

NO. 36273-2-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

IN RE THE DETENTION OF C.D.

STATE OF WASHINGTON,
Respondent,

v.

C.D.
Appellant.

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

The Honorable Leonard W. Costello, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The court's failure to require the state to plead and prove a recent overt act violated appellant's right to due process.

2. Admission of opinion evidence which relied on the expert's evaluation of the credibility of other witnesses invaded the province of the jury.

3. The state failed to prove the elements necessary for commitment beyond a reasonable doubt.

Issues pertaining to assignments of error

1. Appellant was held in custody beyond his earned early release date due to the application of a DOC policy precluding final decision on a release plan submitted by an offender being considered for commitment under RCW 71.09. The state subsequently filed a commitment petition. Where, at the time the petition was filed, appellant was not in custody for a sexually violent offense or an overt act, but instead was incarcerated in violation of due process, should the state be required to plead and prove a recent overt act in order to commit appellant?

2. The state's expert was permitted to testify that she diagnosed appellant with pedophilia, based solely on allegations by the state's witnesses. There was no physical or corroborative evidence to

support the allegations, and appellant denied them. Where the expert's opinion was dependent on her perception of the other witnesses' truthfulness, did admission of that opinion usurp the exclusive function of the jury to weigh the evidence and determine credibility?

3. Where the evidence was insufficient to prove appellant is currently dangerous or likely to commit predatory acts, and where there is no scientific basis for the expert's opinion regarding likelihood of reoffense, is reversal required?

B. STATEMENT OF THE CASE

1. Deprivation of Earned Early Release Credits

In 2001, C.D. was convicted of indecent liberties with forcible compulsion and sentenced to 66 months confinement. CP 701. On February, 15, 2005, the Department of Corrections (DOC) End of Sentence Review Committee reviewed C.D. for possible commitment under RCW 71.09. The committee recommended that C.D. be classified as a Level III offender and referred his case to the Sexually Violent Predator Subcommittee. 3RP¹ 74-75.

¹ The Verbatim Report of Proceedings is contained in 14 consecutively-paginated volumes, designated as follows: 1RP—2/26/07; 2RP—3/5/07; 3RP—3/14/07; 4RP—4/16/07; 5RP—4/17/07; 6RP—4/18/07; 7RP—4/19/07; 8RP—4/20/07; 9RP—4/26/07; 10RP—4/27/07; 11RP—4/30/07; 12RP—5/1/07; 13RP—5/2/07; 14RP—5/3/07.

Based on his good time credits, C.D. was assigned an earned early release date of May 23, 2005. 3RP 76. In March 2005, C.D. proposed a release plan under which he would reside with his wife. 3RP 77. The plan was submitted to a community corrections officer for investigation on March 18, 2005. 3RP 78.

On April 12, 2005, the investigating officer approved C.D.'s release plan. Three days later, Kimberly Acker, the DOC End of Sentence Review and SVP program manager, revoked the approval, finding it inconsistent with DOC's policies regarding offenders being considered for SVP commitment. 3RP 81-83. Acker resubmitted C.D.'s release plan, without any changes, restarting the investigation process on April 15, 2005. 3RP 85, 105. The plan was submitted to a different community corrections officer for investigation. 3RP 110.

Although DOC policy requires that the investigation be completed in 30 days, C.D.'s plan was not approved for the second time until June 1, 2005. 3RP 88, 110. Local law enforcement was notified of C.D.'s pending release on June 2, 2005, setting C.D.'s release date at July 7, 2005.² 3RP 89.

² RCW 9.94A.612 requires DOC to notify local law enforcement no less than 30 days before a sex offender is released into the community. DOC policy sets the required notification period at 35 days. 3RP 88-89.

As part of the SVP review process, DOC had contracted with Dr. Amy Phenix to conduct a forensic psychological evaluation. DOC received that evaluation on June 24, 2005. 3RP 90. In it Phenix opined that C.D. met the criteria for commitment under RCW 71.09. Id. The state filed a petition to have C.D. involuntarily committed on July 6, 2005, 44 days after C.D.'s earned early release date. CP 84.

Prior to trial on the commitment petition, C.D. moved to require the state to prove a recent overt act. CP 109-21. He argued that his continued detention after his earned early release date violated due process. Although he was in custody when the petition was filed, he was no longer incarcerated for a sexually violent offense as required to excuse the state from proving a recent overt act as one of the criteria for commitment. 1RP 28-29. The trial court was initially persuaded that if C.D. was held unlawfully past his early release date, the state should be required to prove a recent overt act. 1RP 42, 55. It ultimately ruled, however, that the continued detention was not unlawful and thus there was no violation of due process to remedy. CP 227-28. C.D. sought discretionary review, which this Court denied, finding C.D. had not shown probable error. CP 261-64.

2. The Commitment Trial

The case proceeded to jury trial in Kitsap County Superior Court before the Honorable Leonard W. Costello. C.D. was 73 years old at the time of the trial. He retired from the Air Force as a Colonel in 1985, after a 32-year career as a fighter pilot. CP 632-33.

At the trial, the state presented testimony from six women who claimed C.D. had molested them or made unwelcome sexual advances: Deborah Lucas, Kimberly Miller, Piper O'Hanlon, Kindra Miller, Michelle Spivey, and Sarah Lockhart.

a. **Deborah Lucas**

Deborah Lucas testified that when she was eight years old³, her father was in the Air Force, stationed in Spain. Her family became very close friends with C.D.'s family, who lived on the same base. 7RP 259. Lucas testified she often spent the night with C.D.'s youngest daughter, Karen, and that C.D. sexually molested her every time. 7RP 263-64. She claimed this occurred about 200 times over the course of three years. 7RP 264. No one else was aware of the alleged assaults, despite the fact that Lucas said Karen was sleeping in the same bed with her every time it happened. 7RP 265. Lucas testified that she knew C.D.'s daughters Karen and Dawn shared a room when they lived in Spain, but she did not

³ Deborah Lucas was born November 18, 1962. 7RP 255.

recall Dawn ever being in the room with her and Karen. 7RP 286. She could not say for certain whether Dawn was there; she just did not have an accurate memory regarding that fact. 7RP 288.

