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Court of Appeals  
Division I  
State of Washington

Nos. 69731-5-I  
71131-8-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

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IN RE THE DETENTION OF:

VICTOR CANNON

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SUPPLEMENTAL BRIEF ADDRESSING *In re Meirhofer*

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## A. SUMMARY OF PROCEDURAL HISTORY

In these consolidated cases, Victor Cannon challenges the 2012 and 2013 denials of a full evidentiary hearing following show-cause hearings pursuant to RCW 71.09.090.

Mr. Cannon was originally committed after a trial at which the State's expert opined that actuarial risk assessment tools showed his risk of reoffense was greater than 50%. *See In re Detention of Cannon*, 2009 WL 2230268 (unpublished, citing for facts). In his 2012 annual review, however, the State's expert noted that the actuarial risk assessment tool measured Mr. Cannon's current risk at 31.2% to 41.9%. *See No. 697315 MDR*, Appendix A at 6. At the show cause hearing, the court asked the State, "is there anything in Dr. Allison's report, upon which the State relies exclusively for its showing of a prima facie case, that establishes that in fact the respondent here has a greater than 50 percent likelihood of reoffending?" *No. 697315 MDR* Appendix D at 7. The court noted that the Static 99 score dropped, putting the risk of recidivism at 31.2%-41.9%. The judge said, "isn't that the only evidence in Dr. Allison's report of a prediction of future risk of recidivism that qualifies under the sexually violent predator definition?" *No. 697315 MDR App. D* at 8.

The State responded, "what's important to not lose sight of in this type of case is that the jury has already returned a verdict that he is a

sexually violent predator.” No. 697315 MDR App. D at 8-9. “And so to go back and make the State’s burden to reprove all of the facts that were already proven at the jury trial is not what this is about.” No. 697315

MDR App. D at 9. The judge said:

I realize what the purpose of a show cause hearing is, counsel. It’s not to require the State to retry the case. But it does require the State to establish a prima facie case that the defendant still meets the definition of a sexually violent predator...

No. 697315 MDR App. D at 9. The court noted that other than the Static 99, the only evidence of dangerousness was Mr. Cannon’s prior offenses.

No. 697315 MDR App. D at 9. The court nevertheless concluded that “reading the report in total, not simply looking at the Static 99 as an actuarial instrument as the sole predictor of future dangerousness, the court does conclude that the State has met its burden of proof on that prong of the standard to be applied at the show cause hearing.” No. 697315 MDR App. D at 18. The court denied an evidentiary hearing and terminated the annual review without further proceedings. No. 697315 MDR Appendix E.

Mr. Cannon moved for discretionary review of the order denying an evidentiary hearing on the issue of whether he continues to have a mental abnormality that makes it more likely than not he will sexually reoffend if not confined to a secure facility. That motion and a

consolidated PRP were still pending when Dr. Allison submitted the next year's annual review. No. 71131-8-I MDR Appendix 1.

The 2013 report was largely copied and pasted from the 2012 report – indeed, Dr. Allison forgot to change the header, which says “March 2011-March 2012.” *Compare id. to* No. 697315 MDR App. A. Some of the report was not copied from Mr. Cannon's prior review; it was copied from another inmate's annual review. No. 71131-8-I MDR App. 1 at 1 (“the purpose of this report is to evaluate whether *Mr. Parsons* continues to meet the definition of a sexually violent predator ...”). Notwithstanding the requirement that the State show an inmate is *currently* dangerous in order to continue to confine him without trial, the risk assessment section of the 2013 report states: “This section is verbatim from his 2011 annual review.” No. 71131-8-I MDR App. 1 at 3. As in the previous year's report, Dr. Allison noted that according to the Static-99, Mr. Cannon's predicted recidivism rate is 31.2% within five years and 41.9% within ten years. No. 71131-8-I MDR App. 1 at 4.

Despite the actuarial assessment showing Mr. Cannon is well below 50% likely to reoffend, Dr. Allison opined that Mr. Cannon continues to meet the criteria for confinement. Dr. Allison noted that Mr. Cannon has not participated in treatment and, although he receives excellent reviews for his work as a custodian, he has also fought with

other inmates. No. 71131-8-I MDR App. 1 at 3, 4. Dr. Allison employed the wrong standard for risk, stating, “[w]hen one takes into consideration Mr. Cannon’s data including his historical information, the likelihood that he might reoffend if given the opportunity to live in the community *cannot be ruled out.*” No. 71131-8-I MDR App. 1 at 4 (emphasis added).

