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Aug 17, 2015  
Court of Appeals  
Division I  
State of Washington

NO. 69731-5-I  
(consolidated with 70170-3-I and 71131-8-I)

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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In re the Detention of

VICTOR CANNON

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**SUPPLEMENTAL BRIEF REGARDING IN RE MEIRHOFER**

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TABLE OF CONTENTS

	Page
A. <u>ISSUE PRESENTED</u> .....	1
B. <u>STATEMENT OF THE CASE</u> .....	1
C. <u>ARGUMENT</u> .....	2
1. <u>MEIRHOFER</u> HOLDS THAT A SEXUALLY VIOLENT PREDATOR MAY CHALLENGE HIS CONTINUING COMMITMENT VIA A PERSONAL RESTRAINT PETITION, BUT HE MUST MEET HIGH STANDARDS TO MERIT RELIEF .....	2
2. <u>MEIRHOFER</u> AFFIRMS THAT THE STATE CAN MEET ITS BURDEN OF PROVING THAT A PERSON CONTINUES TO BE A SEXUALLY VIOLENT PREDATOR WHEN AN ACTUARIAL INSTRUMENT SCORES HIS ESTIMATED RISK OF DETECTED RECIDIVISM AT LESS THAN 50 PERCENT.....	5
D. <u>CONCLUSION</u> .....	7

TABLE OF AUTHORITIES

Page

Table of Cases

Washington State:

In re Det. of Moore, 167 Wn.2d 113,  
216 P.3d 1015 (2009)..... 5

In re Det. of Thorell, 149 Wn.2d 724,  
72 P.3d 708 (2003)..... 5, 6

In re Pers. Restraint of Cook, 114 Wn.2d 802,  
792 P.2d 506 (1990)..... 4

In re Pers. Restraint of Grantham, 168 Wn.2d 204,  
227 P.3d 285 (2010)..... 3

In re Pers. Restraint of Meirhofer, 182 Wn.2d 632,  
343 P.3d 731 (2015)..... 1, 2, 3, 4, 5, 6, 7

Statutes

Washington State:

Chapter 71.09 RCW..... 4

RCW 71.09.090..... 6

Rules and Regulations

Washington State:

RAP 16.4..... 3

**A. ISSUE PRESENTED**

Whether the Washington Supreme Court's decision in In re Personal Restraint of Meirhofer, 182 Wn.2d 632, 343 P.3d 731 (2015), impacts the issues raised in Cannon's motions for discretionary review and personal restraint petition.

**B. STATEMENT OF THE CASE**

The substantive and procedural facts of this case up to the point of the 2012 annual review proceedings are described in the State's Consolidated Response to Personal Restraint Petition and Motion for Discretionary Review (hereinafter "State's Consolidated Response") and supporting materials, which were filed in this Court in July 2013. See State's Consolidated Response at 1-2, accompanying Appendix A.

In June 2014, this Court ordered these matters stayed pending the Washington Supreme Court's decision in In re Personal Restraint Petition of Meirhofer, 182 Wn.2d 632, 343 P.3d 731 (2015). Appendix at 1-2. The issues that are presented in Cannon's case and in In re Meirhofer are: 1) whether a sexually violent predator may challenge his continuing civil commitment via a personal restraint petition; and 2) whether a sexually violent

predator may obtain a release trial because of an actuarial risk estimate that is less than 50 percent. Appendix at 1-2.

The following month, in July 2014, this Court granted Cannon's motion to consolidate his motion for discretionary review regarding the 2013 annual review proceedings with his motion for discretionary review and personal restraint petition challenging the 2012 annual review proceedings,<sup>1</sup> and stayed that matter pending In re Meirhofer as well. Appendix at 3.

In re Meirhofer was decided in February 2015. This Court now directs the parties to file supplemental briefing "addressing the next steps for these consolidated matters and the effect, if any, of the decision in Meirhofer." Appendix at 4.

