No. 45499-8-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

In re the Detention of:

Brent Pettis,

Appellant.

Clark County Superior Court Cause No. 01-2-03870-6

The Honorable Judge Scott Collier

Appellant's Reply Brief

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ARGUMENT

I. THE SCC ADMINISTRATION'S POWER TO UNILATERALLY DENY ACCESS TO THE SCTF STEP-DOWN FACILITY VIOLATES DUE PROCESS BECAUSE IT PERMITS TOTAL CONFINEMENT EVEN WHEN A PERSON CAN BE SAFELY TREATED IN THAT LESS-RESTRICTIVE SETTING.

A. The SCC administration's role as exclusive gatekeeper to the SCTF cannot survive strict scrutiny and permits deprivation of liberty based on arbitrary governmental action.

Because they infringe on fundamental liberty interests, the provisions of RCW 71.09 are unconstitutional unless narrowly tailored to further a compelling interest. *In re Young*, 122 Wn.2d 1, 26, 857 P.2d 989 (1993) *superseded on other grounds as recognized by In re Det. of Thorell*, 149 Wn.2d 724, 746, 72 P.3d 708 (2003); *In re Albrecht*, 147 Wn.2d 1, 7, 51 P.3d 73 (2002).

The constitutionality of RCW 71.09 rests in part on the existence of the step-down facility at the SCTF. But the current statutory scheme permits the SCC administration to deny access to the SCTF based on unwritten rules, even when the SCC's internal review recommends transfer.[1] The SCC administration's role as exclusive gatekeeper to the

[1] For the first time on appeal, the state takes issue with this factual assertion. Brief of Respondent, pp. 28-29. Respondent argues that Mr. Pettis did not present evidence that he'd asked the SCC administration to transfer him to the SCTF. Brief of Respondent, pp. 28-29. But the state's attorney agreed at the hearing that the SCC administration had refused to send Mr. Pettis to the SCTF. RP 1337. The deposition of Dr. Cathi Harris (of the SCC senior clinical team) explicitly confirms that Mr. Pettis had been denied transfer to the SCTF because he was not in formal treatment. CP 283.

SCTF violates substantive due process because it permits total confinement based on arbitrary government action. *Foucha v. Louisiana*, 504 U.S. 71, 80, 112 S.Ct. 1780, 118 L.Ed.2d 437 (1992). Likewise, the statutory scheme is not narrowly tailored to achieve its purpose because it allows for total confinement even when public safety and treatment can be achieved at the less-restrictive SCTF. *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 813, 120 S.Ct. 1878, 146 L.Ed.2d 865 (2000); *Washington v. Glucksberg*, 521 U.S. 702, 721, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997).

The statutory provisions related to LRAs create a substantive due process liberty interest in conditional release to an LRA when appropriate. *In re Det. of Bergen*, 146 Wn. App. 515, 527, 195 P.3d 529 (2008) (holding that the statutory procedures governing LRAs are subject to strict scrutiny). Even so, in the face of this holding, the state relies on *Bergen* to argue that a person committed at the SCC has no liberty interest in an LRA. Brief of Respondent, pp. 35-36.

Contrary to Respondent's argument, the *Bergen* court explicitly found that the statutory procedure establishes such a liberty interest:

Respondent also argues that there is no evidence of the unwritten policy denying admission to the SCTF for anyone at the SCC who is not engaged in formal treatment. Brief of Respondent, pp. 28-29. But Dr. Harris stated that it is against SCC policy to agree to SCTF transfer for someone who is not currently engaged in treatment. CP 283. All of the facts necessary to adjudicate Mr. Pettis's claim are in the record.

> [T]he statutory provisions that allow an SVP to petition for an LRA dictate a particular outcome based on particular facts and therefore create a liberty interest in a conditional release to an LRA.

Bergen, 146 Wn. App. at 527. Respondent misconstrues the holding of *Bergen*.[2]

Two state experts and one defense expert agreed that placement at the SCTF could protect the community and was in Mr. Pettis's best interest.[3] CP 404, 425. Accordingly, the state no longer had a compelling interest in holding Mr. Pettis in complete confinement at the SCC. Still, the SCC administration refused to transfer Mr. Pettis to the SCTF. CP 283. Unlike the best interest standard upheld in *Bergen*, the SCC administration's gatekeeping function – refusing transfer even when experts agree that placement at the SCTF is appropriate -- is arbitrary and is not narrowly-tailored.

The Supreme Court's *McCuistion* decision does not compel a different result. *State v. McCuistion*, 174 Wn.2d 369, 385, 275 P.3d 1092

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[2] *Bergen* does note that there is no *inherent* liberty interest in an LRA created directly by the due process clause of its own force. *Bergen*, 146 Wn. App. at 525.

