paralysis, stroke, or dementia, that renders the committed person unable to commit a sexually violent act and this change is permanent; or
- (ii) A change in the person's mental condition brought through positive response to continuing participation in treatment which indicates that the person meets the standard for conditional release to a less restrictive alternative or that the person would be safe to be at large if unconditionally released from commitment.

RCW 71.09.090(4)(b). Furthermore, a court may not find probable cause based on only "a change in a single demographic factor."

RCW 71.09.090(4)(c). "[A] single demographic factor includes, but is not limited to, a change in chronological age, marital status, or gender of the committed person." Id.

In In re Det. of Fox, a two-judge majority in Division II rejected challenges to these 2005 amendments.<sup>5</sup> 138 Wn.App. at 393-402. The majority found the statutes meets due process requirements because a person may obtain a trial by showing he or she is no longer a danger to society or has completed behavioral

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<sup>5</sup> The Court of Appeals ruling in Fox was abrogated on other grounds, and after further appeal, this Court granted review on the same grounds as the case at bar. In re Det. of Fox, 138 Wn.App. 374, 158 P.3d 69 (2007), rev. granted and remanded on other grounds, 162 P.3d 1019 (2008); affirmed by unpublished ruling, COA 34145-0-II (decided June 2, 2008); rev. granted, 164 Wn.2d 1025 (2008). However, the petitioner withdrew his appeal pursuant to an agreement with the State. Supreme Ct. No. 81796-1 (order granting motion to withdraw enter Oct. 30, 2008).

treatment, so long as the finding is not based on a single demographic factor. 138 Wn.App. at 399.

Judge Armstrong wrote a sharp dissent in Fox. Judge Armstrong argued that it violates the right to due process of law to limit a person's ability to obtain a release hearing when that person is not dangerous or mentally disordered as required by the initial commitment procedure. 138 Wn.App. at 407-08 (Armstrong, J. dissenting). The amendments to RCW 71.09.090 bar a person from making a *prima facie* case he or she is entitled to release based on certain evidence. Id. at 407. Yet a person may be able to show he or she has lost desire or interest in violent sexual acts, or has attained a significant measure of control over those receding impulses, even if he or she has not suffered paralysis or has not made significant gains in the State's treatment program. Id. at 407-08. By denying a release hearing even if the person no longer meets the basic dangerous or mentally ill requirements of a civil commitment, the statute violates due process. Id.

As Judge Armstrong's dissent indicates, the statute's limitations on the type of evidence that a detainee may use to gain a full review of his commitment essentially eradicate most detainees' meaningful ability to petition for unconditional release.

Becoming permanently physiologically incapacitated is not an option for most people. Concocting this “avenue” for gaining a release trial is disingenuous, and brings to mind the “only acceptable standard for release” found in Minnesota’s committed sexually violent predator program, “They died.”<sup>6</sup>

The only realistic avenue of gaining a trial at which a detainee could win the right to release is successful, continued treatment. The viability of treatment may be desirable, but it is “difficult to ascertain the efficacy of treatment in [states’] SVP programs.”<sup>7</sup> The State controls the treatment program and thus may readily “set impossibly high standards for release . . . . [creating a] catch-22 world” and create treatment programs that cannot be successfully completed. *Id.* Since the inception of the SVP statute in Washington, the State has not unconditionally discharged any committed person.<sup>8</sup>

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<sup>6</sup> E. Janus & B. Bolin, An End-Game for Sexually Violent Predator Laws: As-Applied Invalidation, Ohio St. J. of Crim. Law, Vol 6:25, 31 (2008) (quoting Larry Oakes, *Locked in Limbo*, Star Trib. (Minneapolis), June 8, 2008, at A1 (article describes only available “standard of release” for SVP committees as “completing treatment” by dying)).

<sup>7</sup> R. Prentky, H. Barbaree, et al, Sexually Violent Predators in the Courtroom: Science on Trial, 12 Psych. Pub. Pol. and L. 357, 381 (Nov. 2006).