### C. **ARGUMENT**

1. **MEIRHOFER HOLDS THAT A SEXUALLY VIOLENT PREDATOR MAY CHALLENGE HIS CONTINUING COMMITMENT VIA A PERSONAL RESTRAINT PETITION, BUT HE MUST MEET HIGH STANDARDS TO MERIT RELIEF.**

The issue of whether a sexually violent predator may challenge a trial court's ruling terminating annual review

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<sup>1</sup> The motion to consolidate was granted over the State's objection.

proceedings without an evidentiary hearing via a personal restraint petition was addressed in In re Meirhofer. The court stated:

While we agree with the State that Meirhofer is not entitled to relief on the merits, we stress that there are no special rules prohibiting those committed under the SVP act from filing otherwise meritorious personal restraint petitions.

In re Meirhofer, 182 Wn.2d at 648. Accordingly, Meirhofer establishes that a sexually violent predator may challenge his civil commitment via a personal restraint petition.

However, as the court further explained,

A personal restraint petition is not a substitute for statutory avenues for review, and “[t]o prevent it from becoming a substitute for appeal, and to protect the finality of judgments, this court has imposed significant threshold, prima facie burdens on the petitioner before the merits of the substantive claim will be considered.”

In re Meirhofer, 182 Wn.2d at 648 (quoting In re Personal Restraint of Grantham, 168 Wn.2d 204, 211, 227 P.3d 285 (2010)). In other words, although a personal restraint petition is available as a potential avenue for review in a sexually violent predator case, a petitioner will not be granted substantive review unless he can meet stringent threshold standards. Such standards include a showing that “other remedies which may be available to petitioner are inadequate.” Id. (quoting RAP 16.4(d)). And, even if a petitioner

can show that other available remedies are inadequate, an appellate court will grant substantive review of a personal restraint petition only when the petitioner also establishes either constitutional error from which he has suffered actual prejudice or nonconstitutional error that constitutes a fundamental defect that inherently resulted in a complete miscarriage of justice. In re Personal Restraint of Cook, 114 Wn.2d 802, 813, 792 P.2d 506 (1990).

In In re Meirhofer, the court held that Meirhofer had not shown that the available avenue for review under chapter 71.09 RCW was inadequate to protect against unlawful detention. In re Meirhofer, 182 Wn.2d at 648-51. Given that the issues presented in Meirhofer and in this case are essentially the same, the result should be the same as well: Cannon's personal restraint petition should be dismissed without further review.

2. **MEIRHOFER AFFIRMS THAT THE STATE CAN MEET ITS BURDEN OF PROVING THAT A PERSON CONTINUES TO BE A SEXUALLY VIOLENT PREDATOR WHEN AN ACTUARIAL INSTRUMENT SCORES HIS ESTIMATED RISK OF DETECTED RECIDIVISM AT LESS THAN 50 PERCENT.**

In In re Meirhofer, as in this case, Meirhofer argued that the State had not presented evidence sufficient to establish probable cause that he continued to meet the definition of a sexually violent predator based on, *inter alia*, the results of the Static-99R actuarial instrument, which “suggested that offenders with similar static risk factors as Meirhofer had ‘a 5-year sexual recidivism estimate of about 20% and a 10-year sexual recidivism estimate of about 30%.’” In re Meirhofer, 182 Wn.2d at 640. As the court explained, this argument misconstrues the role of actuarial instruments in sexually violent predator cases:

Meirhofer is correct that the actuarial instruments the State’s expert used suggest his risk of re-offense is 30% in the next 10 years. However, the SVP act does not limit experts to the results of actuarial tests and there is no requirement that “the SVP will reoffend in the foreseeable future.” *In re Det. of Moore*, 167 Wn.2d 113, 125, 216 P.3d 1015 (2009). While Meirhofer is correct that we observed in a case considering the admissibility of actuarial instruments in SVP proceedings that the State “asserts [they] are more reliable than clinical judgment,” we never found that they were better evidence than clinical judgment. *In re Det. of Thorell*, 149 Wn.2d 724, 757, 72 P.3d

708 (2003). Based on static and dynamic risk factors and his own clinical judgment, the State's expert opined that "there has been no apparent change in [Meirhofer's] mental condition that would indicate a lowered risk for sexual re-offense." PRP, App. G at 14. This is amply supported by the evidence reviewed in Dr. Saari's report. The State has met its *prima facie* burden under RCW 71.09.090(2)(b).