[3] In *Bergen*, by contrast, the state's experts opined that an LRA was *not* in Bergen's best interest. *Id.* at 522.The *Bergen* court found the "best interest" requirement consistent with strict scrutiny because it relates directly to the person's dangerousness and mental illness. *Bergen*, 146 Wn. App. at 529. The court also found "best interest" requirement narrowly tailored to meet the state's interest in appropriate treatment. *Id.*

(2012) *cert. denied,* 133 S.Ct. 1460 (U.S. 2013).[4] The state relies on *McCuistion* to argue that the scheme at RCW 71.09 complies with due process because it provides for annual review of each person committed at the SCC. Brief of Respondent, p. 34.

Respondent is incorrect for two reasons. First, the SCC administration's role as exclusive gatekeeper was not at issue in *McCuistion*. 174 Wn.2d 369. Second, the annual review process is meaningless if the SCC administration is free to ignore the evaluator's recommendations based on arbitrary considerations and unwritten rules.

Here, Mr. Pettis's constitutionally-mandated annual review recommended transfer to the SCTF. CP 425. But the statutes did not provide him a mechanism to enforce that determination in the face of the SCC administration's refusal to transfer him. The state's reliance on *McCuistion* is misplaced.

Dr. Phenix, the state's expert at Mr. Pettis's trial opined that placement at the SCTF was appropriate. CP 404. The defense expert did not think he needed to be confined to the SCC. CP 331. Shortly before trial, the annual report also found that he could be adequately treated at the SCTF. CP 425. No other expert examined Mr. Pettis during the review

[4] In *McCuistion*, the Supreme Court upheld RCW 71.09 against a due process challenge, noting that substantive due process requires periodic review of each committed person's case.

period. Even so, the state takes issue with Mr. Pettis's assertion that the experts agreed that his transfer to the SCTF would be proper.[5] Brief of Respondent, p. 27. Respondent points out that Mr. Pettis's *previous* annual evaluations did not all recommend an LRA. Brief of Respondent, p. 27. But outdated evaluations are not relevant here; all current evaluations agreed that Mr. Pettis could be safely treated at the SCTF at the time of the hearing. Respondent's factual claim lacks merit.[6]

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[5] The state also points out that the SCC administration did not agree that Mr. Pettis should be transferred to the SCTF. Brief of Respondent, p. 28, 30. But that is exactly the issue of which Mr. Pettis complains. The statutory annual review process is in place to comply with substantive due process and to ensure that people committed at the SCC are not held in total confinement beyond the time that it is necessary. *McCuistion*, 174 Wn.2d at 385. Insofar as the current statutory scheme permits the SCC administration to continue to completely confine someone after the annual review process (and every other up-to-date evaluation) has determined that such confinement is unnecessary, that scheme cannot survive strict scrutiny.

[6] The state also complains that Mr. Pettis did not comply with the statutory procedures for requesting an LRA by filing a petition presenting prima facie evidence that he meets the elements at RCW 71.09.092. Brief of Respondent, pp. 21-27. But Mr. Pettis was unable to meet the elements at RCW 71.09.092 because the SCC administration would not agree to house him at the SCTF. Accordingly, Mr. Pettis challenges the statutory procedures with which he was not able to comply.

Respondent points out that the state was not offered additional time for discovery and that DSHS did not have the chance to respond to Mr. Pettis's motion for transfer to the SCTF. But the state did not ask for a continuance at the hearing on Mr. Pettis's motion. RP 1302-63. Furthermore, two state experts had already evaluated Mr. Pettis. Both recommended transfer to the SCTF. Respondent does not explain what additional discovery was necessary.

Finally, the state notes that Mr. Pettis cannot point to any statute authorizing the court to compel the SCTF to accept him. Brief of Respondent, p. 37. That is exactly the statutory gap that Mr. Pettis challenges. The constitutionally-mandated, state-run step-down facility should not be able to pick and choose which eligible people will be admitted. Such a system permits arbitrary governmental action and violates due process. *Foucha*, 504 U.S. at 80.

Finally, the state argues that any unwritten rule limiting transfer to persons engaged in formal treatment is reasonable. Brief of Respondent, p. 31(*citing McCuistion*, 174 Wn.2d at 394). Respondent points out that the goals of RCW 71.09 include encouraging participation in treatment. Brief of Respondent pp. 31-32.

But due process requires narrow tailoring, not reasonableness. *Albrecht*, 147 Wn.2d at 7. Additionally, Mr. Pettis actively engaged in treatment for nine years. RP 1110. He had one of the best treatment portfolios at the SCC. RP 672; CP 64. He was able to use the techniques he had learned in treatment to reduce his deviant arousal significantly. CP 65. Accordingly, all three current evaluators found that Mr. Pettis could be successfully treated at the SCTF. CP 331, 404, 425. This case is not like *McCuistion*, in which the offender refused to participate in formal treatment. *McCuistion*, 174 Wn.2d at 375. The statute's goal of encouraging engagement in treatment had already been accomplished in Mr. Pettis's case.