<sup>8</sup> Doren, D., “Model for Considering Release for Civilly Committed Offenders,” The Sexual Predator: Law and Public Policy, Clinical Practice Vol. III (A. Schlank ed., Civic Research Inst. 2006), at 6-4.

Requiring success from continued participation in treatment while confined negates the possibility of reduced dangerousness due to personal or religious education during years of involuntary confinement, medical intervention such as psychotropic drugs prescribed for mental illness, or other means of gaining behavioral control. Even the DSHS psychologists acknowledged that while paraphilias such as McCuiston's may be chronic and life-long, the standard diagnostic manual provides that they "often diminish with advancing age in adults." CP 19 (DeMarco report); CP 65 (VanDam report). Despite apparent consensus that a person's behavioral risk may diminish with age, and other behavior may support the decreased risk, an individual may not receive a new hearing without meeting the physical incapacity or success in treatment requirements of RCW 71.09.090(4)(b).

Additionally, "there is the troubling question of whether a 'personality disorder' or 'mental abnormality' can ever be 'changed.'" A. Horwitz, *Sexual Psychopath Legislation: Is There Anywhere To Go But Backwards?*, 57 U. Pitt. L.Rev. 35, 54-55 (1995). One "renowned expert" stated, "it is entirely unclear how a personality disorder can be changed through treatment because most of the defining features of personality disorder diagnoses . . .

are historical in nature.” Id. (quoting Dr. Vernon Quinsey). For antisocial personality disorder, “no traditional voluntary or inpatient milieu has been shown to be effective, and there is no individual or group psychotherapy that is routinely associated with success.” W. Reid & C. Gacono, Treatment of Antisocial Personality, Psychopathy, and other Characterological Antisocial Syndromes, 18 Behav. Sci. & L. 647, 658 (2000).

Using success in treatment as the only viable avenue for winning a full re-commitment trial is fraught with scientific uncertainty and unmoored from the necessary requirement that commitment may not continue when a person is not currently likely to commit sexually violent offenses due to a mental disorder. The restrictions enacted in 2005 fundamentally deny a person the ability to gain a new hearing on the merits of the continued commitment, even if a qualified expert of unchallenged credentials believes the individual does not meet the criteria for confinement.

d. Annual review is the only remedy available to most detainees who no longer meet the criteria for commitment. The State has argued that McCuiston's show cause motion was a collateral attack on the commitment order that must be pursued by other alternatives. But this claim mischaracterizes McCuiston's

show cause motion, which is not attacking his prior trial but rather seeking because of current circumstances and recent risk studies. CP 590, 593. Moreover, there are no other realistically available alternatives to present his claim that he no longer meets the criteria for commitment: CR 60(b), personal restraint petitions (PRP), and federal habeas corpus writs have strict time limits and procedural rules making them inapplicable.

Requiring a detainee rely on alternative legal avenues to challenge the continuing constitutionality of his confinement would place the burden of proof squarely on the detainee. The Court has ruled on numerous occasions that due process requires the State to bear the burden at the review hearing. In re Det. of Turay, 139 Wn.2d 379, 424, 986 P.2d 790 (1999) ("due process requires that the burden of proof remain upon the State in the show cause hearing."); In re Det. of Petersen, 145 Wn.2d 789, 795-96, 42 P.3d 952 (2002) (burden of proof on State and trial on merits required when detainee presents prima facie evidence he no longer meets initial commitment criteria); Young, 122 Wn.2d at 38. The risk of error must be borne by the State in civil commitment cases. Addington v. Texas, 441 U.S. 418, 427, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979).

Additionally, civil commitment rests on certain facts subject to different interpretations by experts and advances in science, which makes it very different from other legal cases. Addington, 441 U.S. at 429. Rules permitted a court to vacate a judgment for newly discovered evidence have strict time bars to when the evidence must arise and prohibit the repetition of information that was or could have been raised earlier. See CR 60(b)(3) (one year time bar and facts cannot be those that “could have been presented at trial.”);<sup>9</sup> RCW 10.73.090 (one year time bar for PRP); In re Pers. Restraint of Brown, 143 Wn.2d 431, 453, 21 P.3d 687 (2001) (PRP for new evidence only allowed if evidence could not have been discovered earlier, is not impeaching or cumulative, and will probably change the result of the trial).

