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In re the Detention of:

CECIL DUDGEON,

Appellant,

v.

STATE OF WASHINGTON,

Respondent.

RESPONDENT'S OPENING BRIEF

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I. ISSUES PRESENTED

A. Were Dudgeon's due process rights violated because the State did not allege, or present evidence, that he committed a recent overt act as defined by RCW 71.09.020(10)?

B. Where the State's expert reviewed recorded victim accounts of Dudgeon's abuse within the materials she considered in her evaluation, and used those records as one of the many bases upon which she relied when forming her opinions in this case, did admission of her opinion testimony usurp the exclusive function of the jury to weigh evidence and determine witness credibility?

C. Was sufficient evidence presented at trial court to support the jury's verdict that Dudgeon is a sexually violent predator?

II. STATEMENT OF THE CASE

A. Procedural History

This sexually violent predator (SVP) civil commitment action was initiated on July 6, 2005. Respondent's Supp. CP at ___. On that date, Cecil Dudgeon was serving the sentence imposed due to his 2001 indecent liberties conviction. With his release date approaching, Dudgeon originally submitted a release plan (referred to as a "CRR," or "Community Release Referral,") on March 10, 2005. CP at 222. Prior to his submission of the release plan, on February 15, 2005, the End of Sentence Review Committee (ESRC)[1] referred Dudgeon to the ESRC

[1] The ESRC, pursuant to RCW 72.09.345, is responsible for assigning risk levels, reviewing available release plans, and making appropriate referrals for sex offenders. The committee is required to assess, on a case-by-case basis, the public risk posed by sex offenders who are: (a) Preparing for their release from confinement for sex

Sexually Violent Predator Subcommittee for possible civil commitment consideration under RCW 71.09. *Id.* On March 31, 2005, the Subcommittee determined that a Forensic Psychological Evaluation should be requested to determine if Dudgeon met criteria as a SVP. *Id.*

Meanwhile, however, the Department of Corrections (DOC) had already begun investigating Respondent's proposed release plan, and it was approved on April 12, 2005. On April 15, 2005, Kimberly Acker, ESRC/SVP Civil Commitment Program Manager for DOC, determined that, pursuant to *In re the Detention of Dutcher*, 114 Wn. App. 755, 60 P.3d 635 (2002), the plan had been improperly and prematurely approved. At the time, DOC interpreted *Dutcher* as requiring that a proposed release plan for an offender who is under SVP civil commitment consideration could neither be approved or denied until the assigned Community Corrections Officer, as part of his or her investigation of the plan, had 1) reviewed the ESR file materials, including all psychological, psychiatric reports, forensic psychological reports, and 2) requested and reviewed the completed SVP forensic psychological evaluation as recommended by the ESRC. CP at 223. The officer's investigation of Dudgeon's plan appeared to suffer from other shortcomings as well. For example, there was no indication that the

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offenses committed on or after July 1, 1984; and (b) accepted from another state under a reciprocal agreement under the interstate compact authorized in chapter RCW 72.74.

investigating officer had ever actually visited the proposed residence (the home of Respondent's wife, Mrs. Claudine Dudgeon), or assessed the degree of risk for victims and potential victims of similar age or circumstances, both of which would be part of any investigation of proposed sex offender housing. *Id.*

Upon determining that the correct review procedure had not been followed, DOC withdrew its approval of the release plan, and the plan was then immediately re-submitted in order to allow the investigating officer the opportunity to request and review appropriate file materials and fully investigate Dudgeon's release plan in light of the risk he posed to the community. *Id.* The Department then again began to review his release plan, while simultaneously processing the case under RCW 71.09. *Id.*

On May 17, 2005, the Court of Appeals issued its decision in *In re Pers. Restraint Petition of Liptrap*, 127 Wn. App. 463, 111 P.3d 1227 (2005), holding that DOC "must act on proposed release plans in a timely manner, so as to ensure the inmate has a genuine opportunity to benefit from the earned early release credits." *Liptrap* at 476. At that point, however, Dudgeon's plan was already being actively reviewed. The review continued Dudgeon's statements suggesting that he did not wish to have his plan processed. Departmental records indicate that on May 23, 2005, during the investigation of Respondent's proposed

release plan, Dudgeon informed Correctional Counselor Cindy Tully that he did not want to release from the institution as a Level III sex offender, and wanted to know if he could cancel the CRR until he could get the level "removed." CP at 223. He went on to state that he was in the process of contacting his attorney to assist him with this process. *Id.* On May 31, 2005, Ms. Acker spoke with an attorney representing the Dudgeon, and informed him that the investigating CCO was scheduled to meet with Dudgeon's wife at the proposed residence the following day. CP at 224. She further informed the attorney that Dudgeon was stating that he did not wish to release as a Level III sex offender and was possibly on the verge of pulling his release plan to pursue appeal of his convictions and/or established Risk Level Classification, but that the investigation appeared to be proceeding despite Dudgeon's statements regarding canceling the release plan. *Id.*

The investigating officer approved Dudgeon's release plan on June 1, 2005. CP at 224. Per Department of Corrections policy 350.600, Law Enforcement community notification of Dudgeon's release was commenced on June 2, 2005, thirty-five days prior to Respondent's release.[2] *Id.*; *See also* RCW 9.94A.612. That thirty-five day period

[2] Department of Corrections Policy 350.600 (I) (A) (Teletype Notification) provides that DOC will send teletype notifications to local law enforcement at least 35

expired on July 7, 2005, the day after the State filed its SVP petition. *Id.* During that 35 day period, on June 24, 2005, the Department received the completed SVP Forensic Psychological Evaluation by Dr. Amy Phenix. *Id.*

Upon filing the SVP Petition, the trial court found probable cause to believe Dudgeon is a SVP, and after several continuances, the SVP commitment trial was scheduled to begin in February 2007. CP at 89-91. On February 26, 2007, Dudgeon's pretrial motion to require the State to prove a recent overt act was heard. 1RP 25. In short, the motion alleged that Dudgeon was unlawfully held in prison beyond his earned early release date so that SVP proceedings could be initiated against him. CP at 114. Since, under Dudgeon's theory, he should have already been released prior to filing of the SVP Petition, he argued that the State should be required to prove that he committed a "recent overt act" during the period of time between the release date and the filing of the Petition.[3]

Initially, the trial court was inclined to grant the motion, but agreed to continue the hearing to allow presentation of the information delineated

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days prior to release or transfer on sex, serious violent, violent, or felony harassment crime offenders. CP 224.

[3] In SVP cases where the Respondent is living in the community at the time the Petition is filed, the State is required by RCW 71.09.030(5) to plead and prove the Respondent committed a "recent overt act." A "recent overt act" is "any act or threat that has either caused harm of a sexually violent nature or creates a reasonable apprehension of such harm in the mind of an objective person who knows of the history and mental condition of the person engaging in the act." RCW 71.09.020(10).

above regarding the authority under which Dudgeon was held at the time the SVP Petition was filed. 1RP 55-56. At the conclusion of those further proceedings, the trial court denied the motion and Dudgeon sought discretionary review. CP at 225-229. This Court denied discretionary review on April 12, 2007. In that ruling, the State was found to have started the SVP commitment process in a timely fashion. Moreover, because the limited liberty interest in earned early release is unrelated to any of the due process rights applicable to the SVP determination process, Dudgeon's proposed remedy was deemed to be flawed.[4]

The parties reconvened for trial on April 17, 2007. 5RP 190. The State presented the testimony of Dudgeon's six victims, parents of two of the victims, clinical psychologist Dr. Amy Phenix, and Dudgeon. Dudgeon presented the testimony of two of his biological daughters, and a former Department of Corrections employee who explained the conditions of probation Dudgeon would be under if found not to be a SVP and, as a result, released from the Special Commitment Center on McNeil Island (SCC).