In re Meirhofer, 182 Wn.2d at 645-46.<sup>2</sup>

Cannon's arguments regarding the Static-99R are the same as the arguments in Meirhofer, *i.e.*, that because the risk estimates from the Static-99R are less than 50 percent,<sup>3</sup> the State cannot meet its *prima facie* burden of showing that Cannon continues to meet the definition of a sexually violent predator. But just as in Meirhofer, the State's expert's opinion that Cannon is still a sexually violent predator is based on a host of information other than the actuarial instrument. See State's Consolidated Response at 12-16. As Meirhofer holds, it is entirely proper for an expert to reach his or

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<sup>2</sup> In addition, the court observed that "[s]tatic tests such as the Static-99R underestimate the probability of future sexual misconduct because they do not actually measure the probability that an offender will commit another sexual offense; they instead predict whether an offender will be caught for a new sexual offense by being arrested, convicted, or, in some cases, by self-report recidivism." In re Meirhofer, 182 Wn.2d at 640 n.4. In other words, the Static-99R attempts to measure the risk of *detected* recidivism, not absolute recidivism. This is one of many arguments the State has made in the State's Consolidated Response.

<sup>3</sup> Notably, however, Cannon's risk estimates are considerably higher than Meirhofer's were (*i.e.*, 31.2% over five years and 41.9% over ten years). See State's Consolidated Response at 1.

her conclusions in this manner; accordingly, Cannon's argument is wholly without merit in light of Meirhofer.

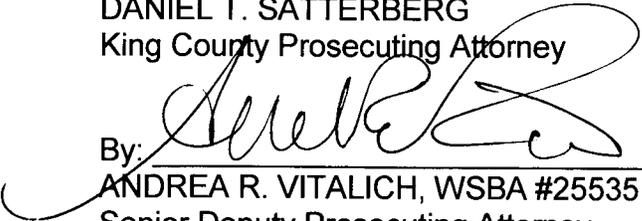
**D. CONCLUSION**

For the reasons stated above, In re Meirhofer squarely rejects the arguments Cannon has made in his motions for discretionary review and in his personal restraint petition. Accordingly, Cannon's motions for discretionary review should be denied, and his personal restraint petition should be dismissed without further review in accordance with controlling authority.

DATED this 17<sup>th</sup> day of August, 2015.

Respectfully submitted,

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By: 

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

In the Matter of the Detention of	)	
	)	
VICTOR CANNON	)	No. 69731-5-1
	)	(consolidated with
_____	)	No. 70170-3-1
	)	
IN THE MATTER OF THE	)	ORDER STAYING PETITION
PERSONAL RESTRAINT OF:	)	
	)	No. 70170-3-1
VICTOR CANNON,	)	
	)	
_____	)	
Petitioner.	)	

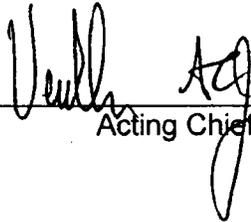
Victor Cannon, who was committed as a sexually violent predator in 2008, filed a motion for discretionary review of the trial court's 2012 order denying an evidentiary hearing on the issue of unconditional or conditional release. Shortly thereafter Cannon filed a personal restraint petition challenging his continued confinement as a sexually violent predator. On agreement of the parties, a commissioner of this court consolidated the two actions.