A motion to vacate under the “other reasons” prong of CR 60(b)(11) requires proof of “extreme, unexpected situations.” In re: Det. Ward, 125 Wn.App. 374, 380, 104 P.3d 751; rev. denied, 155 Wn.2d 1025 (2005). It is “not a blanket provision authorizing reconsideration for all conceivable reasons.” State v. Keller, 32 Wn.App. 135, 141, 647 P.2d 35 (1997). The extraordinary

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<sup>9</sup> Full text of CR.60 attached as App. B.

circumstances must relate to “irregularities which are extraneous to the action of the court or go to the question of the regularity of its proceedings.” Keller, 32 Wn.App. at 141. A CR 60(b)(11) motion must be filed within a reasonable time. Although a “reasonable time” is undefined, prompt filing is necessary for relief and the motion cannot rest on years-old claims. Ward, 125 Wn.App. at 380.

The burden of proof on the party seeking relief are high. For CR 60(b), the petitioner must prove a meritorious defense. CR 60(e)(1) (quoting Court Rules Annotated, Editorial Commentary, Vol. 2 at 599 (2002 ed.)). For a PRP, the petitioner must prove “actual and substantial prejudice” or establish “a fundamental defect inherently resulting in a complete miscarriage of justice” from a non-constitutional error. In re Pers. Restraint of St. Pierre, 118 Wn.2d 321, 328, 823 P.2d 492 (1992).

A federal habeas petition challenging a state court ruling must rise from a claim exhausted in state court, and the state court’s ruling must be contrary to clearly established federal law as determined by the Supreme Court of the United States, or an unreasonable determination of the facts. 28 U.S.C. 2254(d). It must be filed within one year from the judgment, or from when

underlying facts objectively could have been known. 28 U.S.C. 2254(d)(1)(A), (D).

Other mechanisms for vacating judgments have procedural limitations that would make relief impossible and fundamentally shift the burden of proof, and therefore are inadequate and insufficient substitutes for what due process requires when the State elects to institute lifelong civil commitments.

e. It violates the separation of powers for the Legislature to dictate the type of evidence a detainee may offer to show he is unconstitutionally confined. The separation of powers doctrine bars the legislature from making or changing judicial determinations. Tacoma v. O'Brien, 85 Wn.2d 266, 272-73, 534 P.2d 114 (1975) (courts “carefully preserve[ ] judicial functions from legislative encroachment”). The “effect of a judicial interpretation of the constitution may not be modified or impaired in any way by the legislature.” Seattle Sch. Dist. No. 1 v. State, 90 Wn.2d 476, 496, 585 P.2d 71 (1978).

Young and Ward found it would violate due process to deny a full review hearing when the court receives *prima facie* evidence the detainee currently does not meet the initial criteria for commitment, regardless of whether his condition has changed.

Young, 120 Wn.App. at 763 (“Because current risk assessment techniques suggest Young is not an SVP, denying him a hearing at this point raises due process concerns.”); Ward, 125 Wn.App. at 386 (“If a detainee provides new evidence establishing probable cause that he is not currently a sexually violent predator, due process requires a trial on the merits.”).

In a transparent effort to circumvent Young and Ward, the Legislature amended the annual review statute and restricted the type of evidence a court may rely on to find a detainee entitled to a review trial. Laws 2005, ch. 344 §1. This legislation not only clarifies the statutory definitions, it intrudes upon the province of the fact-finder and bars the court from considering otherwise reliable, admissible, scientifically valid evidence that would cast doubt on the legality of continued commitment. To the extent RCW 71.09.090(4)(b) prohibits a court from ordering a new trial even when the petitioner does not meet the criteria for confinement, the legislation plainly contradicts the judiciary’s interpretation of the constitutional requirements for a detainee to petition for release and violates the separation of powers.

