

**Court of Appeals No. 39548-7-II**

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

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**In re: the Detention of:**

**GEORGE MITCHELL,  
Respondent**

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**BRIEF OF APPELLANT**

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**Appeal from the Superior Court of Pierce County,  
Cause No. 00-2-06377-1  
The Honorable Katherine M. Stolz, Presiding Judge**

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## **I. ASSIGNMENTS OF ERROR**

1. The trial court abused its discretion in denying Mr. Mitchell's Motion to Set Aside Judgment under CR 60.
2. The trial court's decision denied Mr. Mitchell his constitutional right to access to the courts.

## **II. ISSUES PRESENTED**

1. Is it an abuse of discretion for a trial court to refuse to apply CR 60 to a sexually violent predator proceeding? (Assignment of Error No. 1)
2. Did the trial court's denial of Mr. Mitchell's motion violate his constitutionally guaranteed access to the courts? (Assignment of Error No. 2)
3. Did the trial court abuse its discretion in denying Mr. Mitchell's motion to set aside the judgment? (Assignment of Error No. 1)

## **III. STATEMENT OF THE CASE**

### *Factual and Procedural Background*

On April 29, 1974, George Mitchell pled guilty to and was convicted of one count of rape. CP 4-10. On February 5, 1990, Mr. Mitchell pled guilty to rape in the second degree by forcible compulsion. CP 4-10.

On March 27, 2000, one day before Mr. Mitchell was to be released from confinement, the State of Washington filed a petition to have Mr. Mitchell confined as a sexually violent predator pursuant to RCW 71.09. CP1-2.

While imprisoned at Twin Rivers, Mr. Mitchell did complete some sex offender treatment. CP 309-344.

On April 9, 2003, Mr. Mitchell was committed to the SCC as a sexually violent predator (SVP) pursuant to RCW 71.09.060(1) after waiving his right to a jury trial. CP 20-308.

Mr. Mitchell was transferred to the SCC in May of 2000. CP 382-422. Between Mr. Mitchell's arrival at the SCC and April 2003, Mr. Mitchell was participating in the sex offender treatment offered at the SCC. CP 382-422.

Mr. Mitchell was evaluated by Dr. Brian Judd, Ph.D., who concluded that Mr. Mitchell suffered from antisocial personality disorder as well as two paraphilias: sexual sadism and paraphilia not otherwise specified. CP 4-10. On June 27, 2003, Mr. Mitchell was found by the Superior Court to be a sexually violent predator as defined in RCW 71.09.020(16) and was ordered to be placed in a secure facility for control, care, and treatment until further order of the court. CP 4-10.

Mr. Mitchell appealed the finding of the Superior Court, but the Court of Appeals affirmed the Superior Court on August 16, 2005. CP 11-12.

On April 4, 2007, a review hearing was held to determine whether Mr. Mitchell should be released. CP 612-615. At the April

4, 2007 hearing, Dr. Lee Coleman, a certified psychiatrist who evaluated Mr. Mitchell pursuant to RCW 71.09 for purposes of post-commitment litigation, testified on behalf of Mr. Mitchell. CP 612-615. Dr. Coleman testified that Mr. Mitchell did not suffer from a qualifying mental disorder that rendered him more likely than not to engage in acts of sexual violence if not confined to a secure facility and that Mr. Mitchell had never suffered from a qualifying mental disorder. CP 612-615. Dr. Coleman did not provide any testimony that Mr. Mitchell's condition had changed in any way. CP 612-615.

On April 4, 2007, the court found that the evaluation submitted by DSHS provided prima facie evidence that Mr. Mitchell continued to meet the definition of a sexually violent predator, that release to a less restrictive alternative was not in Mr. Mitchell's best interest, and that conditions could not be imposed that would adequately protect the community. CP 612-615. The court further found that Mr. Mitchell had not presented evidence that his condition had so changed that he no longer met the criteria for a sexually violent predator. CP 612-615.

The court also found that Mr. Mitchell had participated in the SCC Sex Offender Treatment program from September 2001 to April 2003 and advanced to treatment phase three out of six treatment phases. CP 612-615. The court found that since April 2003, Mr. Mitchell had not participated in the treatment program at the SCC. CP 612-615.

The court further found that Mr. Mitchell had refused to meet on all occasions with the DSHS evaluators completing the annual reviews. CP 612-615.