C.D.'s daughters, Dawn Kaufman and Karen Casey, testified that they remembered Lucas as part of their group of friends in Spain. 11RP 801; 12RP 827. Dawn and Karen shared a room and a double bed when they lived in Spain, and when friends would sleep over, they usually camped out on the living room floor. 11RP 802; 12RP 828. On occasion, if Dawn spent the night at another friend's house, Lucas and Karen would share Karen's bed, but that was not the usual arrangement. 12RP 829. Dawn and Karen never saw any inappropriate conduct between C.D. and Lucas, and C.D. never did anything inappropriate with them or their siblings. 11RP 803, 817; 12RP 829-30.

C.D.'s family moved to Mississippi in 1973. CP 640. In 1974, Lucas's father retired from the Air Force and moved his family to California, stopping to visit C.D.'s family in Mississippi on the way. CP 641; 7RP 265-66. Lucas testified that C.D. molested her again on that one-night visit. 7RP 267.

In 1977, C.D. was reassigned to Sacramento, California. CP 642; 12RP 831. C.D.'s family became reacquainted with the Lucas family in California, and they saw each other from time to time. CP 643. Lucas

claimed C.D. again molested her in Karen's bed whenever she spent the night with Karen. 7RP 270. Karen testified, however, that on the few occasions Lucas spent the night at her house in California, they slept on the living room floor, and she never saw C.D. having sex with Lucas. 12RP 832.

C.D. was visiting Lucas's father one day⁴ when Lucas came in from the backyard wearing a bikini. CP 645. C.D. tugged on her bikini strap and commented that she looked sexy. CP 645-46. Lucas told her mother about the incident, who then met with C.D. and his wife to discuss it. CP 646. C.D. apologized, and he never saw Lucas again. CP 646.

Lucas testified that she also reported everything that had happened in Spain, and her mother testified that she confronted C.D. with those accusations as well. 7RP 276; 12RP 955, 959. C.D. testified that they only discussed the inappropriate bikini gesture, for which he apologized. 11RP 725. Lucas's mother asked him to seek counseling, and he spoke to the base chaplain about the incident. 11RP 725. The first time Lucas made any formal statement regarding the allegations of molestation was at her deposition for this trial, 26 years after she claimed the abuse began. 7RP 284-85.

⁴ There was no testimony as to the exact date of this encounter. Lucas and her mother both believed Lucas was 13 at the time and that it occurred in 1975 or 1976. 7RP 301; 12RP 954. It was undisputed that the incident took place after C.D.'s family moved to Sacramento, however, which C.D. testified was in 1977. 11RP 778; 12RP 954.

C.D. admitted tugging at Lucas's bikini strap and acknowledged that his gesture was inappropriate. CP 640. He denied all Lucas's other allegations, however, and he was never charged with any crimes based on those allegations. 11RP 726; CP 650.

b. **Kimberly Miller and Piper O'Hanlon**

When C.D. was living in Fair Oaks, California, after separating from his wife, he became acquainted with the Miller family, who lived across the street from him. CP 653-54. The Millers moved to Alaska, and in 1983, they asked C.D. if their 14-year-old daughter Kimberly⁵ could spend the summer at his house while visiting friends in Sacramento. CP 657-58. Kimberly⁶ stayed with C.D. for about six weeks that summer and again for a few days over Christmas vacation. CP 658, 670.

Kimberly testified that she and C.D. had sexual contact a couple of times a week during the summer, usually after they had consumed alcohol, and that the intercourse occurred again when she stayed with C.D. over Christmas. 7RP 313-14, 317. She testified that she was not a willing participant, but she did nothing to resist C.D. when he came to her bedroom to have sex. 7RP 323-24.

⁵ Kimberly Miller was born June 11, 1969. 7RP 306.

⁶ The state presented testimony from Kimberly Miller and her sister Kindra Miller. The witnesses are referred to by their first names in this brief to avoid confusion. No disrespect is intended.

C.D. admitted having sexual intercourse with Kimberly on three occasions, twice during the summer and once in early January 1984. CP 662. The January incident occurred after C.D., Kimberly, and her friend Piper O'Hanlon had consumed alcohol and played a game of strip poker. CP 667. C.D. admitted touching O'Hanlon's breasts before he had sex with Kimberly. CP 668. Both Kimberly and O'Hanlon described the strip poker incident at trial. 7RP 319-20; 8RP 354-57.

C.D. testified that, although the encounters were consensual, he knew his actions were illegal because the girls were underage, and he pleaded guilty to three counts of unlawful intercourse. CP 663-64, 670-71. He served eight months in jail and two years on probation. CP 671; 11RP 762.

c. **Kindra Miller**

Kimberly testified that her younger sister Kindra also made a trip to California during the summer of 1983, and she believed Kindra stayed with C.D. part of the time and with other friends the rest of the time. 7RP 309, 334. Upon further questioning, however, Kimberly could not recall Kindra sleeping in the guest room with her, and she had no recollection of Kindra ever being at C.D.'s house at breakfast time. 7RP 336. C.D. testified that Kindra never stayed at his house. CP 659.

Kindra did not testify in person at trial, but a video taped deposition was played for the jury. 9RP 444. She said in her deposition that she stayed at C.D.'s house a total of a couple of weeks the summer after she moved to Alaska, moving back and forth between his house and other friends' houses. CP 724-25. She was ten or 11 years old at the time.⁷ CP 727. Kindra testified she slept in the guest bedroom with her sister at C.D.'s house. CP 727-28. According to Kindra, C.D. would tickle her while he was wrapped in a towel, exposing his penis. CP 730. She said this happened almost daily when she was there. CP 732. She also claimed that C.D. would fondle her vagina when he tucked her in at night. CP 733. She did not remember any sexual contact with C.D. when her sister Kimberly was there, however. CP 753.