2. MCCUISTION HAS A DUE PROCESS RIGHT  
TO A NEW COMMITMENT TRIAL

a. The trial court misapplied the *prima facie* standard.

At McCuiston's show cause hearing, the trial court improperly weighed the evidence, rather than decide whether there was *prima facie* evidence he did not currently meet the criteria for SVP confinement. Because he presented a *prima facie* case that he does not currently meet criteria for commitment, he has a due process right to a re-commitment trial.

The 2005 amendments do not alter the basic *prima facie* standard required at a show cause hearing. RCW 71.09.090(2). *Prima facie* evidence is "a very low standard" that bars the court from weighing the evidence. Petersen, 145 Wn.2d at 797, 803.

The trial court did not dispute Dr. Coleman's credentials or qualifications. CP 585. The court did not find Dr. Coleman's opinion would be inadmissible at trial and disregard it, as would be within the court's discretion. Ambers, 160 Wn.2d at 553.

Yet the trial court refused to grant McCuiston a new hearing because it believed Dr. Coleman's disagreement "with past examiners and fact-finders does not, itself, make his opinion the correct one." CP 585.<sup>10</sup> The court found McCuiston's evidence of

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<sup>10</sup> McCuiston assigned error to these findings in his Opening Brief.

his recent behavioral control was “relevant” but not “persuasive evidence that would compel a finding that a further hearing is required.” Id. The court concluded that McCuiston had not rebutted the State’s evidence. Id.

McCuiston did not need to convince the court that Dr. Coleman’s opinion was the correct one, or even that it was as credible as the opinions offered by the State. McCuiston simply bore the burden of presenting some evidence that, if believed, would show he did not meet the criteria for SVP commitment. Petersen, 145 Wn.2d at 803; Young, 120 Wn.App. at 759. The court weighed the evidence, rather than determining whether McCuiston offered a *prima facie* case. Id.

b. McCuiston presented *prima facie* evidence that his condition has changed such that he is no longer a sexually violent predator. McCuiston presented admissible evidence from a qualified expert that he did not meet the criteria for commitment as he did not suffer from a mental disorder or lack behavioral control due to a mental disorder. CP 614-23; CP 585. Furthermore, McCuiston demonstrated a significant change in his behavior and the court agreed.

The court found, "Mr. McCuiston is a very capable and well-regarded man," and "[h]e has proven himself to be a hard worker and received several very positive reviews by staff." Id.

Contradicting the State's claim that improved behavioral control at SCC lacked value because of the lack of opportunity to reoffend, McCuiston offered evidence of a host of behavioral problems and criminal acts by other inmates. He explained that DSHS psychologist DeMarco knew of "numerous instances of residents exhibiting assaultive and inappropriate sexual behaviors" at SCC. CP 594. Contrary to the State's repeated allegation that behavioral control at the SCC is meaningless, examples arise routinely. In the past year, a resident and employee were arrested for delivering cocaine inside the SCC on multiple times; a detainee was arrested for setting fires and assaulting a staff member; and a number of detainees were investigated for possessing pornography.<sup>11</sup> Current

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<sup>11</sup> McNeil Island Crack-smuggling scheme thwarted, Seattle Times (Aug. 2, 2008), available at: [http://seattletimes.nwsourc.com/html/localnews/2008087449\\_mcneil02m.html](http://seattletimes.nwsourc.com/html/localnews/2008087449_mcneil02m.html); Ian Demsky, Imprisoned sex felon at McNeil Special Commitment Center charged with arson, assault, News Tribune (May 29, 2008), available at: <http://www.thenewstribune.com/news/crime/story/375286.html>; Jonathan Martin, Sex offenders at State Center Getting Porn, Seattle Times (Jan. 7, 2008), at A1, available at: [http://seattletimes.nwsourc.com/html/localnews/2004111167\\_mcneil07m.html](http://seattletimes.nwsourc.com/html/localnews/2004111167_mcneil07m.html) (articles attached in App. C). A court may take judicial notice of reports from accurate sources, capable of verification. ER 201.

evidence supports McCuiston's claim that his present behavioral control is not simply the product of lack of opportunity to offend sexually, violently, or anti-socially. In the past several years, McCuiston has not acted inappropriately other than rare verbal disagreements, and has not had minor rule infractions despite strict regulations and close monitoring. CP 15-18; CP 594-96, 605.