On May 3, 2007, upon the finding of the jury that he was a SVP, Dudgeon was committed to the SCC where he remains today. CP at 836 - 837. This appeal follows. CP at 838.

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[4] *See* Commissioner's Ruling Denying Review at 2-4. Copy attached as Appendix A.

B. Substantive History

1. Dudgeon's Criminal Sexual History

Cecil Dudgeon has a history of sexually abusing girls and young women that spans more than thirty years. That history includes the following incidents, charges and convictions:

Beginning in approximately 1970, Dudgeon began molesting eight-year-old D. L., a childhood friend of Dudgeon's daughter. 7RP 256-265. Both Dudgeon and D.L.'s father were in the United States Air Force, and the families were stationed in Spain. When D.L. would spend the night at the Dudgeon home, Dudgeon would often come into the room where D.L. was sleeping, penetrate her vagina with his finger, and rub his penis on her. 7RP 264. Given the close relationship between Dudgeon and D.L.'s father, D.L. was unable to tell her family what was happening to her. 7RP 265. The molestation continued until D. L.'s family left Spain in 1974, but resumed when the two families reconnected in Biloxi, MS, and Sacramento, CA. 7RP 265-269. As D.L. became older, she was able to extricate herself from the relationship between the two families. 7RP 271-272. D.L. estimates she was sexually assaulted by Dudgeon well over 200 times. 7RP 264.

The distance D.L. placed between them did not stop Dudgeon from continuing to pursue D.L. at her home. 7RP 272-273. It was this pursuit

that finally caused D.L. to disclose what was happening to her mother. 7RP 274-275. Having just started at a new school, and worried about the perceived stigma associated with publicly disclosing her victimization, D.L. told her mother she did not want to press charges against Dudgeon. 12RP 962. D.L.'s mother, Diane Stevenson, testified regarding her subsequent conversation with Dudgeon, and Dudgeon's promise to seek help. 12RP 963.

In 1983, Dudgeon sexually abused three more girls: fourteen-year-old K.M.14, fifteen-year-old P. O., and eight-year-old K.M.8. K.M.14 and K.M.8 were sisters who lived across the street from Dudgeon in Sacramento. 7RP 307. P.O. was one of K.M.14's neighborhood friends. 8RP 351. The K.M. sisters and the rest of their family moved to Alaska, but would come back to Sacramento to visit friends during their summer and Christmas school breaks. 7RP 308-309; 7RP 315. Dudgeon offered to let them stay with him during these visits. *Id.* It was then that Dudgeon repeatedly molested and raped the two sisters. In addition, he would often give the older sister, K.M.14, alcohol, and encourage her to watch pornographic movies with him before molesting her. 7RP 310-312. On one occasion, K.M.14 asked P.O. to stay overnight with her at Dudgeon's home, in the hope that having a guest in the house would preclude further abuse. Instead, Dudgeon took that opportunity to molest P.O. as well.

7RP 317 - 320. Dudgeon was convicted of three felony charges of Unlawful Sexual Activity as a result of his involvement with K.M.14, and P.O. Petitioner's Exhibit 1.

While serving a term of probation due to that conviction, Dudgeon began dating the mother of his fourth victim, M.S. 8RP 377; Petitioner's Exhibit 3. M.S. was approximately nine years old at that time. 8RP 377. Shortly thereafter, Dudgeon began to molest and rape M.S., and continued to do so until she was twenty-four years old. 8RP 377-390. The abuse continued after Dudgeon had moved in with M.S.'s family, and the group moved to Washington State. 8RP 382. During those years, Dudgeon consistently threatened to harm M.S., and indirectly, M.S.'s mother, in order to keep M.S. from reporting the abuse. 8RP 391-392; 8RP 428-429. M.S. finally broke down and disclosed the abuse to a friend in 1997. 8RP 390. Dudgeon was eventually convicted of indecent Liberties by Forcible Compulsion against M.S., and received a 68-month prison sentence. Petitioner's Exhibit 3.

Prior to M.S.'s disclosure, Dudgeon molested one of M.S.'s other friends, S.L. S.L. was visiting M.S. on New Year's Eve of 1992. 10RP 685. After M.S. had gone to sleep, Dudgeon decided to teach S.L. about sex by attempting to force sex upon her under the guise of "education." 10RP 688-692. Dudgeon told S.L. he could be whatever she

wanted him to be, as he continued to attempt to force sex on her. 10RP 692-693. Eventually, by lying still and pretending to sleep, S.L. convinced Dudgeon to leave her. *Id.* She reported the incident to her parents the next day. 10RP 694. S.L's father, Russell L., testified about confronting Dudgeon shortly thereafter. Dudgeon, despite his previous five victims which included the on-going abuse of M.S., told Russell he'd never done anything like that before, and promised it would never happen again. 11RP 712.

2. Expert Opinion Evidence: Dr. Amy Phenix

At trial, the State offered the expert opinion testimony of clinical psychologist Amy Phenix, PhD. Dr. Phenix has considerable experience in the evaluation, diagnosis, treatment, and risk assessment of sex offenders. 9RP at 445-454. Dr. Phenix has been licensed as a psychologist since 1992 and holds licenses to practice in California, Florida, and Washington. 9RP 446. She has evaluated approximately 300 individuals to determine whether they meet the statutory criteria for civil commitment pursuant to SVP laws. 9RP at 454-455. Of those 300 evaluations, Dr. Phenix has found that the individual she is evaluating meets SVP criteria about half the time. 9RP 510. She has conducted these evaluations for the State, for the Joint Forensic Unit, and for individuals alleged to be sexually violent predators. 9RP 455.

As part of her evaluation, Dr. Phenix personally interviewed Dudgeon on April 19, 2006. 9RP 455. She also reviewed court documents, police reports, presentence investigation reports, criminal history information, Department of Corrections (DOC) records, SCC records that document Dudgeon's progress there, and victim deposition testimony. 9RP 455-456. Dr. Phenix testified that those records were of the type that she and other mental health professionals commonly rely upon when evaluating sex offenders. 9RP 457.

Dr. Phenix testified that, in her professional opinion, Dudgeon suffers from Pedophilia, sexually attracted to females, non-exclusive type. 9RP 472. In diagnosing that condition, Dr. Phenix relied upon a classification system that is used universally by mental health workers, the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision (DSM-IV-TR). 9RP 470-471. Dr. Phenix explained that Pedophilia involves abnormal sexual arousal and is defined as involving recurrent intense sexually arousing fantasies, sexual urges, or behaviors, toward prepubescent children that cause marked distress or interpersonal difficulty. 9RP 474-475.

Pedophilia is a pervasive and long-standing disorder that Dr. Phenix testified is likely to stay with a person over his life span. 9RP 473. Pedophilia causes the person to have difficulty in his life – that

is, they cause clinically significant distress or impairment, can be disruptive, and affect the social life, romantic relationships, family relationships, school, work, and other areas of functioning. 9RP 482. Dr. Phenix testified that, in her professional opinion, Dudgeon's Pedophilia is a mental abnormality, as that term is defined by statute. 9RP 490-493. It is also her opinion that Dudgeon's Pedophilia causes him serious difficulty controlling his sexually violent behavior. 9RP 539.