Kindra claimed that she had told her mother about C.D.'s behavior at the time the police were investigating C.D.'s conduct with Kimberly. CP 743. Nonetheless, her mother did nothing to initiate an investigation into her allegations at the time, and Kindra made no official statement until January 2000, 16 years later. CP 744-45.

No charges were filed regarding Kindra's allegations, and C.D. denied them. CP 672. C.D. testified that Kindra never stayed at his

⁷ Kindra Miller was born August 11, 1972. CP 719.

house, he never tickled her while wrapped in a towel, and he never touched her. 11RP 728, 731-32.

d. Michelle Spivey

C.D. met his current wife, Claudine, in 1983. Her daughter, Michele Spivey, was nine or ten years old at the time.⁸ CP 673-74; 8RP 376. C.D.'s relationship with Claudine started becoming serious around 1985, and in 1988 they moved to Washington, along with Spivey and her older brother. CP 676.

C.D. testified that he and Spivey began a sexual relationship in 1991, just before her eighteenth birthday, and it continued off and on until 1997. CP 681, 687. He thought the relationship was inappropriate, because he was involved with Spivey's mother, but it was always consensual. CP 686, 688.

Spivey's story was remarkably different. She claimed that C.D. first had sexual contact with her when she was eight or nine years old, saying he fondled her genital area when he was tucking her in at night. 8RP 377-78. According to Spivey, this kind of abuse continued over the next several years, although she never told anyone about it. 8RP 379-84. When she was 14 years old, she moved with her mother and C.D. to Washington. 8RP 424. Spivey testified that the abuse continued in

⁸ Michele Spivey was born November 5, 1973. 8RP 376.

Washington, and it eventually progressed to sexual intercourse. 8RP 386-87.

Spivey first moved out of C.D.'s home when she was 19 years old, but she moved back in a short time later. 8RP 390-91. She later moved in with a friend but again returned to C.D.'s house. 8RP 408. Spivey also stayed with her grandmother on occasion, but only temporarily, always moving back in with C.D. and her mother. 8RP 409. Spivey testified that each time she returned, the sexual contact resumed, and she was constantly being fondled and molested. 8RP 390. Nonetheless, she was again living with C.D. and her mother when she was 22 to 24 years old. 8RP 412. Spivey testified that during that time, C.D. forced her to have sex with him two to three times a week. 8RP 413-14.

Spivey last had sex with C.D. on December 27, 1997. She testified that on that occasion, C.D. got into bed with her and started fondling her. She pushed him away and struggled with him, but he persisted and they eventually had sex. 8RP 394-95, 403. A few days later, Spivey told a friend about this final encounter and ultimately reported to the police that C.D. had raped her. 8RP 395, 403. Her various descriptions of this incident, under oath, were inconsistent. She had said that the struggle lasted 15 to 30 minutes, 45 to 60 minutes, and five to ten minutes. 8RP 416. When Spivey went to the emergency room at the request of the

police, however, she reported that there had been no struggle. 8RP 405; 11RP 792, 994.

Although C.D. was eventually convicted of indecent liberties with forcible compulsion based on their last encounter, he denied ever forcing Spivey to have sex in any way. CP 701.

f. **Sarah Lockhart**

On New Year's Eve 1992, C.D. had a brief sexual encounter with Spivey's friend Sarah Lockhart, who was 17 years old.⁹ 10RP 685. The contact ended when Claudine, who was in bed with a migraine, called to C.D. to bring her an aspirin. CP 691-93. C.D. testified that he kissed Lockhart, she undressed herself, and he kissed her genital area. CP 692-93. Lockhart testified that when C.D. started touching her, she kind of stammered, trying to get him to stop, and she told him it was not a good idea. 10RP 690. She claimed he took off her pants and started oral sex, and when Claudine interrupted them, she went upstairs and went to bed. 10RP 692.

The next morning, Lockhart was upset with what had happened and told her father, who then spoke to C.D. CP 694-95. Lockhart and her father testified that C.D. told them he had lost control because he had had too much to drink and he had never done anything like that before. 10RP

⁹ Sarah Lockhart was born July 23, 1975. 10RP 680.

695; 11RP 711. C.D. apologized and assured both of them it would never happen again. CP 694; 10RP 695; 11RP 711-12.

g. The state's expert

The state presented testimony from Dr. Amy Phenix, a clinical psychologist hired by the state to conduct a forensic psychological evaluation of C.D. 9RP 446. Phenix reviewed the legal, criminal, and psychiatric records provided by the state in June 2005, before the petition for commitment was filed. Then, in April 2006, she conducted a clinical interview with C.D., during which she talked to C.D. about the allegations by Lucas, Kimberly and Kindra Miller, O'Hanlon, Spivey, and Lockhart. 9RP 454-56, 458.

At trial, Phenix described the statutory criteria for commitment. 9RP 467. She gave the statutory definition of a mental abnormality and explained the terms used in the definition. 9RP 468-70. Phenix testified that she diagnosed C.D. with pedophilia, sexually attracted to females, non-exclusive type, informing the jury that pedophilia is a mental abnormality as defined by statute. 9RP 472, 490-92.

Although pedophilia is a sexual arousal to prepubescent children, generally under the age of 14, Phenix testified that she found all the allegations relevant to her diagnosis, even those involving girls 14 and older. 9RP 473-74, 76. Phenix felt that C.D.'s actions with post-

pubescent teenagers showed a preoccupation with girls in a transitional stage. 9RP 489. She admitted, however, that arousal to girls over the age of 13 is not abnormal. 9RP 493. Moreover, Phenix acknowledged that her diagnosis depended solely on the accuracy of the allegations in the record. 9RP 584.