Four SCC supervisors filed affidavits attesting to their regular contact with McCuiston over many years at SCC, their knowledge of his SCC records, and their experience with other detainees. CP 638-47. Each swore they had never heard of nor seen McCuiston engaging in or threatening any inappropriate sexual or violent behavior. Each supervisor attested to consistently positive interactions with and observations of McCuiston. As McCuiston told Psychologist van Dam, he had grown older, lost his impulsiveness, and changed his behavior in reaction to the 12 years of involuntary, indefinite confinement. CP 62.

Mr. McCuiston also offered updated scientific analysis regarding the accuracy of risk assessment tests that were used by the State's experts. CP 590 (Memorandum, Apps. G & H). He offered recent studies documenting the low recidivism rates for

those convicted of offenses similar to his, and thus provided new empirical support for his reduced risk.

Based on the expert evaluation, testimonial support, and recent scientific evidence further explaining risk predictions, Mr. McCuiston presented *prima facie* evidence that he no longer met the criteria for continued total confinement. McCuiston had a due process right to a hearing on the merits to determine whether he currently meets the criteria for involuntary commitment.

D. CONCLUSION.

For the foregoing reasons, Mr. McCuiston respectfully requests this Court order he receive a re-commitment trial.

DATED this 19<sup>th</sup> day of December 2008.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Nancy P. Collins", with the number "25228" written to the right of the signature.

NANCY P. COLLINS (WSBA 28806)  
Washington Appellate Project (91052)  
Attorneys for Petitioner

## **APPENDIX A**

Rev. Code Wash. (ARCW) § 71.09.090 (2008)

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

(1) If the secretary determines that the person's condition has so changed that either: (a) 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 the person's condition has so changed that: (i) He or she no longer meets the definition of a sexually violent predator; or (ii) conditional release to a proposed 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 proposed 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) (a) Probable cause exists to believe that a person's condition has "so changed," under subsection (2) of this section, only when evidence exists, since the person's last commitment trial proceeding, of a substantial change in the person's physical or mental condition such that the person either no longer meets the definition of a sexually violent predator or that a conditional release to a less restrictive alternative is in the person's best interest and conditions can be imposed to adequately protect the community.

(b) A new trial proceeding under subsection (3) of this section may be ordered, or held, only when there is current evidence from a licensed professional of one of the following and the evidence presents a change in condition since the person's last commitment trial proceeding:

(i) An identified physiological change to the person, such as paralysis, stroke, or dementia, that renders the committed person unable to commit a sexually violent act and this change is permanent; or

(ii) A change in the person's mental condition brought about through positive response to continuing participation in treatment which indicates that the person meets the standard for conditional release to a less restrictive alternative or that the person would be safe to be at large if unconditionally released from commitment.

(c) For purposes of this section, a change in a single demographic factor, without more, does not establish probable cause for a new trial proceeding under subsection (3) of this section. As used in this section, a single demographic factor includes, but is not limited to, a change in the chronological age, marital status, or gender of the committed person.

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

## **APPENDIX B**

## Wash. CR 60 (2008)

## Rule 60. Relief from judgment or order

(a) *Clerical mistakes* Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. Such mistakes may be so corrected before review is accepted by an appellate court, and thereafter may be corrected pursuant to *RAP 7.2(e)*.