Dr. Phenix also conducted a risk assessment to determine whether Dudgeon was likely, as a result of his mental abnormality, to commit another sex offense. 9RP at 494. She used actuarial instruments, then considered other risk factors outside these instruments that research has identified as associated with sexual offending. 9RP at 494-506; 9RP 509-534; 9RP 537-538. An actuarial instrument is a list of factors associated with a certain outcome, which are then weighted statistically. 9RP at 494. They have been used for assessing risk in other fields, such as the health care industry, and have been used since the mid-1990s to assess risk in the field of sex offender recidivism. 9RP at 494-495. They are widely used by professionals in assessing risk for sexual offenders. *Id.* Dr. Phenix cautioned that these instruments underestimate the overall risk of a sex offense because they assess risk of committing an offense that is detected

and results in rearrest or reconviction, rather than estimating the risk of any reoffense. 9RP at 495.

In assessing Dudgeon's risk for future sexual offending, Dr. Phenix used an actuarial instrument called the Static-99. 9RP 495. The Static-99 is the most widely used instrument in Dr. Phenix's field. 9RP 496. Dudgeon's total score on the Static-99 was a "4." 9RP at 504. A score of "4" placed Dudgeon at "medium-high" risk to be reconvicted of a sexual offense. *Id.* Dr. Phenix cautioned, that there is no actuarial instrument that contains all of the risk factors for prediction of sexual reoffense, and, especially in light of Dudgeon's age, the Static-99 should be used in connection with other important factors. 9RP 504-505.

Consequently, Dr. Phenix considered a number of additional static and dynamic risk factors not accounted for by the standard actuarial instruments but supported by research. 9RP 512. The presence of these additional risk factors heightens Dudgeon's risk for committing a new sexual offense. *Id.* Risk factors that were present for Dudgeon included: prior sex offenses against two or more children under age twelve, failure to enroll in or complete sex offender treatment, noncompliance with conditions of probation, and sexual preoccupation. 9RP 512-516; 9RP 520-523. Dr. Phenix also administered a psychological test called the Hare Psychopathy Checklist which established that Dudgeon displayed

many personality characteristics that have been found to increase the risk of future sexual violence. 9RP 524-526.

Dr. Phenix also considered the possible mitigating effects on Dudgeon's recidivism risk that may be presented by aging. 9RP at 528 - 529. Dr. Phenix explained that research has identified a connection between advancing age and reduction in recidivism levels. *Id.* Given Dudgeon's advanced age at trial of almost 73 years, Dr. Phenix indicated that group norms would indicate that there should have been some significant reduction in risk. *Id.* However, she also explained that because Dudgeon continued to offend multiple times per week well into his sixties, with no indication that the behavior would have stopped but for his arrest, his risk has not been significantly lowered or mitigated by age. 9RP 530.

Dr. Phenix also testified that, in Dudgeon's case, other ordinarily protective factors that usually serve to lower risk of sexual offending, such as being married, did not do so for Dudgeon. 9RP 516-517. In addition, based upon her review of Dudgeon's medical records, Dr. Phenix found that he is a healthy, able-bodied man with no medical problems that would significantly interfere with his ability to commit another sex offense. 9RP 531.

In considering whether any future offenses Dudgeon commits would be predatory in nature, Dr. Phenix indicated that she analyzed the relationship he had with his victims in the past. 9RP 532-533. His past sex offenses targeted casual acquaintances, thereby qualifying his past offending as predatory under the statutory scheme. *Id.*

Based upon her education and experience and her review of the evidence, Dr. Phenix testified that it was her professional opinion that Dudgeon has a mental abnormality or personality disorder that causes him serious difficulty controlling his behavior and makes him more likely than not to commit predatory acts of sexual violence if he is not confined in a secure facility. 9RP 539.

III. ARGUMENT

Dudgeon essentially makes three arguments on appeal. All of them are without merit. First, his claimed due process violation due to alleged unlawful detention prior to the filing of the SVP petition that initiated this case fails for the reasons set forth in *In re Detention of Keeney*, __ Wn. App. __, 169 P.3d 852, 858-859 (Div. 3 Oct. 23, 2007). Second, Dr. Phenix' use of recorded victim statements, to assist in the formulation of her opinions was standard practice, and did not amount to a comment on the evidence or usurp the role of the jury to judge credibility. Finally, when viewed in the light most favorable to the State, sufficient

evidence was presented at trial to support Dudgeon's commitment. Therefore, the State requests that this Court deny Dudgeon's appeal, and affirm his civil commitment as a sexually violent predator.

A. As It Was When First Considered by This Court on His Motion for Discretionary Review, Dudgeon's Claim That His Due Process Rights Were Violated by an Alleged Unlawful Detention Remains Without Merit

Dudgeon argues that the trial court erred in denying his motion to require the State to plead and prove a recent overt act. Specifically, he erroneously claims that "he was not incarcerated for a sexually violent offense or an offense which would constitute a recent overt act" at the time this SVP action was initiated. Brief of Appellant at 26. Therefore, Dudgeon argues, the State should have been required to prove that he committed prove a recent overt act at some time during the period of incarceration between his alleged release date, and the filing of the SVP petition below. Dudgeon's argument fails for several reasons.

First, the trial court lacked jurisdiction to consider the question of lawful confinement because this is a separate civil commitment action, not the underlying criminal case for which Dudgeon was serving his sentence at the time the SVP petition was filed. However, even assuming jurisdiction, the trial court correctly found that his incarceration at the time of the SVP petition's filing was lawful, in that, at the time of the SVP

petition's filing, Dudgeon had been continuously incarcerated since his 2001 conviction for Indecent Liberties by Forcible Compulsion – a sexually violent offense. Thus, the RCW 71.09.030(5) recent overt act requirement is inapplicable here. Moreover, assuming that the trial court had jurisdiction to decide this issue, there is absolutely no authority to require that unlawful detention by DOC should demand proof of an additional element not otherwise required by statute, that is, proof of a recent overt act in this SVP case.

1. The Trial Court Lacked Jurisdiction to Consider This Issue

The trial court lacked jurisdiction to consider the question of the legality of Dudgeon's confinement pursuant to a criminal sentence within the context of a civil commitment proceeding brought pursuant to RCW 71.09. This Court should deny review of the trial court's order denying Dudgeon's motion to require the State to prove an ROA, and Dudgeon, should he wish to contest the legality of his detention, should be required to bring this action as a personal restraint petition under RAP 16.4.

At the time of his trial, Dudgeon was being held pursuant to RCW 71.09. As such, the sole question before the trier of fact in this matter was whether Dudgeon meets the statutory criteria under

RCW 71.09. That is, whether he 1) has been convicted of or charged with a crime of sexual violence; and 2) suffers from a mental abnormality or personality disorder which 3) makes him likely to engage in predatory acts of sexual violence if not confined in a secure facility. *See* RCW 71.09.020 (16)

The jurisdiction of the trial court under the current cause number was limited to determining this SVP civil commitment action. Issues pertaining to custody are limited to those set forth within the SVP commitment statute, RCW 71.09. Recently, in *Keeney*, Division Three denied an identical "lawful custody" challenge to SVP commitment. Regarding the part issues of custody should play in a SVP proceeding, the Court wrote:

> The SVP statute merely requires that an individual be in custody at the time of the commitment hearing. *See* RCW 71.09.030, .040. Moreover, there are sufficient procedural protections that mitigate any risk of erroneous deprivation of an inmate's liberty in SVP commitment proceedings. These protections include the requirement that the State show probable cause to maintain a SVP petition, the right to a jury trial, the requirement of proof beyond a reasonable doubt, the right to cross-examine witnesses, and the right to periodic review upon civil commitment as a SVP. *See* RCW 71.09.060; *Stout,* 159 Wash.2d at 370-71, 150 P.3d 86; *Young,* 122 Wash.2d at 39, 857 P.2d 989.
>
> A review of the legislative intent of the SVP statute also supports the conclusion that unlawful detention does not strip the court of jurisdiction in SVP civil commitment

> proceedings. The special provisions of the SVP statute are intended to address the high likelihood that these offenders will engage in sexually violent behavior upon being released unconditionally into the public. *See* RCW 71.09.010. It is this heightened risk of reoffense that underlies the existence of special civil commitment procedures for a SVP. RCW 71.09.010. Consequently, stripping the courts of jurisdiction in such cases, in absence of a showing of bad faith, would not further the legislative intent of the SVP statute.
>
> "Lawful custody" is not a jurisdictional prerequisite to a valid petition for civil commitment as a SVP. An individual is not precluded from pursuing remedies for an unlawful detention. But the question of the lawfulness of an individual's detention is a separate question, involving separate proceedings, and is not included in the inquiry as to whether an individual meets the criteria for civil commitment as a SVP.