Next Phenix addressed the statutory requirement that the diagnosed mental abnormality makes the person likely to engage in predatory acts of sexual violence if not confined to a secure facility. 9RP 493. She testified that she scored actuarial risk assessments to help determine C.D.'s level of risk for reoffending. 9RP 494-95.

Phenix indicated that C.D.'s score on the Static 99 placed him in the medium to high risk category. 9RP 504. Phenix did not believe it was appropriate to use the probabilities associated with the Static 99 when assessing C.D.'s risk, because the study sample used in creating that instrument did not include elderly offenders. She explained that with advanced age, the risk of reoffense is lower, so the probability of reoffense for a person in his seventies would be lower than indicated by the Static 99. 9RP 496-97.

Phenix testified that she believed C.D. would offend in a predatory manner, because his past offenses had not been within his family, and he had only casual relationships with Spivey and Kimberly Miller when he

began molesting them. 9RP 532-33. Phenix gave her opinion that community supervision would not provide adequate protection and explained that the Special Commitment Center is a secure facility. 9RP 534, 537.

Summing up her opinion, Phenix testified that C.D. suffers from a mental abnormality or personality disorder that causes serious difficulty controlling his behavior, and that mental abnormality makes him likely to engage in predatory acts of sexual violence if not confined in a secure facility. 9RP 539.

h. Respondent's evidence

On cross examination, Phenix explained that C.D.'s score on another actuarial risk assessment, the MnSOST-R, categorized him as low risk to reoffend. 9RP 553. Moreover, Phenix admitted there is no known probability of sexual reoffense associated with C.D.'s score on the Static 99 for a person over age 70. 9RP 564. In fact, Phenix admitted that a 2004 study by Karl Hanson, a leading expert in the field of sex offender recidivism, showed that most sex offenders do not reoffend over time. 9RP 560.

Phenix agreed that the fact that C.D. is over 70 years old should be considered in doing an assessment of his risk to reoffend, along with other factors. 9RP 578. She explained that there are no studies exclusively of

people age 70 and older. 9RP 566. In a 2003 study, however, of 131 subjects 60 and older, only five reoffended. 9RP 567. And in a 2006 study which included a small sample of elderly offenders, Hanson found that the probability of reoffense for medium to high risk offenders over age 60 was 4.8 percent. 9RP 571.

Phenix explained that she did not rely solely on actuarial scores in assessing C.D.'s risk to reoffend. She also relied on her clinical judgment, despite acknowledging that predictions of reoffense based on clinical experience have proven only slightly more accurate than chance. 10RP 616.

Although Phenix admitted that if the risk assessment departs significantly from the factors established in the research, the predictive accuracy of the assessment goes down, she nonetheless believed that some risk factors needed to be evaluated outside the research in individual cases. 10RP 644. Thus, in evaluating C.D., she discounted the fact that C.D. was then 73 years old, even though research indicates his risk of reoffense would be lower than for a younger man, because she did not believe C.D. was like the people studied. 9RP 529-30. Similarly, while research indicates that offenders who have had long term intimate relationships in the community are at lower risk for sexual reoffense, she discounted this

factor in C.D.'s case because he denied any deviant behavior. 10RP 642-43.

In addition to cross examination of Phenix, C.D. presented testimony from his daughters regarding their relationship with Lucas. 11RP 797; 12RP 826. K.C. Butler, a retired community corrections officer, also testified. 12RP 894. Butler was familiar with C.D.'s case and with DOC policies regarding community supervision of Level III offenders. 12RP 896-97.

Butler testified that if C.D. were released, he would be on community custody for 36 months. 12RP 900. During that time he would have regular contact with his community corrections officer, in the office and in the field, both scheduled and unscheduled. 12RP 901, 938. C.D.'s community corrections officer would have to be aware of and approve C.D.'s residence. 12RP 902-03.

While on community custody, C.D. would not be permitted to have direct or indirect contact with girls under the age of 16 unless in the company of a specifically approved chaperone. 12RP 911. Butler explained that that condition is taken very seriously, and only rarely would any contact be allowed, even with a chaperone. 12RP 913. C.D. would also be required to avoid places where children were known to congregate, such as schools, parks, playgrounds, and daycares, and Butler testified that

C.D.'s proposed residence with his wife was sufficiently remote from such locations. 12RP 909, 911, 913. In addition, C.D. would have to submit to polygraphs at the request of his community corrections officer, and DOC's policy was to require polygraphs monthly. 12RP 913-14. Moreover, C.D. is required to register as a sex offender for the rest of his life, and the local sheriff's office monitors Level III offenders for compliance. 12RP 915-16, 942.

On May 3, 2007, the jury returned a verdict finding that the state had established the statutory criteria for commitment. CP 835. C.D. filed this timely appeal. CP 838.

C. ARGUMENT

1. THE STATE'S FAILURE TO PLEAD AND PROVE A RECENT OVERT ACT DENIED C.D. DUE PROCESS

Due process protects against the deprivation of life, liberty, or property. In re Personal Restraint of Cashaw, 123 Wn.2d 138, 143, 866 P.2d 8 (1994); In re Personal Restraint of Liptrap, 127 Wn. App. 463, 469, 111 P.3d 1227 (2005)¹⁰. "An inmate's interest in his earned early release credits is a limited, but protected, liberty interest. Likewise, the department's compliance with requirements of a statute affecting his

¹⁰ Review granted, 156 Wn.2d 1030 (2006).

release is a protected liberty interest." In re Personat Restraint of Dutcher, 114 Wn. App. 755, 758, 60 P.3d 635 (2002).