(b) *Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud; etc* On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

(1) Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order;

(2) For erroneous proceedings against a minor or person of unsound mind, when the condition of such defendant does not appear in the record, nor the error in the proceedings;

(3) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under rule 59(b);

(4) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;

(5) The judgment is void;

(6) The judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application;

(7) If the defendant was served by publication, relief may be granted as prescribed in *RCW 4.28.200*;

(8) Death of one of the parties before the judgment in the action;

(9) Unavoidable casualty or misfortune preventing the party from prosecuting or defending;

(10) Error in judgment shown by a minor, within 12 months after arriving at full age; or

(11) Any other reason justifying relief from the operation of the judgment.

The motion shall be made within a reasonable time and for reasons (1), (2) or (3) not more than 1 year after the judgment, order, or proceeding was entered or taken. If the party entitled to relief is a minor or a person of unsound mind, the motion shall be made within 1 year after the disability ceases. A motion under this section (b) does not affect the finality of the judgment or suspend its operation.

(c) *Other remedies* This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding.

(d) *Writs abolished -- Procedure* Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review are abolished. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

(e) *Procedure on vacation of judgment*

(1) *Motion* Application shall be made by motion filed in the cause stating the grounds upon which relief is asked, and supported by the affidavit of the applicant or his attorney setting forth a concise statement of the facts or errors upon which the motion is based, and if the moving party be a defendant, the facts constituting a defense to the action or proceeding.

(2) *Notice* Upon the filing of the motion and affidavit, the court shall enter an order fixing the time and place of the hearing thereof and directing all parties to the action or proceeding who may be affected thereby to appear and show cause why the relief asked for should not be granted.

(3) *Service* The motion, affidavit, and the order to show cause shall be served upon all parties affected in the same manner as in the case of summons in a civil action at such time before the date fixed for the hearing as the order shall provide; but in case such service cannot be made, the order shall be published in the manner and for such time as may be ordered by the court, and in such case a copy of the motion, affidavit, and order shall be mailed to such parties at their last known post office address and a copy thereof served upon the attorneys of record of such parties in such action or proceeding such time prior to the hearing as the court may direct.

(4) *Statutes* Except as modified by this rule, *RCW 4.72.010-.090* shall remain in full force and effect.

## APPENDIX C

1 of 5 DOCUMENTS

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The Seattle Times

August 2, 2008 Saturday  
Fourth Edition

**SECTION:** ROP ZONE; Local News; Pg. B3

**LENGTH:** 253 words

**HEADLINE:** Crack-smuggling scheme thwarted, authorities say

**BYLINE:** The Associated Press

**BODY:**

Federal and state authorities say they've foiled a conspiracy to bring crack cocaine into Washington's sex offender lockup on McNeil Island.

Two people have been arrested this week Paepaega Matautia Jr., a 39-year-old employee of the Special Commitment Center, and Lawrence Williams, a 50-year-old resident.

The U.S. attorney's office in Seattle says Matautia delivered cocaine to Williams in the facility's mail room on eight occasions, and that the case was cracked with the help of a confidential informant.

Matautia made his initial appearance in federal court Thursday on a charge of attempted cocaine possession with attempt to distribute. Williams, who was arrested Friday, was expected to appear Monday on a charge of conspiracy to distribute crack cocaine.

"We knew about this investigation, and we cooperated fully," said Steve Williams, a spokesman for the state Department of Social and Health Services, which runs the commitment center. "We have no tolerance for this sort of thing."

Matautia worked as a mailroom security officer, helping to ensure residents don't receive contraband through the mail, Steve Williams said. The man cleared a background check before he was hired in December 2003.

His attorney, Phil Brennan, said Friday he had just received the case and had no immediate comment.

Lawrence Williams was admitted to the commitment center in August 2002. He was convicted of first-degree rape with a deadly weapon in 1980.

It was not immediately clear if Lawrence Williams had been assigned a lawyer.