At the show cause hearing pursuant to RCW 71.09.090, Mr. Cannon pointed out that the annual review, on which the State exclusively relied, did not satisfy the State’s prima facie burden of showing Mr. Cannon continues to meet the criteria for confinement because it consisted of conclusory statements unsupported by sufficient objective facts. No. 71131-8-I MDR Appendix 2; Appendix 3. Mr. Cannon’s attorney noted that the Supreme Court upheld the 2005 amendments to RCW ch. 71.09 only because it assumed there would be a meaningful annual review process. App. 3 at 6-7; *In re Detention of McCuiston*, 174 Wn.2d 369, 380-81, 275 P.3d 1092 (2012), *cert. denied*, 133 S.Ct. 1460 (2013). The review process is not meaningful if it is “a cut and paste job.” App. 3 at 6. Furthermore, because Dr. Allison said only that the possibility of reoffense “cannot be ruled out,” the report was insufficient to show Mr. Cannon is more likely than not to reoffend. No. 71131-8-I MDR App. 3 at 10.

The State’s attorney acknowledged that Dr. Allison’s report was “minimal.” App. 3 at 13. The State argued, though, that Mr. Cannon’s

continued confinement without trial was proper because he refuses to participate in treatment and staff describe him as “unpredictable.” No. 71131-8-I MDR App. 3 at 14-15.

The trial court found the State satisfied its prima facie burden and terminated the annual review without further proceedings. No. 71131-8-I MDR Appendix 4. The judge relied in large part on Dr. Allison’s statement that “when one takes into consideration Mr. Cannon’s data including his historical information, the likelihood that he might reoffend if given the opportunity to live in the community cannot be ruled out.” No. 71131-8-I MDR App. 3 at 18.

Mr. Cannon again moved for discretionary review, and moved to consolidate the case with the prior year’s appeal. This Court denied the motion to consolidate. In the meantime, this Court stayed appeal No. 697315 pending the Supreme Court’s decision in *In re Meirhofer*, 182 Wn.2d 632, 343 P.3d 731 (2015). Following argument on No. 71131-8-I, this Court consolidated the cases.

The Supreme Court decided *Meirhofer* on February 12, 2015. On July 28, this Court lifted the stay in Mr. Cannon’s cases, and ordered supplemental briefing addressing “the next steps for these consolidated matters and the effect, if any, of the decision in *Meirhofer*.”

B. SUPPLEMENTAL ARGUMENT

***Meirhofer* is inapposite; this Court should grant review and remand for an evidentiary hearing because the State failed to meet its burden to show Mr. Cannon continues to meet the criteria for involuntary commitment.**

The next step in these consolidated cases remains the same: to remand for a full evidentiary hearing on whether Mr. Cannon continues to meet the criteria for confinement.

*Meirhofer* is not on point. There, the detainee's main argument was that an evidentiary hearing was required because his primary diagnosis had changed from pedophilia to hebephilia. *Meirhofer*, 182 Wn.2d at 644. The Court held that the change in diagnosis was insufficient to require a new trial, in part because the State presented prima facie proof that Mr. Meirhofer still suffered from paraphilia NOS nonconsent and a personality disorder. *Id.* at 645. As Mr. Cannon does not challenge the State's proof of a mental abnormality or personality disorder, this discussion in *Meirhofer* is irrelevant.

The Supreme Court also held that in Mr. Meirhofer's case, the State met its burden to show the detainee was more likely than not to reoffend if not confined. *Meirhofer*, 182 Wn.2d at 645. Although the actuarial instruments predicted only a 30% risk of reoffense within 10

years, the State's expert opined that Mr. Meirhofer was likely to reoffend based on dynamic risk factors and clinical judgment. *Id.* at 646.