Sex offenders who earn time for good behavior may be transferred to community custody status prior to their release date, in lieu of earned early release. RCW 9.94A.728(2)(a). Before a sex offender can be released to community custody, he or she must submit a release plan indicating where the offender will reside, and DOC must approve the residence. RCW 9.94A.728(2)(c); 3RP 76.

DOC policy requires the community corrections officer assigned to investigate the release plan to read the offender's files, contact the proposed sponsor, visit the proposed residence, and investigate the risk to victims and potential victims. The officer must inform the sponsor of the offender's risk level, criminal history, conditions of sentence, and the possibility of community notification. 3RP 78. The investigating officer is supposed to make a record that these actions have been completed before approving a proposed release plan. 3RP 78. By policy, this investigation must be completed in 30 days. 3RP 96.

Based on his good time credits, C.D. was assigned an earned early release date of May 23, 2005. 3RP 76. In March 2005, C.D. proposed a release plan under which he would reside with his wife. 3RP 77. The

release plan was submitted to a community corrections officer for investigation on March 18, 2005. 3RP 78.

Around the same time, the Sexually Violent Predator Subcommittee of the End of Sentence Review Committee was considering C.D. for possible commitment under RCW 71.09. 3RP 74-75. One component of this consideration is a forensic psychological evaluation. An additional DOC policy precluded the investigating officer from either approving or rejecting a release plan submitted by an inmate being considered for commitment under RCW 71.09 until a forensic psychological evaluation had been completed and reviewed. 3RP 82. At the time C.D.'s release plan was submitted for investigation, no such evaluation had been ordered or obtained, however. 3RP 90, 109.

On April 12, 2005, the investigating officer approved C.D.'s release plan. Three days later, Kimberly Acker, the DOC End of Sentence Review and SVP program manager, revoked the approval. 3RP 81. Her primary concern was that the approval violated DOC's policy against making a final decision on any release plan submitted by an offender being considered for civil commitment until a forensic psychological evaluation had been reviewed. 3RP 82. Since the evaluation had not yet been completed in C.D.'s case, Acker was of the opinion that his release plan could not be approved. 3RP 83. In addition, the investigating officer

had made no record of visiting the proposed residence, contacting the sponsor, or conducting the necessary assessment of risk to victims and potential victims. 3RP 84. Even if the officer had done a thorough investigation, however, Acker would have revoked the approval because the civil commitment evaluation was not yet complete. 3RP 99.

Acker entered a chronological record indicating that C.D.'s plan needed to be resubmitted and could neither be approved nor denied until a forensic psychological evaluation had been obtained. 3RP 85. On April 15, 2005, Acker resubmitted C.D.'s release plan, without any changes, restarting the investigation process. 3RP 85, 105. The plan was submitted to a different community corrections officer for investigation. 3RP 110.

On May 16, 2005, Division One of the Court of Appeals decided In re Personal Restraint of Liptrap, 127 Wn. App. 463, 111 P.3d 1227 (2005). In that decision, the Court held that "The department's obligation to take action on an eligible prisoner's plan to transfer to community custody is independent of the decision to refer for civil commitment." Liptrap, 127 Wn. App. at 466. Thus, administrative delay in deciding whether an inmate qualifies for civil commitment referral does not justify delay in considering the inmate's release plan if he has become eligible for transfer to community custody. Liptrap, 127 Wn. App. at 474. Accordingly, the department must act on a proposed release plan in a

timely manner, and application of DOC's policy delaying decision on a release plan until the SVP referral process is complete deprives the inmate of earned early release credits in violation of due process. Liptrap, 127 Wn. App. at 476.

In response to Liptrap, the DOC administrative staff developed a list of offenders affected by this decision, including C.D. DOC was directed to make sure his plan was proceeding and that the investigation was completed. 3RP 87. Although DOC policy required that the investigation be completed in 30 days, C.D.'s plan was not approved for the second time until June 1, 2005. 3RP 88, 110. On June 2, 2005, local law enforcement was notified of C.D.'s pending release, and his release date was set at July 7, 2005. 3RP 89.

The SVP subcommittee had contracted with Dr. Phenix to conduct a forensic psychological evaluation of C.D. on May 20, 2005, and DOC received that evaluation on June 24, 2005. 3RP 90, 109. On July 6, 2005, the state filed a petition to have C.D. involuntarily committed under RCW 71.09. CP 84.

- a. **Application of DOC's policy deprived C.D. of earned early release credits in violation of due process.**

C.D.'s release plan was submitted for investigation on March 18, 2005, and DOC policy required the investigation to be completed within

30 days. 3RP 96. If DOC had acted promptly on C.D.'s release plan, he could have been transferred to community custody on his early release date of May 23, 2005, even allowing the necessary time for notification. C.D.'s release plan, as originally submitted by him, met all DOC requirements and was eventually approved. 3RP 105. Nonetheless, that approval was administratively delayed past C.D.'s early release date by the application of DOC's unlawful policy precluding a final decision on release plans submitted by inmates undergoing SVP consideration. 3RP 82-83, 99. Application of this policy, and the resulting continued detention, violated C.D.'s right to due process. See Liptrap, 127 Wn. App. at 476.

In addition, the original investigating officer's arbitrary failure to follow clearly established requirements for investigating a release plan contributed to this due process violation. Substantive due process protects against arbitrary and capricious government action which results in loss of life, liberty, or property. Amunrud v. Board of Appeals, 158 Wn.2d 208, 218-19, 43 P.3d 571 (2006), cert. denied, 127 S. Ct. 1844 (2007).