In re Keeney, ___ Wn. App. ___, 169 P.3d 852, 858 -859 (Div. 3 Oct. 23, 2007)

The current case is not a catch-all cause number for all disputes that Dudgeon may have with the State of Washington or agencies of the State of Washington. In the seminal case of *In re Turay*, 139 Wn.2d 379, 986 P.2d (1999) *cert. denied* 531 U.S. 1125 (2001), Turay tried to use his SVP action to challenge DSHS "conditions of confinement" at the SCC. The Washington Supreme Court rejected Turay's attempt to use his complaint against DSHS to gain release in the SVP action: "Turay's remedy for these unconstitutional conditions is not a release from confinement. Turay's remedy for unconstitutional conditions of confinement at the SCC is, therefore, an injunction action

and/or award of damages." *Id.* at 420. The constitutional complaint against DSHS was not for the SVP court to decide. *Id.* ("The trier of facts role in an SVP commitment proceeding ... **is to determine whether the defendant constitutes an SVP; it is not to evaluate the potential conditions of confinement**.") (emphasis added). The role of the trial court in this SVP case was to try the statutory question of whether Dudgeon is a sexually violent predator, not to decide the lawfulness of DOC regulations that related to his confinement during his last prison term, or any other issues pertaining to confinement either before or after his civil commitment. For this reason, Dudgeon's claim is without merit and should be denied.

2. The Trial Court Correctly Held That Dudgeon's Detention on the Day the Petition Was Filed Was Lawful

Beyond jurisdictional questions, even if this Court chooses to address the substance of Dudgeon's argument that he was unlawfully confined at the time the SVP action was initiated against him, his claim remains without merit. Assuming the trial court had jurisdiction to adjudicate this issue, it correctly found that Dudgeon's detention was at all times legal and in accordance with state and federal law. Thus, since there is no evidence that the State acted in bad faith in this case, there was no reason to grant Dudgeon the relief he had requested.

The Earned Early Release Program statute requires DOC to establish an incentive program that allows early release time for good behavior. However, unlike other eligible felons, sex offenders are not automatically eligible for earned early release. RCW 9.94A.728(2). Sex offenders "**may** become eligible for transfer to community custody status in lieu of early release time." RCW 9.94A.728(2)(a). (Emphasis added). "Thus, for sex offenders who earn time for good behavior, early release from confinement is available only by way of transfer to community custody." *Liptrap,* at 467. The offender must submit a community custody release plan to DOC for consideration. *Id.* at 470.

In order to grant community custody to a sex offender, DOC must comply with RCW 9.94A.728(2)(c) and (d), which requires an approved residence and living situation: "All offenders with community placement or community custody terms eligible for release to community custody status in lieu of earned release **shall** provide an approved residence and living arrangement prior to release to the community." RCW 9.94A.728(c) (emphasis added). DOC is permitted to deny an inmate transfer to community custody if the proposed release plan does not comport with the conditions of sentence, places an offender at risk of reoffending, or presents a risk to victim or community safety.

RCW 9.94A.728(2)(d); RCW 72.09.340(3).[5] Thus, DOC is vested with the sole authority to decide whether a release plan submitted by an offender is appropriate, and the offender has no right to release on community custody.

Dudgeon cites *Liptrap* in support of the proposition that his detention at the time of the SVP petition's filing was in violation of due process. His reliance on *Liptrap* is, however, misplaced. Liptrap, a sex offender, submitted a release plan to DOC prior to his earned early release date. At the time, DOC policy instructed staff to submit release plans presented by sex offenders thought to be candidates for civil commitment, but the investigation of that plan could not be concluded until the Forensic Psychological Evaluation of the inmate had been completed and reviewed. In conformance with this policy, DOC had submitted Liptrap's plan for investigation, but had postponed completion of the investigation pending completion and review of the evaluation. Liptrap sought review.

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[5] "For any offender convicted of a felony sex offense against a minor victim after June 6, 1996, the department shall not approve a residence location if the proposed residence: (a) Includes a minor victim or child of similar age or circumstance as a previous victim who the department determines may be put at substantial risk of harm by the offender's residence in the household; or (b) is within close proximity of the current residence of a minor victim, unless the whereabouts of the minor victim cannot be determined or unless such a restriction would impede family reunification efforts ordered by the court or directed by the department of social and health services. The department is further authorized to reject a residence location if the proposed residence is within close proximity to schools, child care centers, playgrounds, or other grounds or facilities where children of similar age or circumstance as a previous victim are present who the department determines may be put at substantial risk of harm by the sex offender's residence at that location." RCW 72.09.340(3).

The *Liptrap* Court invalidated the Department's policy, clearly enunciating DOC's obligation with regard to release plans:

> The department must **act on proposed release plans in a timely manner,** so as to ensure the inmate has a genuine opportunity to benefit from the earned early release credits.

Liptrap at 476 (emphasis added).[6]

Dudgeon's argument that, because he was released 44 days after his EERD, his detention during that period of time was necessarily unlawful, grossly over-simplifies the issues surrounding release of sex offenders under consideration for civil commitment referral. The question under *Liptrap* is not simply whether someone was or was not held beyond his or her EERD. Rather, the issue is whether, despite the fact that an inmate has been referred for consideration under RCW 71.09, the Department is "act[ing] on proposed release plans in a timely manner." *Liptrap* at 476. Application of the *Liptrap* ruling to the facts of this case demonstrates that DOC was at all times acting to timely investigate his plan, and as such Dudgeon's claim of unlawful restraint fails.

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[6] The facts of Liptrap's case, as well as those of his co-litigants Norwood and Sellers, are instructive. Liptrap had submitted his plan three months before his EERD of August 18, 2003. The Department, however, did not arrange for his evaluation until December 2003, seven months after submission and four months after his EERD. That evaluation finally was completed in February, 2004, a full six months after his EERD. Norwood submitted a release plan four months before his earned early release date of July 14, 2003; his evaluation was not completed until the end of December 2003, five months after his EERD. A third plaintiff, Sellers, submitted a release plan on September 11, 2003; as of May, 2004, no evaluation had been completed.

Here, Dudgeon originally submitted his release plan (referred to as a "CRR," or "Community Release Referral,") on March 10, 2005. CP at 222. On February 15, 2005, the End of Sentence Review Committee (ESRC)[7] referred Dudgeon to the ESRC Sexually Violent Predator Subcommittee for possible civil commitment consideration under RCW 71.09. *Id.*

Meanwhile, however, the Department had already begun investigating Dudgeon's proposed release plan, and approved it on April 12, 2005. On April 15, 2005, Kimberly Acker, ESRC/SVP Civil Commitment Program Manager for DOC, determined that the plan had been improperly and prematurely approved pursuant to DOC policy requiring that a proposed release plan for an offender who is under civil commitment consideration as an SVP could neither be approved or denied until the assigned Community Corrections Officer, as part of his or her investigation of the plan, had reviewed the completed Forensic Psychological Evaluation. CP at 223.