The SCC administration's role as exclusive gatekeeper to the SCTF violates due process because it permits total confinement based on arbitrary government action. *Foucha*, 504 U.S. at 80. The statutory scheme is not narrowly tailored to meet a compelling state interest. *Glucksberg*, 521 U.S. at 721. This court must reverse the lower court's

denial of Mr. Pettis's motion to be placed at the SCTF. The case must be remanded with instructions to order the SCC to transfer Mr. Pettis to the SCTF.

B. The SCC administration's role as exclusive gatekeeper to the SCTF violates procedural due process as applied to Mr. Pettis because it does not provide a process through which he can seek review of his total confinement.

Respondent does not respond to Mr. Pettis's procedural due process claim. Brief of Respondent, pp. 17-37. The state's failure to address the issue can be treated as a concession. *In re Pullman*, 167 Wn.2d 205, 212 n.4, 218 P.3d 913 (2009).

II. THE COURT ERRED BY ADMITTING EVIDENCE BASED ON THE SRA-FV, WHICH IS NOT RELIABLE ENOUGH TO PASS THE *FRYE* TEST.

Expert testimony applying novel methodology is inadmissible under the *Frye* test unless (1) the scientific principle is generally accepted in the relevant scientific community and (2) the method of applying that principle is "capable of producing reliable results." *Lake Chelan Shores Homeowners Ass'n v. St. Paul Fire & Marine Ins. Co.*, 176 Wn. App. 168, 175, 313 P.3d 408 (2013) *review denied,* 179 Wn.2d 1019, 318 P.3d 280 (2014).

Here, the trial court improperly permitted the state's expert to testify based on the SRA-FV: a tool which is not generally accepted by the

relevant scientific community and is not "capable of producing reliable results." *Lake Chelan Shores*, 176 Wn. App. at 175.

The inter-rater reliability of the SRA-FV is 0.55. RP 338-39, 351. There is only a 55% chance that two experts would come to the same score using the instrument. RP 338-39, 351. When Mr. Pettis asked the state's expert about that reliability score, she said: "You know, .55 is, you know, modest. It's -- you know, you hope that, in time, the inter-rater reliability, as more studies are done, would improve." RP 338.

Because the SRA-FV has only a 0.55 reliability rating, it is not "capable of producing reliable results." *Lake Chelan Shores*, 176 Wn. App. at 175. The state argues that the SRA-FV has been "fairly widely accepted" in the relevant scientific community but does not address the second prong of the *Frye* test. Brief of Respondent, pp. 37-39. The state's failure to argue the issue can be treated as a concession. *Pullman*, 167 Wn.2d at 212 n.4.

The state's expert relied on the SRA-FV to place Mr. Pettis into the "high risk / high needs" group for her analysis with another actuarial instrument. RP 398-401. Her placement of Mr. Pettis in that group was a primary area of disagreement among the experts. *See* RP 834-38. Still, the state argues that the admission of the SRA-FV evidence did not prejudice Mr. Pettis because the state's expert testified that she would

have placed him in the high risk / high needs group even without the instrument. Brief of Respondent, pp. 38-39. But the expert's reliance on the SRA-FV lent technical cachet -- based on an unreliable "scientific" measure – to her assessment regarding a contested issue. There is a reasonable probability that the court's improper admission of the SRA-FV evidence affected the outcome of Mr. Pettis's trial. *State v. Acosta*, 123 Wn. App. 424, 438, 98 P.3d 503 (2004).

The court erred by admitting extensive evidence based on a novel and unreliable instrument that does not pass the *Frye* test. *Lake Chelan Shores*, 176 Wn. App. at 175. Mr. Pettis's commitment must be reversed and the case remanded for a new trial.

III. THE COURT IMPERMISSIBLY COMMENTED ON THE EVIDENCE IN VIOLATION OF WASH. CONST. ART. IV, § 16.

Mr. Pettis relies on the argument set forth in his Opening Brief.

IV. MR. PETTIS WAS DENIED HIS STATUTORY AND DUE PROCESS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

Mr. Pettis relies on the argument in his Opening Brief.

V. THE STATE'S RELIANCE ON IRRELEVANT AND MISLEADING EVIDENCE PREJUDICED MR. PETTIS.

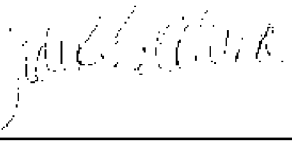
Mr. Pettis relies on the argument set forth in his Opening Brief.

CONCLUSION

For the reasons set forth above and in Mr. Pettis's Opening Brief, Mr. Pettis's commitment order must be vacated and his case must be remanded for a new trial.

Respectfully submitted on October 22, 2014,

BACKLUND AND MISTRY



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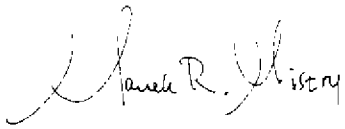

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I filed the Appellant's Reply Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

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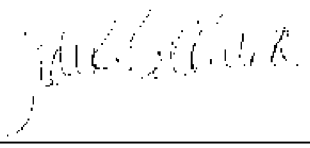

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