In accordance with statute, DOC has developed a program for transferring sex offenders to community custody in lieu of earned early release time, which requires offenders to establish an approved release plan. See RCW 9.94A.728(2). DOC may deny transfer to community

custody if the proposed release plan violates the conditions of sentence, places the offender at a risk to reoffend, or is unsatisfactory in terms of safety. RCW 9.94A.728(2)(d). DOC policy 350.200 implements this statute by requiring the investigating officer to read the offender's file, contact the proposed sponsor, visit the proposed residence, and investigate the risk to victims or potential victims. 3RP 78-79. The officer must also inform the proposed sponsor of the offender's risk level, the possibility that law enforcement will do community notification, the conditions imposed on the offender, and the offender's criminal history. Id. Finally, the investigating officer must enter a chronological record indicating that these steps have been completed. Id.

When he approved C.D.'s release plan on April 12, 2005, the original investigating officer failed to make the necessary record to indicate the investigation had been conducted as required. 3RP 85. This arbitrary failure to follow DOC's clearly established policy was one factor in delaying the final approval of C.D.'s plan, and thus the loss of earned early release credits. 3RP 83-84.

Even if the investigation of the C.D.'s proposed residence had been conducted according to DOC policies, however, Acker would have revoked the approval of C.D.'s release plan, based on DOC's policy that no final action could be taken on a release plan until the SVP evaluation

was complete. 3RP 99. Thus, while the delay was compounded by the investigating officer's knowing violation of DOC standards, it was primarily application of the unlawful policy which deprived C.D. of earned early release in violation of due process.

- b. **The state should have been required to plead and prove a recent overt act in order to commit C.D. under RCW 71.09.**

At the time the petition was filed, C.D. was unlawfully incarcerated in violation of due process. Because he was not incarcerated for a sexually violent offense or an offense which would constitute a recent overt act, the state should have been required to plead and prove a recent overt act in order to commit him under RCW 71.09.

The Supreme Court has established that civil commitment constitutes a deprivation of liberty which requires due process protections. Addington v. Texas, 441 U.S. 418, 425, 60 L. Ed. 2d 323, 99 S. Ct. 1804 (1979). Thus, a person must be both mentally ill and currently dangerous to be committed consistent with constitutional guarantees. In re Personl Restraint of Young, 122 Wn.2d 1, 27, 857 P.2d 989 (1993) (citing Addington v. Texas). In Young, the Washington Supreme Court held that due process requires proof of a recent overt act if the offender is not incarcerated at the time the commitment petition is filed. Young, 122 Wn.2d at 41.

The Legislature amended the commitment statute to conform to Young. Accordingly, under the statute, the state must plead and prove a recent overt act if, at the time the commitment petition is filed, the offender has been released from total confinement following conviction for a sexually violent offense. RCW 71.09.030. Although the statute excuses the state from proving a recent overt act when a petition is filed against an incarcerated individual, the commitment must still satisfy due process. In re Henrickson, 140 Wn.2d 686, 694, 2 P.3d 473 (2000) (citing Young, 122 Wn.2d at 27).

In Henrickson, the court considered whether due process requires proof of a recent overt act when the offender has at some point been released into the community but is incarcerated on the day the commitment petition is filed. Henrickson, 140 Wn.2d at 688-89. The court held that due process requires the state to prove a recent overt act unless "on the day a sexually violent predator petition is filed, an individual is incarcerated for a sexually violent offense, RCW 71.09.020[15], or for an act that would itself qualify as a recent overt act, RCW 71.09.020[10]." Henrickson, 140 Wn.2d at 689, 695; see In re Detention of Albrecht, 147 Wn.2d 1, 8, 51 P.3d 73 (2002) (unless reincarceration after release is for sexually violent offense or act which

would constitute recent overt act, due process requires state to prove recent over act).

There is no dispute that C.D. was held in total confinement at the time the petition was filed. This fact does not resolve the due process issue, however. See Albrecht, 147 Wn.2d at 10 (excusing state from proving recent overt act where offender was in jail on violation of community placement would subvert due process). “[W]here the individual is incarcerated on the day the petition is filed, the question is whether the confinement is for a sexually violent act or an act that itself qualifies as a recent overt act.” In re Detention of Marshall, 156 Wn.2d 150, 158, 25 P.3d 111 (2005) (where respondent had been released from confinement on sexually violent offense but was incarcerated on offense which would constitute recent overt act at time petition was filed, due process did not require state to prove recent overt act).

Here, although he was incarcerated, C.D. was not incarcerated for a sexually violent offense or a recent overt act when the commitment petition was filed. Instead, he was being unlawfully detained as result of a violation of his due process right to earned early release. No Washington case has decided whether such unlawful incarceration excuses the state from its burden of pleading and proving a recent overt act. Cases addressing this due process requirement have focused on the

circumstances under which an offender's release triggers the state's burden. See Young; Henrickson; Albrecht; Marshall. Recently, Division Three held that lawful detention is not a prerequisite to superior court jurisdiction in RCW 71.09 commitment proceedings. In re Detention of Keeney, ___ Wn. App. ___ 2007 Wash. App. LEXIS 2888, Slip Op. at 18. Keeney did not argue that the state should be required to prove a recent overt act as a result of the unlawful detention, however, and the court did not address that issue.

As the court below recognized, application of existing case law would require the state to plead and prove a recent overt act when the petition is filed while the offender is in total confinement due solely to violation of his earned early release date. See IRP 36, 42, 55. If DOC had not unlawfully delayed approval of C.D.'s release plan, he would have received the benefit of his good time credits and been released into the community before the petition was filed. There is no question that under those circumstances, the state would be required to plead and prove a recent overt act in order to commit C.D. See RCW 71.09.030. C.D.'s continued incarceration beyond his early release date in violation of due process should not excuse the state from its burden of proving a recent overt act.

2. ADMISSION OF PHENIX'S OPINION, WHICH WAS DEPENDENT ON HER DETERMINATION AS TO THE CREDIBILITY OF THE WITNESSES, INVADED THE PROVINCE OF THE JURY AND REQUIRES REVERSAL.