Additionally, aside from its failure to abide by this policy, the investigation appeared to suffer from other shortcomings, as well: there

[7] The ESRC, pursuant to RCW 72.09.345, is responsible for assigning risk levels, reviewing available release plans, and making appropriate referrals for sex offenders. The committee is required to assess, on a case-by-case basis, the public risk posed by sex offenders who are: (a) Preparing for their release from confinement for sex offenses committed on or after July 1, 1984; and (b) accepted from another state under a reciprocal agreement under the interstate compact authorized in chapter RCW 72.74.

was no indication, for example, that the CCO had ever actually visited the proposed residence (the home of his wife, Mrs. Claudine Dudgeon), or assessed the degree of risk for victims and potential victims of similar age or circumstances, both of which would be part of any investigation of proposed sex offender housing. *Id.*

Upon determining that the correct procedure had not been followed, DOC withdrew its approval of the plan, and the plan was then immediately re-submitted in order to allow the CCO the opportunity to request and review appropriate file materials and fully consider and investigate the plan. *Id.* On May 17, 2005, the Court of Appeals issued its decision in *Liptrap*, holding that DOC "must act on proposed release plans in a timely manner, so as to ensure the inmate has a genuine opportunity to benefit from the earned early release credits." *Liptrap* at 476. At that point, however, Dudgeon's plan was already being actively and timely reviewed by DOC. The release plan was then approved on June 1, 2005. CP at 224. On June 2, 2005, the statutorily required thirty-five day community notification of sex offender release began, and it lasted thirty-five days *Id.*; *See also* RCW 9.94A.612.

That 35-day period resulted in a scheduled release date of July 7, 2005, the day after the State filed its SVP petition. CP at 224. During that 35-day period, on June 24, 2005, the Department received the

completed evaluation by Dr. Amy Phenix in which she opined that Dudgeon met SVP criteria. *Id.*

As is clear from the above, Dudgeon's release was in no way delayed by the fact that the Department was pursuing civil commitment or waiting for the evaluation by Dr. Phenix. The initial approval of his plan had been in violation of DOC policy, and had failed to take into consideration important features of any release plan of a sex offender. By requiring that Dudgeon's release plan be appropriately investigated prior to approval, DOC was complying with its own policies and considering the safety of the community. To overrule the initial release plan approval and require a complete investigation was a good faith determination on DOC's part which considered the interests of both the community and Dudgeon. DOC at all times acted on his release plan in a timely manner, despite Dudgeon's own inquiry as to whether he could withdraw the CRR. Any delay in Dudgeon's release after his May 23, 2005 EERD was due to notification required by RCW 9.94.612 and DOC policy 350.600, and as such was not unlawful.

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3. Even if Unlawfully Held, Dudgeon's Remedy is to Pursue Injunctive Relief Against DOC, Not Imposition of an Impossible Burden of Proof at the SVP Commitment Trial

Even if this Court were to ultimately determine that the trial court had erred in its determination that Dudgeon's confinement was lawful, it still should not consider Dudgeon's due process claim because Dudgeon is not permitted to challenge the legality of his DOC confinement within the context of this SVP proceeding at all. As noted above, the proper procedure by which to litigate the lawfulness of an inmate's restraint during his last prison term is through a personal restraint petition filed with the Court of Appeals. RAP 16.4. "When an inmate challenges an action from which he has had no previous alternative avenue for obtaining state judicial review, the petition is properly considered under the requirements of RAP 16.4." *In re the Personal Restraint Petition of Cashaw*, 123 Wn.2d 138, 148-9, 866 P.2d 8 (1994). "A personal restraint petitioner may obtain relief by showing either a constitutional violation or a violation of the laws of the State of Washington. RAP 16.4 (c)(2)(6); *Cashaw*, at 148, 866 P.2d 8." *In re Liptrap,* 127 Wn. App. 463.

Here, Dudgeon failed to pursue his remedy under the applicable RAP, and the trial court did not have jurisdiction to rule on his complaint that DOC held him unlawfully past his EERD. Dudgeon also cannot

claim he didn't know the proper remedy for his complaint. Both *Liptrap* and *Dutcher*, on which he relies, originated as personal restraint petitions properly brought against DOC. Thus, by pursuing this claim here, Dudgeon fails to follow the procedure in the cases he cites in support of his claim. *Dutcher,* at 755*; Liptrap,* at 469. Because the trial court had no authority to decide Dudgeon was unlawfully held by DOC for referral by the ESRB for civil commitment, his request to have the trial court make this determination was properly denied.[8]

However, even if this Court chooses to consider Dudgeon's claim regardless of its procedural flaws, unlike the inmate in *Dutcher,* Dudgeon is no longer in a position where this Court can afford him any relief. As Division One stated when addressing an identical claim in *Keeney,* "The correct remedy for this particular violation is to allow the inmate to submit a community custody plan to the DOC for investigation. Since Keeney has already served the full length of his sentence, this remedy is no longer

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[8] Because the SVP statute is a result of the compelling need to protect society from serial rapists and pedophiles, the Washington Supreme Court has rejected an approach where an SVP respondent can sleep on his rights and then claim release for a statutory violation. For example, in *In re Campbell*, 139 Wn.2d 341, 986 P.2d 771 (1999) *cert. denied* 531 U.S. 1125 (2001), the court rejected Campbell's argument that he was entitled to reversal because his 72 hour probable cause hearing was untimely. The court held that "Campbell's failure to timely request a hearing effectively waives any future objections he might frame as to the timing of his second probable cause hearing." *Id.* at 351. In the same way, this court should not allow Dudgeon to accept his situation while in DOC custody and then wait two years, until the eve of his SVP trial, to seek release based on DOC actions.

available. In the absence of any effective remedy that can be provided by this court, Mr. Keeney's due process issue is moot." *Keeney* at 857-858.

DOC is not a party to this litigation, and the Attorney General's Office had no authority over DOC's decisions with regard to Dudgeon's release from custody. RCW 71.09.030 requires SVP petitions to be filed when an offender is about to be released from total confinement. As noted by Ms. Acker in her evidentiary hearing testimony, had DOC indicated that they intended to release Dudgeon any time before his actual release date, the Attorney General's Office would have filed the SVP action prior to that date. 3RP 92-93. For these reasons, Dudgeon's claim is moot, and need not be considered by this Court.

4. The Trial Court Properly Determined That the State was Not Required to Prove a Recent Overt Act at Dudgeon's Trial

The trial court also correctly determined that the State was not required to prove a recent overt act at trial because Dudgeon was never released from confinement prior to the filing of the SVP petition. A recent overt act" is "any act or threat that has either caused harm of a sexually violent nature or creates a reasonable apprehension of such harm in the mind of an objective person who knows of the history and mental condition of the person engaging in the act." RCW 71.09.020(10). Under certain circumstances, proof of a recent overt act may be required to

establish current dangerousness. According to the clear language of RCW 71.09.060(5), however, the State is required to plead and prove a recent overt act to the finder of fact only "if, on the date that the petition is filed, the person was living in the community after release from custody." Dudgeon was in total confinement on the day that the State initiated RCW 71.09 proceedings. Thus, pursuant to the statute's "unambiguous directive that the State need not prove a recent overt act when the subject of a sexually violent predator petition is incarcerated on the day the petition is filed," Dudgeon has no statutory right to require the State to plead and prove a recent overt act prior to committing him. *In re the Detention of Henrickson,* 140 Wn.2d 686, 693, 2 P.3d 473, 476-7 (2000).