**LOAD-DATE:** August 5, 2008

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## **Imprisoned sex felon at McNeil Special Commitment Center charged with arson, assault**

May 29, 2008

IAN DEMSKY; [ian.demsky@thenewstribune.com](mailto:ian.demsky@thenewstribune.com)

Bad: Being charged with setting fires at the Special Commitment Center on McNeil Island.

Worse: Facing life in prison without parole under "persistent offender" laws.

Center resident Billy James Aschenbrenner was booked into the Pierce County Jail on Wednesday on charges of first-degree arson and fourth-degree assault, records show.

He's accused of starting two or three fires in January at the center for sexual offenders. The fires endangered the facility's 274 residents and 46 employees, prosecutors contend. He's also accused of trying to "mule kick" a staff member.

The first fire was his T-shirt, according to court documents, and the second his blanket and his sheet.

Staff members "took resident Aschenbrenner to the Intensive Management Unit where he attempted to start a third fire," the court records say. The reports contain conflicting accounts as to whether he was successful.

Prosecutors also filed a notice that if Aschenbrenner is convicted of a third "most serious offense," he could face life without parole under the state's persistent offender law.

Aschenbrenner previously pleaded guilty to first-degree arson, saying he set his bedding on fire because he wanted to return to the general prison population. He also was previously convicted of taking indecent liberties.

Ian Demsky: 253-597-8872

[blogs.thenewstribune.com/crime](http://blogs.thenewstribune.com/crime)

# The Seattle Times

Monday, January 7, 2008 - Page updated at 09:22 AM

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## Sex offenders at state center getting porn

By Jonathan Martin  
Seattle Times staff reporter

The state's treatment center on McNeil Island for its most predatory sex offenders is surrounded by concertina wire and security cameras. Mail and visitors are searched, and the staff can't even bring iPods to work.

But that hasn't kept some men held at the Special Commitment Center (SCC) from getting their hands on thousands of images of child pornography.

In the past two years, at least four of the 267 residents have been charged with possessing illegal pornography, and officials there are investigating several others. The latest case emerged just before Christmas, when the FBI arrested a 49-year-old child molester who had computer CDs full of graphic child pornography stashed in his room.

Managers of the SCC say they don't know how the material is getting in. The most recent arrest has prompted at least one personnel investigation, though no one has been disciplined.

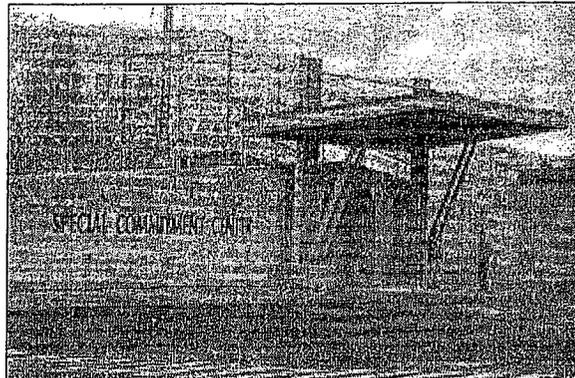
However it's happening, the managers agree with law-enforcement leaders that it's unacceptable. All of the men have proven, sexually violent urges and must undergo treatment before they can ever be released into society.

"They've got a serious problem with contraband in that institution," said David Hackett, King County's lead prosecutor for sex-predator cases. "You don't want to send a sex predator down there to look at child porn."

But it's not as easy as it might seem to crack down.

Though the residents don't have Internet access, they are allowed computers, partly because the courts have consistently ruled that the treatment facility can't be run like a prison.

Henry Richards, the superintendent of the SCC, said banning computers, though under consideration, could



GREG GILBERT / THE SEATTLE TIMES

Several residents of the state's Special Commitment Center for treatment of sex predators have been caught with child pornography in the past two years.



STEVE RINGMAN / THE SEATTLE TIMES

Officials can't explain how child pornography has gotten into the state's Special Commitment Center for treatment of sex offenders, located within the McNeil Island state prison.

"cut the tether to the rest of the world" for men who may one day return to society.