Prior to trial, the court granted C.D.'s motion to preclude witnesses from commenting on the credibility of other witnesses. 5RP 221. Nonetheless, the state's expert was permitted to testify, over C.D.'s objection, that she diagnosed C.D. with pedophilia based on the sexual abuse described by Lucas, Kindra Miller, and Spivey, who were all under the age of 14 at the time of the abuse. 9RP 477-79. The court allowed this opinion despite the fact that it required a determination by Phenix that C.D.'s accusers were more credible than C.D. C.D. categorically denied any arousal or sexual activity with prepubescent girls, and Phenix formed her opinion based solely on the witnesses' allegations. 9RP 476, 480-81.

Testimony from a psychological expert on a diagnosis as to whether an alleged victim was raped is troublesome because there is a danger such testimony will amount to no more than a comment on witness credibility and thus invade the province of the jury. State v. Ciskie, 110 Wn.2d 263, 280, 751 P.2d 1165 (1988). Consequently, when an expert's opinion as to an ultimate issue of fact is based solely on the expert's perception of another witness's truthfulness, that opinion must be excluded. State v. Dunn, 125 Wn. App. 582, 592-93, 105 P.3d 1022

(2005); State v. Florczak, 76 Wn. App. 55, 74, 882 P.2d 199 (1994) (by stating that diagnosis of posttraumatic stress syndrome was secondary to sexual abuse, expert gave opinion that sexual abuse occurred, which was for the jury to decide), review denied, 126 Wn.2d 1010 (1995); State v. Fitzgerald, 39 Wn. App. 652, 694 P.2d 1117 (1985) (pediatrician could not testify based solely on interviews with alleged victims that she believed allegations of rape). Because such evidence usurps the exclusive function of the jury to weigh the evidence and determine credibility, its admission is constitutional error. Dunn, 125 Wn. App. at 593.

In Dunn, the defendant was charged with rape of a child and child molestation. The only evidence of sexual abuse was the alleged victim's statements. Dunn denied the abuse, and there was no physical evidence or independent witness to the alleged acts. Under those circumstances, it was reversible error for a physician's assistant to testify that the child had probably been sexually abused, based on his evaluation of her truthfulness. This testimony usurped the exclusive function of the jury to weigh the evidence and determine credibility. Dunn, 125 Wn. App. at 593-94.

Similarly here, the only evidence regarding sexual abuse of children under the age of 14 (as necessary to diagnose pedophilia) was the statements of the alleged victims. There was no physical evidence, these allegations were never investigated or charged, and there was no previous

jury determination. Moreover, C.D. denied any sexual contact which would support Phenix's diagnosis. It is clear then that Phenix's diagnosis, and consequently her determination that C.D. met the criteria for commitment, was based solely on her determination that the alleged victims were more credible than C.D.

No witness may testify, directly or indirectly, to an opinion that a person should be committed, because that decision is the exclusive province of the jury. In re Detention of Aqui, 84 Wn. App. 88, 100, 929 P.2d 436 (1996)¹¹ (error to allow state's expert to testify that respondent met statutory definition of sexually violent predator, but harmless in light of volume of untainted evidence). Because Phenix's diagnosis of pedophilia was dependent upon her evaluation of the truthfulness of the various witnesses, her testimony that C.D. meets the statutory criteria for commitment is no more than an opinion that he should be committed. See 9RP 539. Admission of that evidence invaded the province of the jury and amounts to constitutional error.

Any error which infringes on a constitutional right is presumed prejudicial, and the state must show the error was harmless beyond a reasonable doubt. Dunn, 125 Wn. App. at 593 (citing State v. Miller, 131 Wn.2d 78, 90, 929 P.2d 372 (1997)). Constitutional error is harmless only

¹¹ Overruled on other grounds in In re Henrickson, 140 Wn.2d 686, 2 P.3d 473 (2000).

if the untainted evidence is so overwhelming that the jury would have reached the same conclusion absent the error. Id.

The error in this case was not harmless. The existence of a mental abnormality, a finding necessary for commitment, turned on whether the jury believed the uncorroborated allegations or C.D.'s testimony denying them. There was no physical evidence and no independent witness to any of the alleged pedophilic conduct. A psychological expert's opinion that alleged sexual misconduct occurred can create an "aura of special reliability and trustworthiness" about the allegations, unfairly prejudicing the defense. Ciskie, 110 Wn.2d at 280. Under these circumstances, there is a reasonable probability that improper admission of Phenix's opinion affected the jury's verdict, and a new trial is required. See Dunn, 125 Wn. App. at 594 (improper admission of expert's opinion of probable sexual abuse required reversal).

3. THE EVIDENCE WAS INSUFFICIENT TO ESTABLISH THE STATUTORY REQUIREMENTS FOR COMMITMENT.

The state and federal constitutions prohibit deprivation of life, liberty, or property without due process of law. U.S. Const. amends. V, XIV; Wash. Const. art. I, § 3. A law that impinges on a fundamental right such as freedom from restraint is constitutional only if it furthers a compelling state interest and is narrowly tailored to further that interest.

Young, 122 Wn.2d at 26. While the state has a legitimate interest in treating the mentally ill and protecting society from their actions, a statute providing for involuntary civil commitment satisfies due process only if the individual committed is both mentally ill and currently dangerous. Albrecht, 147 Wn.2d at 7; Henrickson, 140 Wn.2d at 692; accord Foucha v. Louisiana, 504 U.S. 71, 80, 112 S. Ct. 1780, 118 L. Ed. 2d 437 (1992).

The state must prove every element of the sexually violent predator definition¹² beyond a reasonable doubt. In re Detention of Thorell, 149 Wn.2d 724, 744, 72 P.3d 708 (2003), cert. denied, 541 U.S. 990 (2004); RCW 71.09.060(1). Due process, in turn, requires the state to prove every element of its case beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L.Ed.2d 368 (1970). As a matter of due process and as a statutory requirement, a person may not be committed unless the state meets this threshold.