Mr. Cannon also challenges the State's proof of risk, but whereas the annual review in *Meirhofer* was sufficient, the State's report here is clearly deficient. The annual review, on which the State exclusively relied, misstates the legal standard for continuing confinement. Dr. Allison opined that even though actuarial tools show Mr. Cannon is at a low risk to reoffend, he nevertheless continues to satisfy the criteria for commitment because: "When one takes into consideration Mr. Cannon's data including his historical information, the likelihood that he might reoffend if given the opportunity to live in the community cannot be ruled out." No. 71131-8-I App. 1 at 4. The trial court relied on this statement in denying an evidentiary hearing. No. 71131-8-I App. 3 at 18.

The trial court erred, because it is not enough that the possibility of reoffense "cannot be ruled out." A person is not a "sexually violent predator" unless he has a mental abnormality or personality disorder that makes him *more likely than not* to reoffend if not confined. RCW 71.09.020 (7), (18). In other words, there must be a greater than 50% likelihood of reoffense. *In re Detention of Brooks*, 145 Wn.2d 275, 295-96, 36 P.3d 1034 (2001), *overruled on other grounds by In re Detention of Thorell*, 149 Wn.2d 724, 72 P.3d 708 (2003). "The fact to be proved with

respect to the SVP statute is expressed in terms of a statistical probability.” *Brooks*, 145 Wn.2d at 296. The question is “not whether the defendant will reoffend, but whether the probability of the defendant’s reoffending exceeds 50 percent.” *Id.* at 298; *see also In re Detention of Moore*, 167 Wn.2d 113, 125-26, 216 P.3d 1015 (2009) (sufficient evidence of dangerousness where actuarial tools predicted 52-89% likelihood of reoffense, and even detainee’s own expert agreed he was more likely than not to reoffend).

Dr. Allison not only applied the wrong legal standard, he also misstated key facts in multiple places in the annual review – presumably because, as trial counsel indicated, the report was “a cut and paste job.” No. 71131-8-I MDR App. 3 at 6. The first page of the report states that the evaluation applies to a “Mr. Parsons.” No. 71131-8-I MDR App. 1 at 1. And another paragraph relies on Mr. Cannon’s “high Static-99R score” to conclude he continues to meet the criteria for confinement. No. 71131-8-I MDR App. 1 at 4. But this paragraph was obviously copied from an earlier annual review, because Mr. Cannon’s Static-99 score is no longer high. His current Static-99R score places him at well below a 50% risk to reoffend, such that at best Dr. Allison can conclude the possibility of reoffense “cannot be ruled out.” *Id.* This is insufficient to support

continued confinement without an evidentiary hearing. *Meirhofer* is thus inapposite, and this Court should reverse and remand for a full trial.

Finally, Mr. Cannon made other arguments not at issue in *Meirhofer*: (1) that Dr. Allison, who wrote the annual review, did not qualify as an expert; and (2) that the prima facie standard is insufficient to satisfy due process and equal protection. For these additional reasons, this Court should reverse.<sup>1</sup>

C. CONCLUSION

For the reasons set forth above and in his motions for discretionary review and personal restraint petition, Victor Cannon asks this Court to grant review and remand for an evidentiary hearing.

DATED this 18th day of August, 2015.

Respectfully submitted,

/s Lila J. Silverstein  
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Washington Appellate Project  
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<sup>1</sup> The *Meirhofer* Court also held that “there are no special rules prohibiting those committed under the SVP act from filing otherwise meritorious personal restraint petitions.” 182 Wn.2d at 648. Although Mr. Meirhofer was not entitled to relief because he failed to show RCW 71.09 was inadequate in his case, this Court should grant Mr. Cannon’s PRP if it determines RCW 71.09.090 does not permit the full trial that is constitutionally required.

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DIVISION ONE**

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IN RE THE DETENTION OF	)	
	)	
VICTOR CANNON,	)	NO. 69731-5-I
	)	
APPELLANT.	)	
	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 18<sup>TH</sup> DAY OF AUGUST, 2015, I CAUSED THE ORIGINAL **SUPPLEMENTAL BRIEF** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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[X] VICTOR CANNON SPECIAL COMMITMENT CENTER PO BOX 881000 STEILACOOM, WA 98388	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

**SIGNED** IN SEATTLE, WASHINGTON THIS 18<sup>TH</sup> DAY OF AUGUST, 2015.

X \_\_\_\_\_ 

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