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NO. 59808-2-I

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**COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON**

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In re the Detention of:  
CHARLES DECUIR,

Appellant,

v.

THE STATE OF WASHINGTON,

Respondent.

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**SUPPLEMENTAL BRIEF OF RESPONDENT**

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## I. SUPPLEMENTAL ARGUMENT

This Court has asked the parties to submit supplemental briefing in the case, addressing the impact of the Washington State Supreme Court's recent decision in *In re the Detention of John L. Strand*, 167 Wn.2d 180, 217 P.3d 1159 (2009) to DeCuir's case.

In *Strand*, the court soundly rejected John Strand's argument that an SVP litigant has a statutory or constitutional right to counsel at a mental health evaluation performed prior to the initiation of SVP proceedings. *Id.* 167 Wn. 2d at 180. Strand, like DeCuir, had agreed to participate in an interview with the State's psychologist prior to the State's filing of an SVP petition. *Id.* 167 Wn. 2d at 185. Strand was informed that the interview was not confidential and that the information he volunteered to her could be used against him in an SVP commitment proceeding. *Id.* Strand agreed to the evaluation, and signed a consent form. *Id.* After probable cause was established, Strand consented to a second interview, this time with counsel present. *Id.* On appeal, Strand argued, *inter alia*, that the State had no authority to examine him until after the probable cause hearing. *Id.* at 186. The court of appeals rejected this argument and affirmed his commitment. He then sought review by the Supreme Court, which accepted review on the issue of "whether a

mental examination of Strand as a potential SVP is authorized prior to a judicial finding of probable cause." *Id.*<sup>1</sup>

*Strand* resolves and controls this case. DeCuir, in his supplemental brief, attempts not so much to distinguish *Strand* but to reargue it. This attempt fails. In all pertinent regards, DeCuir's case is indistinguishable from that of Strand. As was the case with Strand, DeCuir agreed to a pre-trial interview with the state's expert, Dr. Robert Wheeler. *Strand* at 185; CP at 300. As was the case with Strand, DeCuir was informed by the evaluating psychologist "that the interview was not confidential and that the information he volunteered to her could be used against him in an SVP commitment proceeding." *Strand* at 185; CP at 300, 303-04. As was the case with Strand, DeCuir "agreed to the evaluation and signed a consent form." *Strand* at 185; CP at 300, 303-04.

DeCuir attempts to distinguish his case by arguing that, in *Strand*, "the State followed the procedures mandated in Ch.71.09," whereas in his case those procedures "were ignored." App. Supp Br. at 1-2. This is a puzzling argument in light of the fact that the central contention in *Strand* was that the State had **not** followed statutory procedures: "Strand claims that his due process rights were violated when the State asked Dr.

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<sup>1</sup> The court also accepted review on a second issue --the voluntariness of Strand's statements to the State's psychologist-- unrelated to this appeal.

Longwell to examine him prior to the commencement of SVP proceedings, **an examination he believes was unauthorized by the SVP statute.**" 167 Wn. 2d at 187 (emphasis added). The distinction between the two cases, he seems to argue, is that the evaluation of DeCuir was really not the "limited investigatory exam" (App. Supp. Br. at 4) provided for in RCW 71.09.025 at all. Rather, "DeCuir was given a complete RCW 71.09.040(4) psychological examination without counsel" in violation of his rights under both the statute and the constitution. App. Supp. Br. at 1, 3. In support of this contention, DeCuir points to the fact that the state's expert in *Strand* conducted a second, "presumably more extensive" (App. Supp. Br. at 1) evaluation, whereas in his case, Dr. Wheeler's pre-filing evaluation was so thorough that "it left nothing to be done" during a second exam. He argues, as well, that the trial court was of the same opinion, asserting that "[t]he court found no further evaluation was necessary to fulfill the requirements of RCW 71.09.040(4)." App. Supp. Br at 5.

This argument both misrepresents the record and misapprehends the central holdings of *Strand*. First, it is not clear upon what DeCuir's presumption that the second interview in *Strand* was "more extensive" than the first. There is nothing in the *Strand* opinion that discusses the relative length or scope of the two interviews, nor does the court suggest

that such a fact is of any relevance. There is nothing in *Strand* that in any way limits the scope of the pre-filing evaluation or otherwise supports DeCuir's contention that Dr. Wheeler's evaluation was "too thorough."