Nor does due process require proof of an ROA in this situation. It is well established that where, at the time the petition is filed, an individual is incarcerated for a sexually violent offense or for an act that itself would have constituted a recent overt act, due process does not require the State to prove a further overt act. *Henrickson,* at 697; *See also In re Albrecht*, 147 Wn.2d 1, 11, fn 11, 51 P.3d 73 (2002) and *In re Marshall*, 156 Wn.2d 150, 157, 125 P.3d 111 (2005). Such a requirement would "create an impossible burden" for the State to meet. *Henrickson,* at 695, (citing *Young,* 122 Wn.2d at 41, 857 P.2d 989);

Albrecht, at 9. Due process "does not require that the absurd be done." *Id.* at 14.

Dudgeon seeks to avoid this rule by arguing that, because his EERD on his 2001 conviction for Indecent Liberties by Forcible Compulsion, a sexually violent offense occurred 44 days before the filing of the State's petition, he was no longer actually being held on a sexually violent offense. Brief of Appellant at 26. In other words, the effect of this 44-day period of unlawful detention was to somehow void the underlying conviction for Indecent Liberties that led to his detention. While conceding that he was never actually released, Dudgeon argues that the fact that he allegedly should have been released triggers the constitutional requirement of an ROA.

Dudgeon's reliance on *Albrecht* in support of this proposition is misplaced. In that case, the offender had been released into the community. Dudgeon cites absolutely no authority for the proposition that an ROA is required where the offender is in continuous custody since the time of the individual's sentencing on the underlying sexually violent offense. Dudgeon's proposed remedy is to effectively eviscerate the State's ability to bring an SVP action by requiring that the State prove an ROA during a 44-day period during which he allegedly should have been released, but remained incarcerated. The purpose of the ROA requirement

in certain cases, as explained by the *Albrecht* Court, is to establish current dangerousness. *Albrecht* at 6. Such a requirement makes sense where the court is considering an individual who has, in fact, been free in the community for some period of time immediately prior to the petition's filing, or where the person's underlying detention is due to something that has not been demonstrated to be a sexual offense.

Dudgeon did not, however, seek to require that the State prove an ROA in order to demonstrate current dangerousness. Rather, he sought to effectively punish the State, and by extension the community, for allegedly unlawful behavior on the part of DOC. His civil commitment trial was not the proper forum in which to raise his concern, and his proposed remedy was invention of a factually impossible burden of proof. Therefore, the trial court correctly denied his requested relief, and his appeal should be denied as well.

B. The Testimony of Dr. Amy Phenix Did Not Usurp the Function of the Jury to Weigh Evidence and Determine Witness Credibility

Dudgeon argues that the trial court erroneously permitted the State's expert witness, Dr. Amy Phenix, to testify that she diagnosed Dudgeon with pedophilia "based solely on her determination that the alleged victims were more credible than [Dudgeon]." Brief of Appellant

at 32. Dudgeon's argument is not only without merit, but is also premised upon a mischaracterization of Dr. Phenix' testimony.

A reviewing court does not sit in the place of the trial court, "and will not disturb a discretionary admission of expert testimony absent abuse." *State v. Ciskie*, 110 Wn.2d 263, 280, 751 P.2d 1165, 1174 (1988) (*citing State v. Petrich,* 101 Wn.2d 566, 575, 683 P.2d 173 (1984)). Whether Dudgeon "suffered from a mental abnormality within the meaning of the statute was a necessary element of a determination that he is a sexual predator. ... Expert opinion testimony [on that issue] may encompass ultimate issues of fact if it is 'otherwise admissible' and satisfies the requirements of ER 403 and ER 702." *In re Detention of Bedker*, 134 Wn. App. 775, 778, 146 P.3d 442, 443 (Div. 1 2006) (*citing City of Seattle v. Heatley*, 70 Wn. App. 573, 579, 854 P.2d 658 (1993)). "[T]estimony that is not a direct comment on the defendant's guilt or on the veracity of a witness, is otherwise helpful to the jury, and is based on inferences from the evidence is not improper opinion testimony." *Heatley,* at 578. "Determining whether a particular person possesses such a condition is based upon the complicated science of human psychology and is beyond the ken of the average juror." *Bedker.* at 779. It is appropriate for expert testimony on this issue not to be mere statement of

opinion, but supported with the expert's "training, experience and the available data about [the SVP Respondent] and his condition." *Id.*

Here, regarding the information pertaining to Dudgeon's offense history, Dr. Phenix testified that she interviewed Dudgeon on April 19, 2006. 9RP 455. During her testimony, she relayed to the jury Dudgeon's version of events with regard to each of his six known victims. 9RP 458-465. She also reviewed court documents, police reports, presentence investigation reports, criminal history information, Department of Corrections (DOC) records, SCC records that document Dudgeon's progress there, and victim deposition testimony. 9RP 455-456. Dr. Phenix testified that those records were of the type that are ordinarily relied upon by mental health professionals when conducting evaluations of people similarly situated to Dudgeon. 9RP 457. Dudgeon's statements to Dr. Phenix about his various victims differed from previous statements he made to police about them. 9RP 462.

A pedophilia diagnosis requires the presence of fantasies, urges or behaviors involving pre-pubescent children. American Psychiatric Ass'n., *Diagnostic and Statistical Manual of Mental Disorders* (4th rev. ed. 2000) at 571. Dudgeon has never been convicted of sexually assaulting or molesting anyone under the age of 13. However, based on all of the records and information she had available, which included various

statements and reports of Dudgeon's victims, as well as her interview of Dudgeon, Dr. Phenix concluded that Dudgeon did have such urges, and acted on them. 9RP 481-2. Although Dudgeon objected to this testimony, the trial court held that Dr. Phenix was "entitled to give her opinion and the basis of her opinion." 9RP 479.

Dr. Phenix' opinion was that Dudgeon suffered from Pedophilia, and that Dudgeon's Pedophilia met the various components of the definition of "mental abnormality." 9RP 472; 9RP 490-493. Dr. Phenix did not opine as to whether or not Dudgeon was a sexually violent predator. Dr. Phenix also did not attempt to explain to the jury why the records of Dudgeon's sexual abuse of children were credible. She merely asserted that she relied upon those records when formulating her opinions in this case. In addition, during cross-examination, Dudgeon was able to, and did, highlight the weaknesses in Dr. Phenix' approach to his case. *See e.g.* 9RP 584-588.

Further, the record below also establishes that the jury received specific instructions that they were the sole triers of fact and the sole deciders of the credibility of witnesses. For example, jury instruction 1 states that jurors "are the sole judges of the credibility of the witnesses and of what weight is to be given to the testimony of each." CP at 814. Jury instruction 2 states that jurors "are not bound" by expert witness

opinions, but "determin[e] the credibility and weight to be given such opinion evidence." CP at 817. Jurors are presumed to follow the court's instructions. *State v. Kirkman*, 159 Wn.2d 918, 937, 155 P.3d 125, 136 (2007). In *Ciskie*, upon which Dudgeon relies here, the Court found such instructions relevant (and curative) in claims of judicial comment on the evidence. *See Ciskie,* 110 Wn.2d 263.

In spite of all this, even if the trial court erred in overruling Dudgeon's objections, that error was harmless. "An evidentiary error which is not of constitutional magnitude requires reversal only if the error, within reasonable probability, materially affected the outcome." *State v. Justesen*, 121 Wn. App. 83, 96, 86 P.3d 1259, 1265 (Div. 1 2004) (*citing State v. Halstien*, 122 Wn.2d 109, 127, 857 P.2d 270 (1993)). The mere fact that Dr. Phenix relied upon recorded victim accounts is unlikely to have affected the jury verdict here because, at trial, and before Dr. Phenix took the witness stand, five of Dudgeon's six victims testified. The sixth victim also testified after Dr. Phenix.