The Supreme Court recently heard oral argument in In re Pers. Restraint of Meirhofer, No. 89251-2, which addressed "[w]hether a detainee civilly committed as a sexually violent predator may challenge his continued confinement by personal restraint petition, and if so, whether the detainee is entitled to a release trial on the basis of a changed mental abnormality diagnosis and a risk of re-offense assessment of less than 50 percent." It appears that this case raises similar issues. Accordingly, any further consideration of this petition should be stayed pending resolution of Meirhofer by the Supreme Court. RAP 16.4(a).

Now, therefore, it is hereby

ORDERED that this consolidated motion for discretionary review and personal restraint petition is stayed pending issuance of the Supreme Court's final decision in In re Pers. Restraint of Meirhofer, No. 89251-2.

Done this 9<sup>th</sup> day of June, 2014.

  
\_\_\_\_\_  
Acting Chief Judge

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The Court of Appeals  
of the  
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RICHARD D. JOHNSON,  
Court Administrator/Clerk

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CASE #: 69731-5-I  
In re the Detention of Victor Cannon, Petitioner v. State of Washington, Respondent  
CASE #: 71131-8-I  
In re the Detention of Victor Cannon, Petitioner v. State of Washington, Respondent

Counsel:

The following notation ruling by Commissioner Mary Neel of the Court was entered on July 17, 2014:

Petitioner Victor Cannon is confined at the Special Commitment Center as a sexually violent predator. In this matter he seeks review of the trial court order terminating the 2013 annual review process at the show cause stage. Mr. Cannon filed a motion to consolidate review in this matter with review in In re Det. of Cannon, No. 69731-5-I (consolidated with In re Pers. Restraint of Cannon, No. 70170-3-I), in which he challenges the order terminating the 2012 annual review process. The State opposed consolidation. On May 27, 2014, I denied the request for consolidation, and on June 20, 2014 heard oral argument.

After further review of the briefing and record, I conclude that consolidation of this 2013 annual review challenge with the 2012 annual review challenge pending in No. 69731-5-I is appropriate. Review in No. 71131-8-I is consolidated under No. 69731-5-I. Review in No. 69731-5-I is currently stayed pending a decision by the Washington Supreme Court in In re Det. of Alan Meirhofer, No. 89251-2. Accordingly, review in No. 71131-8-I, now consolidated under No. 69731-5-I, is also stayed.

Therefore, it is

ORDERED that review in this matter, In re Det. of Cannon, No. 71131-8-I, is consolidated under In re Det. of Cannon, No. 69731-5-I, which is stayed pending a decision in In re Det. of Meirhofer, No. 89251-2.

Sincerely,



Richard D. Johnson  
Court Administrator/Clerk

7-28-15

The Court of Appeals  
of the  
State of Washington

RICHARD D. JOHNSON,  
Court Administrator/Clerk

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CASE #: 69731-5-1  
In re the Detention of Victor Cannon, Petitioner v. State of Washington, Respondent

Counsel:

The following notation ruling by Commissioner Mary Neel of the Court was entered on July 28, 2015:

These consolidated matters have been stayed pending a decision by the Supreme Court in In re Det. of Meirhofer, No. 89251-2. The decision in Meirhofer was filed February 12, 2015. The stay is lifted. By August 28, 2015, the parties should file supplemental briefing addressing the next steps for these consolidated matters and the effect, if any, of the decision in Meirhofer.

Sincerely,



Richard D. Johnson  
Court Administrator/Clerk

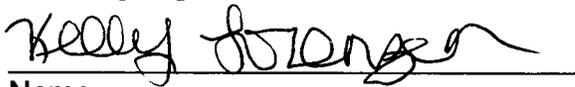
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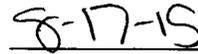
Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Lila Silverstein, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Supplemental Brief Regarding In re Meirhofer, in IN RE THE DETENTION OF VICTOR CANNON, Cause No. 69731-5-I (consolidated with 70170-3-I and 71131-8-I), in the Court of Appeals, Division I, for the State of Washington.

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



Name

Done in Seattle, Washington



Date