Nor is it correct to suggest either that the trial court determined that no further interview was necessary or Dr. Wheeler did not wish to conduct one. After the probable cause hearing, the trial court entered into a brief exchange with DeCuir, informing him that he was "going to be subject to interviews with the State's psychologist to help them prepare for trial," and asked if he understood. 2/5/05 RP at 26. Nor did the written Order foreclose the possibility of further interviews with DeCuir, stating that "an evaluation of the Respondent...has already been conducted. However, if a personal interview and testing of the Respondent was not done as part of that evaluation, or should the evaluation become stale prior to trial, the Respondent may be required, consistent with RCW 71.09.040(4), to submit to supplemental evaluation procedures." CP at 157.

Although Dr. Wheeler did not conduct a second interview, he testified at trial that he "would have liked to have met with Mr. DeCuir" in order "to give him every opportunity to provide information that he

thought was relevant." 6RP at 686. He had, however, received information that DeCuir had declined a second interview. 6RP at 681.<sup>2</sup>

DeCuir also raises several new arguments, asserting that the pre-filing interview conducted by Dr. Wheeler cannot properly be considered an interview conducted pursuant to RCW 71.09.025(1)(b)(v) because 1) the ESRC lost its "authority" after its referral of the case to the prosecutor; 2) the review of records done by the ESRC in order to determine whether the case should be referred for prosecution is in fact the only "mental health records review" contemplated by the statute; and 3) Dr. Wheeler's report based on his pre-filing interview cannot be considered "current" because it was conducted after the ESRC had referred the case to the prosecutor. App. Supp. Br. at 7-8.

None of these arguments were made in Strand's Opening Brief, and as such are not properly made here. *See* Respondent's Motion to Strike.<sup>3</sup>

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<sup>2</sup> DeCuir suggests that the record does not support the State's claim (Resp. Br. at 22) that DeCuir's counsel indicated DeCuir would not cooperate with a further interview. App. Supp. Br at 2. It is not clear in what regard this does not accurately reflect the record. At trial, Dr. Wheeler, when asked whether he had interviewed DeCuir a second time before writing his 2007 report, testified that DeCuir "declined to be interviewed" (6RP at 676, 681) and indicated that he would like to have met with DeCuir. 6RP at 686. Trial counsel, objecting to this characterization, pursued this point, establishing that Dr. Wheeler had received this information not from DeCuir, but from the State's attorney and as such, did not "know if Mr. DeCuir refused or if Mr. DeCuir's lawyer said I'm not going to let it happen." 6RP at 686. As such, counsel asserted, Dr. Wheeler could not completely accurately "testify that Mr. DeCuir refused." *Id.* Dr. Wheeler conceded this point, indicating that, because he was ethically prohibited from contacting DeCuir directly, he was limited to contact through third parties, and that he "frankly...would have assumed" that DeCuir's refusal was based on advice of counsel. 6RP at 686.

The purpose of the supplemental briefs by the parties is to provide an opportunity to discuss the impact of *Strand*, not to offer the parties an opportunity to raise arguments not raised in the initial briefs.

Moreover, even if this Court were to consider these arguments, they are meritless. *Strand* held clearly that the State does not violate due process or the statute when it conducts a psychological evaluation, without counsel, prior to a finding of probable cause. There is nothing in the *Strand* decision suggesting the particular moment in time at which that evaluation must be conducted. At issue in *Strand*, as the court noted, "is whether the legislature intended the term 'current,' in the context of providing '[a] current mental health evaluation or mental health records review,' to authorize a new evaluation or merely the forwarding of the last available evaluation." 167 Wn. 2d at 188. A "comprehensive reading of chapter 71.09 RCW," the court determined, "shows that the plain meaning of 'current' **must include a new evaluation.**" *Id.* The obvious purpose of providing this "current evaluation" is to provide the prosecuting agency with the best possible information upon which to base a filing decision.

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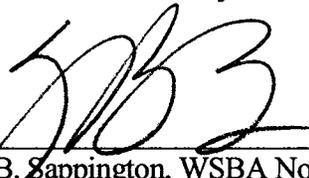
<sup>3</sup> The State's Motion to Strike will be filed on the date this Supplemental Brief is filed.

Whether this "new evaluation" is provided before or after the sending of other materials to the prosecuting agency is irrelevant.<sup>4</sup>

## II. CONCLUSION

For the foregoing reasons and the reasons cited in the State's Opening Brief, the State asks this Court to affirm Charles DeCuir's commitment as a sexually violent predator.

RESPECTFULLY SUBMITTED this 28th day of January, 2010.



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<sup>4</sup> As set forth in its Motion to Strike, the State asks that, if the Court considers these new arguments, it provide the State with an opportunity to respond at more length.