Consequently, the jury was able to assess the victims' credibility for themselves before hearing from Dr. Phenix. That victim testimony, therefore, provided a barometer by which the jury could judge Dr. Phenix' credibility. Therefore, if the jury felt that all or a portion of the victim testimony was not credible, they were free to apply those opinions when

hearing from Dr. Phenix that she considered previously recorded victim accounts before rendering her opinions in this case. Regardless, "appellate courts are reluctant to disregard fact finders' determinations of credibility because appellate courts are unable to observe witness demeanor." *In re Detention of Stout*, 159 Wn.2d 357, 383, 150 P.3d 86, 100 (2007) (internal citations omitted). For all of these reasons, Dudgeon's claim is without merit, and his appeal should be denied.

C. Sufficient Evidence Was Presented at Trial to Support the Finding That Dudgeon is a Sexually Violent Predator

Dudgeon makes a number of arguments to the effect that the evidence was insufficient to support his commitment as a SVP. A SVP is an individual "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). Proof is sufficient if, when viewed in the light most favorable to the State, a rational trier of fact could have found those elements beyond a reasonable doubt. *In re Detention of Thorell,* 149 Wn.2d 724, 744 - 45, 72 P.3d 708 (2003).

Dudgeon argues, for example, that given the passage of time since his last offense, he cannot be found to be "currently dangerous." Brief of Appellant at 35. In addition, he argues that, the State failed to

prove Dudgeon was likely to offend in a "predatory" manner if released because his past offenses were not directed against strangers or borne of relationships primarily promoted for the purpose of victimization. *Id.* at 36. Finally, he argues that the risk assessment methods employed by the State's expert were not supported by any scientific evidence. *Id.* at 37. Appellant's arguments lack merit and should be rejected.

1. The Evidence Showed That Dudgeon Was More Likely Than Not to Re-Offend if Not Confined to a Secure Facility

Dudgeon argues that the State did not sufficiently prove that Dudgeon is likely to reoffend because there was "no evidence" that Dudgeon is currently dangerous given the passage of time since his last offense. Brief of Appellant at 35. "[A] diagnosis of a mental abnormality or personality disorder is not, in itself, sufficient evidence for a jury to find a serious lack of control. Such a diagnosis, however, when coupled with evidence of prior sexually violent behavior and testimony from mental health experts, which links these to a serious lack of control, is sufficient for a jury to find that the person presents a serious risk of future sexual violence and therefore meets the requirements of an SVP." *In re Thorell*, at 761-762.

Here, the jury heard from six of Dudgeon's victims, whom he raped and molested on hundreds of occasions from the early 1970s through the late 1990s. 7RP 261-264; 8RP 403. They heard that Dudgeon

was sexually offending against M.S. on a near daily basis despite being well into in his sixties. 8RP 414. Dr. Amy Phenix, a highly qualified and experienced clinical psychologist, then provided ample evidence to the jury that, despite his age and the passage of time since his arrest and incarceration for his last offense, Dudgeon remained likely to reoffend if released to the community. Dr. Phenix used her interview of Dudgeon, extensive records, actuarial tools, empirically validated risk factors, and information about Dudgeon's physical abilities to form her opinions. Dr. Phenix also informed the jury that, even in spite of his extraordinary offense history, Dudgeon doesn't believe he needs sex offender treatment because he doesn't believe he has a problem that would require treatment. 9RP 513.

Based upon all of that abundant information, it is her opinion that Dudgeon's Pedophilia continues to cause him serious difficulty controlling his sexually violent behavior. 9RP 539. For these reasons, the jury had more than enough evidence to support their decision that Dudgeon is a currently dangerous sexually violent predator. As such, Dudgeon's appeal should be denied.

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2. Sufficient Evidence Was Presented at Trial to Establish That Dudgeon's Future Sexual Offending Would Likely Be Predatory in Nature

In the context of RCW 71.09, "Predatory" means 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). At trial, Dr. Phenix testified that she believed to a reasonable degree of psychological certainty that Dudgeon was likely to reoffend, and his reoffending would be predatory in nature. 9RP 532. In reaching that conclusion, she relied upon information in the records she reviewed that Dudgeon had never offended against any of his own biological children, and described how his previous victims were persons of casual acquaintance. 9RP 532-533.

The jury also heard from several of Mr. Dudgeon's victims whose relationship to him was as father of a childhood friend, neighbor across the street, or a man one of the victim's mother began dating. 7RP 259; 7RP 307; 8RP 376. Since much, if not all, of Dudgeon's twenty-five year history of offending can be fairly characterized as predatory for purposes of SVP civil commitment, it was logical for the jury to conclude that his future offenses would be carried out in a similar fashion. Thus, when

viewed in the light most favorable to the State, sufficient evidence was presented to support the jury's determination on that issue.

3. Dr. Phenix' Risk Assessment Was Scientifically Valid, and Provided Sufficient Evidence to Support His Commitment

Dudgeon also argues that the evidence presented fails to adequately support his commitment because, he alleges, Dr. Phenix' risk assessment was not supported by scientific evidence. Brief of Appellant at 37. This argument fails when Dr. Phenix' testimony is read as a whole.

Here, as noted above, Dr. Phenix used several available tools when assessing Dudgeon's risk to sexually re-offend. These included consideration of actuarial tools, psychological testing, extensive records, Dudgeon's interview, and application of recognized risk factors. The validity of using actuarial tools, such as the Static-99, in SVP proceedings has already been recognized by the Washington Supreme Court. *In re Thorell*, at 756 ("[W]e reiterate that the *Frye* standard has been satisfied by both clinical and actuarial determinations of future dangerousness.")

In addition, the historical and dynamic risk factors Dr. Phenix considered were established and supported by the research of her peers. Despite Dudgeon's assertions on appeal, Dr. Phenix did not merely use her clinical judgment and flip a metaphorical coin when conducting her

evaluation. Rather, when evaluating persons who are under consideration for SVP civil commitment, employing technical means such as dynamic risk factors that are not included within actuarial risk assessment tools is recognized not only by the psychological community, but also the courts of this and other jurisdictions. *See e.g. In re Detention of Ambers*, 160 Wn.2d 543, 158 P.3d 1144, (2007) (SVP's petition for unconditional release included risk assessment that included actuarial tools and other dynamic risk factors); *In re Detention of Lewis*, 134 Wn. App. 896, 906, 143 P.3d 833, 838 (Div. 3 2006) (expert reviewed dynamic risk factors that included the nature of relationships, emotional identification with children, sexual self-regulation, current attitudes, general self-regulation, and completion of sex offender treatment); *In re Care and Treatment of Kapprelian*, 168 S.W.3d 708, 715 (Mo. App. S.D. 2005) (research supported the use of additional scientifically derived, dynamic factors utilized in evaluating a SVP); *Commonwealth v. Chapman*, 444 Mass. 15, 825 N.E.2d 508 (Mass. 2005) (petition for sex offender civil commitment that included consideration of dynamic risk factors such as treatment quality and participation justified further proceedings).