On October 12, 2007, the court concluded: (1) that DSHS's April 26, 2007, annual review of Mr. Mitchell's mental condition provided prima facie evidence that Mr. Mitchell's condition remained the same such that he continued to meet the statutory definition of a sexually violent predator; and (2) that release to any proposed less restrictive alternative placement was not in the best interest of Mr. Mitchell, not could conditions be imposed which could adequately protect the community. CP 612-615. The court further concluded that, pursuant to *Detention of Petersen v. State*, 145 Wn.2d 789, 42 P.3d 952, 958 (2002), Mr. Mitchell did not present prima facie evidence that: (1) his condition had so changed that he no longer met the criteria of a sexually violent predator; or (2) that release to a less restrictive alternative was in Mr. Mitchell's best interest or that conditions could be imposed which would adequately protect the community. CP 612-615. The court ordered that Mr. Mitchell's civil commitment would continue until the further order of the court. CP 612-615.

On March 11, 2008, because Mr. Mitchell did not affirmatively waive his right to petition for release as part of his annual review, the State of Washington brought a Motion for Order to Show Cause under

RCW 71.09.090(2) asking the court for an Order directing Mr. Mitchell to appear to determine whether or not probable cause existed to warrant a hearing on whether: (1) Mr. Mitchell's condition had so changed that he no longer met the definition of a sexually violent predator; or (2) release to a less restrictive alternative would be in the best interest of Mr. Mitchell and conditions could be imposed that would adequately protect the community. CP 616.

On March 13, 2008, Mr. Mitchell submitted to an evaluation by Dr. Halon which was completed on April 16, 2008. CP 20-308. Dr. Halon found that "the database overwhelmingly suggests that there [were] no signs or symptoms of any form of mental disorder producing any dysfunction in Mr. Mitchell's thought, interests, ideas, cognition, perceptions or emotions." CP 20-308, Attachment B.

On May 5, 2008, Mr. Mitchell filed a Memorandum Regarding Annual Review Hearing for Unconditional Release wherein he argued that he should be granted a trial to determine whether or not his condition had changed so that he no longer met the definition of a sexually violent predator or that a less restrictive alternative confinement was warranted on the basis of Dr. Halon's diagnosis. CP 617-643.

The State filed a Response to Mr. Mitchell's Memorandum arguing that Dr. Halon's failed to address whether or not Mr. Mitchell

had a substantial change in his mental condition *due to participation in treatment*, most of Dr. Halon's report was irrelevant. CP 644-735.

The show cause hearing was held on July 25, 2008. CP 20-308, Attachment A. Dr. Halon testified at the hearing and repeated his diagnosis of Mr. Mitchell that Mr. Mitchell was no longer a sexually violent predator because Mr. Mitchell either never had a mental disorder or, if he did, it was entirely in remission. CP 20-308, Attachment A.

The trial court ruled that Mr. Mitchell's confinement as a sexually violent predator should continue and that Mr. Mitchell did not present prima facie evidence that (a) his condition had so changed that he no longer met the criteria of a sexually violent predator, or (b) that release to a less restrictive alternative confinement was appropriate. CP 736-738.

On April 3, 2009, Mr. Mitchell filed a Motion to Set Aside Judgment pursuant to CR 60(b)(3) and (b)(11). CP 20-308.

On June 19, 2009, a hearing was held regarding Mr. Mitchell's Motion to Set Aside Judgment. RP 1-14. Judge Stolz denied Mr. Mitchell's motion finding that "under the circumstances that CR 60(b)(3) and CR 60(b)(11) do not apply at this juncture of the case." RP 13.

Notice of Appeal was timely filed on July 14, 2009. CP 596-597.

#### IV. ARGUMENT

**1. The trial court abused its discretion in finding that CR 60 did not apply to Mr. Mitchel's case.**

A trial court's decision on a motion to vacate a judgment under CR 60(b) is reviewed for an abuse of discretion. *In re Marriage of Tang*, 57 Wn.App. 648, 653, 789 P.2d 118 (1990).

A trial court abuses its discretion when its decision is "manifestly unreasonable or based on untenable grounds." *Grandmaster Sheng-Yen Lu v. King County*, 110 Wn.App. 92, 99, 38 P.3d 1040 (2002). A court's decision is manifestly unreasonable

if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard.

*Grandmaster Sheng-Yen Lu*, 110 Wn.App. at 99, 38 P.3d 1040.

Chapter 71.09 RCW is civil in nature. The civil rules govern sexually violent predator proceedings, '[e]xcept where inconsistent with rules or statutes applicable to special proceedings.' [CR 81]. Sexually violent predator proceedings are special proceedings; therefore the civil rules apply unless they conflict with provisions within chapter 71.09 RCW. CR 60(B) authorizes the court to relieve a party from judgment in specified circumstances. Because there are no provisions within the statute that prohibit detainees from moving to vacate judgment, CR

60(b) is available to them.

*State v. Ward*, 125 Wn.App. 374, 378-379, 104 P.3d 751, review denied 155 Wn.2d 1025, 126 P.3d 820 (2005).