"One of the things we can't do is treat this group like they are correctional inmates," Richards said. "The presumption is they have every right as any citizen of the state, except for issues that must be constrained to run the treatment program."

### **Stashes of child porn**

On Dec. 21, FBI agents went to the SCC and arrested resident John Michael Obert after the staff, acting on a tip, found compact discs encoded with pornographic images of children.

Obert has been charged in U.S. District Court with possession of child pornography and could serve at least 10 years in prison if convicted. Pending trial, he is being held at the federal detention center in SeaTac.

It wasn't a new situation at the SCC. Three other residents have been convicted of possessing child pornography since 2006, including David J. Lewis, who was sentenced to a year in jail just a few months before the FBI arrested Obert. Another resident, Richard E. Jackson, 39, was convicted in 2006 of storing at least 760 sexual images of nude children, including some involving bestiality, on his computer and on discs, according to Pierce County court records.

And for Obert, it was his second alleged offense at the SCC, and part of a history of such behavior.

Obert arrived at the SCC in 2004 after serving prison time for child molestation and failing to register as a sex offender. While in prison, he was caught with hidden magazine pictures of children that he had altered to be pornographic.

After he got out of prison, he was caught taking photos of young children at local swimming pools, and King County prosecutors filed to have him committed to the SCC.

In August 2006, SCC staff found 11 CDs in Obert's room with images of nude girls and of sexual acts between children and adults. He was charged in Pierce County Superior Court with possessing child pornography.

So when the latest images were found last month, prosecutors pressed federal charges. The 2006 case will be combined with the new case.

"It's unexplainable," said Michael Danko, one of Obert's former defense lawyers. "He's subject to scrutiny all the time, and yet he does it again."

### **"Not a punitive facility"**

In 1990, Washington was the first state in the nation to use mental-health commitment laws to detain sex offenders after they had finished their prison terms. Since then, 18 other states have followed.

Because the SCC is legally a mental hospital, critics have been constantly challenging it as too much like a prison. For 13 years, until last year, the federal courts oversaw the operations. So far, no SCC resident has graduated to full, unconditional release.

The SCC staff does random searches as well as responding to tips from other residents, said Richards, the SCC superintendent. The staff also censors magazines for images that could be sexually arousing to residents, depending on each man's particular proclivities.

But residents' computers have been most troublesome. In 2006, Richards briefly banned all new personal computers and also outlawed certain wireless video games because they could potentially tap into private wireless networks on McNeil Island.

Residents can buy a stripped-down PC, as long as it doesn't have CD burners or USB ports that could accommodate small "thumb" drives.

Richards acknowledges that residents can be very resourceful in hiding pornographic images.

John Phillips, a Seattle attorney who has challenged the constitutionality of the SCC, agrees that the institution has the right to search computers and mail, but only if the staff has reasonable suspicions that there is contraband to find.

"This is not a punitive facility," he said. "It's a treatment program."

But in Hackett's opinion, the "pendulum has swung too far" toward the rights of residents, and the recent infiltration of child porn is proof.

"There are obvious institutional reasons to control things like compact discs coming into the institution," he said.

Richards doesn't disagree. But he said the most severe solution — banning all use of computers by residents — would require the state to prove that computers are a "pervasive, serious threat." And it would penalize those residents who are following the rules, he said.

"I'd rather not be in the Big Brother business," said Richards. "We're in the treatment business."

*Jonathan Martin: 206-464-2605 or [jmartin@seattletimes.com](mailto:jmartin@seattletimes.com)*

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**IN THE SUPREME COURT OF THE STATE OF WASHINGTON**

IN RE THE DETENTION OF )

D.M., )

PETITIONER. )

NO. 81644-1

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I, MARIA ARRANZA RILEY, STATE THAT ON THE 19<sup>TH</sup> DAY OF DECEMBER, 2008, I CAUSED THE ORIGINAL **SUPPLEMENTAL BRIEF OF PETITIONER** TO BE FILED IN THE **COURT WASHINGTON STATE SUPREME COURT** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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