To commit someone as a sexually violent predator, the state must prove that person 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. RCW 71.09.020(16). The statute is premised on a finding that the person subject to commitment

¹² “‘Sexually violent predator’ means 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.” RCW 71.09.020(16).

is presently dangerousness. Henrickson, 150 Wn.2d at 692. This tie to present dangerousness is constitutionally required. Marshall, 156 Wn.2d at 157.

There was no evidence in this case that a mental illness makes C.D. currently dangerous. The only evidence the state presented of a mental illness was Phenix's diagnosis of pedophilia, which requires actions taken on a sexual arousal to prepubescent children, generally under the age of 14. 9RP 473-74. The state presented absolutely no evidence of any sexual contact with prepubescent girls after November 5, 1987, when Spivey turned 14, however. 9RP 586. Although C.D. has been incarcerated since July 24, 2001, there was no evidence of sexual contact with prepubescent girls for almost 14 years prior to that, during which time C.D. lived in the community not subject to any court-ordered supervision. 9RP 587. Phenix admitted that there was no evidence of recurrent sexual fantasies, urges, or behaviors involving children during that time. 9RP 588.

The recency of the acts upon which the state bases its commitment petition may be a significant factor in determining whether the individual is presently dangerous, as required by both the statute and due process. Henrickson, 140 Wn.2d at 697. The last alleged act which would support the pedophilia diagnosis occurred 20 years prior to the commitment trial

and 14 years prior to C.D.'s current incarceration. Thus, even if all the allegations presented at trial were true, the evidence was insufficient to establish that C.D. is presently dangerous due to a mental illness.

Phenix also testified that she believed C.D. would offend in a predatory manner, because his past offenses had not been within his family, and he had only casual relationships with Spivey and Kimberly Miller when he began molesting them. 9RP 532-33. The statute defines predatory as "acts directed towards: (a) strangers; (b) individuals with whom a relationship has been established or promoted for the primary purpose of victimization; or (c) persons of casual acquaintance with whom no substantial personal relationship exists." RCW 71.09.020(9). There was no evidence of any acts of sexual violence directed toward strangers. Further, there was no evidence C.D. promoted relationships with the alleged victims for any purpose, let alone for the purpose of victimization. The evidence showed that C.D. was acquainted with Lucas because she was his daughters' friend, Kimberly Miller's mother proposed that Kimberly stay with C.D., O'Hanlon came to C.D.'s house at Kimberly's invitation, C.D. was romantically involved with Spivey's mother, and Lockhart was Spivey's friend. Given the state's failure to prove C.D. is currently dangerous, this evidence does not support a finding that C.D. is likely to engage in predatory acts of sexual violence.

To meet its burden of proof, the state relied on Phenix's opinion that C.D. is likely to reoffend if not confined to a secure facility. 9RP 539. Phenix explained that she used a portion of the Static 99 actuarial assessment to support her opinion. Phenix indicated that C.D.'s score on the Static 99 placed him in the medium to high risk category. 9RP 504.

C.D. was 73 years old at the time of trial, however, and Phenix admitted that there is no known probability of sexual reoffense associated with C.D.'s score for a person over age 70. The risk of reoffense decreases with advanced age, and the study sample used in creating the Static 99 did not include elderly offenders. 9RP 496-97, 564, 566. While there are no studies exclusively of people age 70 and older, a 2003 study found that only five of the 131 subjects age 60 and older reoffended. 9RP 566-67. And a 2006 study which included a small sample of elderly offenders found that the probability of reoffense for medium to high risk offenders over age 60 was 4.8 percent. 9RP 571

Despite the absence of scientific evidence to support her opinion, Phenix testified that she believed C.D. is likely to engage in predatory acts of sexual violence if not confined in a secure facility. 9RP 539. She explained that she did not rely solely on actuarial scores but also applied her clinical judgment. Phenix admitted, however, that research has shown

that clinical judgment is only slightly better at predicting risk than a coin flip. 10RP 616.

Further, Phenix admitted that if the risk assessment departs significantly from the factors established in the research, the predictive accuracy of the assessment goes down. Nonetheless, she adjusted the weight given to certain risk factors when evaluating C.D., based on her clinical judgment. While research indicates that both age and the presence of long term relationships are protective factors in assessing the risk to reoffend, Phenix discounted these factors based on her belief that C.D. should be evaluated differently than research suggests. 9RP 529-30; 10RP 642-43.

Because there was no evidence of current dangerousness, no evidence of predatory behavior, and no scientific support for Phenix's risk assessment, the state has not proven beyond a reasonable doubt that C.D. suffers from a mental abnormality or personality disorder which makes him likely to engage in predatory acts of sexual violence if not confined in a secure facility. The insufficient proof requires reversal. Thorell, 149 Wn.2d at 744.

D. CONCLUSION

Because the state did not plead and prove a recent overt act, the order of commitment violates C.D.'s right to due process. In addition, the admission of improper opinion evidence invaded the province of the jury, and the state failed to prove the elements necessary for commitment beyond a reasonable doubt. Reversal is therefore required.

DATED this 13th day of November, 2007.

Respectfully submitted,



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Certification of Service by Mail

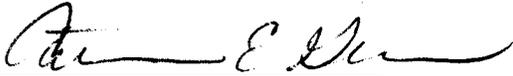
Today I deposited in the mails of the United States of America, postage prepaid, properly stamped and addressed envelopes containing copies of the Brief of Appellant in

In re the Detention of C.D., Cause No. 36273-2-II, directed to:

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



Catherine E. Glinski
Done in Port Orchard, WA
November 13, 2007

STATE OF WASHINGTON
BY:  NOTARY PUBLIC
07/10/13 07:07:05
Cecil Dudgeon