Dr. Phenix was also careful to point out those factors or criteria that weighed in favor of Dudgeon's release. *See* 9RP 518 (Dudgeon did

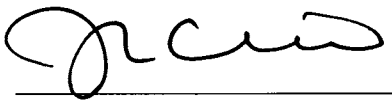
not exhibit the risk factor "intimacy deficits"). In spite of those few psychological criteria, and Dudgeon's age, Dr. Phenix relayed an overwhelming majority of psychological evidence that pointed squarely to the conclusion that Dudgeon is more likely than not to sexually offend if released to the community. For those reasons, it is not surprising that the jury gave her testimony, methods, and opinions weight when rendering their verdict. Therefore, Dudgeon has failed to prove beyond a reasonable doubt that a rational trier of fact could not have found that Dudgeon was more likely than not to reoffend if released.

IV. CONCLUSION

For the foregoing reasons, the State requests that this Court deny Dudgeon's appeal, and affirm his civil commitment as a sexually violent predator.

RESPECTFULLY SUBMITTED this 14th day of January, 2008.

ROBERT M. MCKENNA
Attorney General



JOSHUA CHOATE, WSBA #30867
Assistant Attorney General
Attorneys for Respondent

Appendix A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

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DIVISION II
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STATE OF WASHINGTON
BY
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In re the Detention of

CECIL E. DUDGEON,

Petitioner.

No. 36106-0-II

RULING DENYING REVIEW

Cecil E. Dudgeon seeks review of a Kitsap County Superior Court order denying his motion to require the State to prove a recent overt act in his trial for civil commitment as a sexually violent predator (SVP). Because the trial is scheduled to begin April 16, 2007, this court considered the matter on an emergency basis. RAP 17.4(b).

Dudgeon contends that he was improperly held beyond his earned early release date, May 23, 2005, and the court was therefore, required to treat him as having been released for the purposes of proof at his SVP trial. He argues that in failing to do so, the court probably erred, justifying review under RAP 2.3(b)(2). The relevant events occurred as follows:

> **February 15, 2005** - End of Sentence Review Committee (ESRC) refers Dudgeon for screening by the SVP subcommittee.
> **March 10, 2005** - Dudgeon submits his release plan (CRR).
> **March 31, 2005** - SVP subcommittee requests a forensic psychological evaluation of Dudgeon.
> **April 12, 2005** - a community corrections officer approves the CRR.

April 15, 2005 - Kimberly Acker, the ESRC/SVP civil commitment program manager, withdraws approval of Dudgeon's CRR on the basis of inadequate investigation by the CCO and the uncompleted SVP screening.
May 20, 2005 - the task of performing a psychological evaluation of Dudgeon is assigned to Dr. Amy Phenix.
June 1, 2005 - Dudgeon's second CRR is approved.
June 2, 2005 - pursuant to the 35-day notice requirement in DOC Directive 350.600, local law enforcement is notified that Dudgeon is due to be released. On the basis of that rule, his release date is July 7, 2005.
June 24, 2005 - the psychological report is completed.
July 6, 2005 - the SVP petition is filed.
February 21, 2007 - Dudgeon files the motion to require proof of a recent overt act.

Dudgeon's motion raises two issues: (1) did DOC's failure to release him on May 23, 2005, violate his due process rights, and (2) if so, does the violation entitle him to the remedy he seeks? With regard to the first issue, Dudgeon relies on *In re Personal Restraint Petition of Liptrap,* 127 Wn. App. 463 (2005); and *In re Personal Restraint Petition of Dutcher,* 114 Wn. App. 755 (2002), which held that it is improper to withhold approval of a release plan solely because the SVP screening process is not complete.[1] In those cases, DOC refused to accept (*Dutcher*), or approve (*Liptrap*) release plans until the SVP screening process was complete. Also in those cases, DOC did not initiate the SVP process in a timely fashion and was dilatory in completing it, depriving some petitioners of the opportunity for release before their final release date.

This case is different for several reasons. First, the SVP process was started in timely fashion, and there have not been the kind of delays present in

[1] Notably, neither case specifically precludes consideration of the fact that the inmate has been identified as a possible SVP in evaluating his or her release plan. In fact, *Dutcher* appears to contemplate such consideration. *See* 114 Wn. App. at 762.

Liptrap and *Dutcher.* Second, Dudgeon's CRR was accepted, processed and approved before the SVP screening was complete. Third, the record does not obviously or probably support Dudgeon's allegations of impropriety. The questions about Dudgeon's proposed residence needed to be resolved, and DOC resolved them in a relatively short period of time and approved his release plan the day after they were resolved. As to the second reason Acker gave for withdrawing the initial approval of Dudgeon's release plan, it did not prevent approval of the second plan.

The second issue pertains to remedy. Even assuming that Dudgeon can establish his first claim, he has presented no authority to support the remedy he seeks. The State is not required to prove a recent overt act unless, "on the date that [an SVP] petition is filed, the person was living in the community after release from custody". RCW 71.09.060(1). The rationale for this law is, of course, that incarcerated individuals generally have no opportunity to commit such acts. *See Detention of Albrecht,* 147 Wn.2d 1, 9-10 (2002); *Detention of Paschke,* 121 Wn. App. 614, 620-21 (2004). The propriety or impropriety of that incarceration does not affect the rationale.

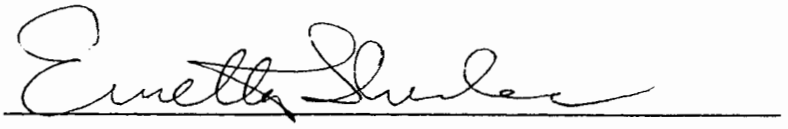
Neither is the limited liberty interest in earned early release related to any due process rights involved in the SVP determination process. *See* RCW 71.09.040, 050, 060; *see also In re Aqui,* 84 Wn. App. 88, 95 (1996), *review denied,* 133 Wn.2d 1015 (1997) (Legislature has designed two separate systems, one concerned with punishment, and one concerned with civil commitment for treatment). There is no apparent reason why a violation

regarding punishment should require a remedy pertinent only to civil commitment.

As Dudgeon points out, no Washington appellate court has addressed the second issue raised here. It is possible that the trial court erred, but it is not probable. Accordingly, it is hereby

ORDERED that review is denied.

DATED this 12th day of April, 2002



Commissioner

cc: The Honorable Leonard Costello
Kitsap County
Superior Court No. 05 2 01588 0
Thomas E. Weaver, Jr.
Sarah Sappington
Joshua Choate

NO. 36273-2-II

WASHINGTON STATE COURT OF APPEALS, DIVISION II

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STATE OF WASHINGTON
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In re the Detention of: CECIL DUDGEON,	DECLARATION OF SERVICE

I, MARTHA NEUMANN, declare as follows:

On January 14, 2008, I deposited in the United States mail, postage affixed, addressed as follows:

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STATE OF WASHINGTON
BY DEPUTY

Catherine Glinski
PO Box 761
Manchester, WA 98353

a true and correct copy of: RESPONDENT'S OPENING BRIEF; and DECLARATION OF SERVICE.

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

DATED this 14th day of January, 2008, at Seattle, Washington.

MARTHA NEUMANN

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STATE OF WASHINGTON
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STATE OF WASHINGTON
KITSAP COUNTY SUPERIOR COURT

In re the Detention of: CECIL DUDGEON, Respondent.	NO. 05-2-01588-0 DECLARATION OF SERVICE

MARTHA NEUMANN declares as follows:

On January 14, 2008, I sent by United States mail, first-class postage prepaid, addressed as follows:

CATHERINE GLINSKI
PO BOX 761
MANCHESTER, WA 98353

a copy of the following documents: SUPPLEMENTAL DESIGNATION OF CLERK'S PAPERS AND EXHIBITS , and DECLARATION OF SERVICE.

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

DATED this 14th day of January, 2008, at Seattle, Washington.

MARTHA NEUMANN
Legal Assistant

ATTORNEY GENERAL'S OFFICE
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Seattle, WA 98104
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