Here, without elucidating its reasons, the trial court held that CR 60 did not apply to Mr. Mitchell's motion. RP 13-14, CP 595. The trial court was clearly incorrect since, as stated in *Ward*, CR 60 *does* apply to SVP proceedings.

The trial court's ruling that CR 60 did not apply to Mr. Mitchell's proceeding was an abuse of discretion since it was outside the range of acceptable choices.

**2. The trial court's ruling violated Mr. Mitchell's constitutionally guaranteed right to access to the courts.**

Under Article I, § 10 of the Washington Constitution, “[f]ull access to the courts . . . is a fundamental right.” *King v. King*, 162 Wn.2d 378, 390, 174 P.3d 659 (2007) (quoting *Bullock v. Roberts*, 84 Wn.2d 101, 104, 524 P.2d 385 (1974) (citing *Boddie v. Connecticut*, 401 U.S. 371, 91 S. Ct. 780, 28 L. Ed. 2d 113 (1971))). The people have a right of access to courts; indeed, it is “the bedrock foundation upon which rest all the people’s rights and obligations.” *John Doe v. Puget Sound Blood Ctr.*, 117 Wn.2d 772, 780, 819 P.2d 370 (1991).

Even though he is currently confined as a sexually violent predator, Mr. Mitchell is still a citizen of the State of Washington. As

such, he has a fundamental constitutional right of access to the courts. The trial court's summary denial of Mr. Mitchell's motion without even giving reasons why CR 60 did not apply to his case deprived Mr. Mitchell of access to the court. The closest the trial court came to giving a reason as to why CR 60 did not apply to Mr. Mitchell's case was the trial court's ruling that CR 60 did not "apply at this juncture" and that "we're going to be revisiting this case in another month; and he can raise those arguments, you know, at that time." RP 13-14. The trial court's ruling appears to be based on the trial court's desire to simply delay dealing with Mr. Mitchell's evidence until a later date. This is not a valid reason to deny Mr. Mitchell the ability to exercise his right to access to the court. Mr. Mitchell had a fundamental right to have his case considered on the day of argument, not a month later when the trial court felt like hearing it.

**3. The trial court's denial of Mr. Mitchell's motion was an abuse of discretion.**

The State's response to Mr. Mitchell's motion below was devoted mainly to arguing why CR 60(b) did not apply to Mr. Mitchell's arguments. CP 427-592. In an abundance of caution, should this court find that, despite the lack of any specific language of the court indicating such, the trial court's ruling denying Mr. Mitchell's motion was based on the arguments made in the State's response brief,

Mr. Mitchell submits the following argument.

Mr. Mitchell was involuntarily committed as a sexually violent offender on July 27, 2003. At his annual review hearing July 25, 2008, the trial court ruled that Mr. Mitchell had not demonstrated that his condition had so changed that he could not be classified as a sexually violent predator. On April 3, 2009, Mr. Mitchell sought vacation of the trial court's July 25, 2008 decision under CR 60(b)(3) and CR 60(b)(11).

CR 60(b)(3) authorizes relief from an order on grounds that “[n]ewly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under rule 59(b).” The Rule also provides, “[t]he motion shall be made within a reasonable time and for reasons (1), (2) or (3) not more than 1 year after the judgment, order, or proceeding was entered or taken.”

CR 60(b)(11) authorizes relief from an order “[f]or any other reason justifying relief from the operation of the judgment.”

*a. The trial court erred in ruling that CR 60(b)(3) did not apply in Mr. Mitchell's circumstances.*

1. The Motion was timely filed under CR 60(b)(3).

The first sentence of Mr. Mitchell's Motion to Set Aside Judgment states that Mr. Mitchell “moves the Court for an Order setting aside the original Judgment entered in the above entitled cause

number pursuant to CR 60(b).” CP 25. However, the arguments in the Motion arose from and are related to the July 25, 2008 show cause hearing, and the Conclusion of the Motion states, “Because Mr. Mitchell has made a prima facie showing that he no longer meets the definition of an SVP this court should grant him a full trial on the issue of unconditional release.” CP 44.

Seizing on the overly enthusiastic first sentence in Mr. Mitchell’s CR 60(b) Motion (CP 433), the State argued that Mr. Mitchell was not eligible for relief under CR 60(b)(3) because the motion was “untimely” since the original judgment was entered in 2003. CP 431. It is clear from the Motion, however, that the relief Mr. Mitchell actually sought was relief from the Court’s July 25, 2008 decision. *See* CP 27-43. The Motion was filed in April of 2009, less than one year after the order was entered. Mr. Mitchell’s Motion was timely filed for purposes of CR 60(b)(3).

2. The evidence presented by Mr. Mitchell at the July 25, 2008 hearing was “newly discovered” under CR 60(b)(3).

The State cited *In re Marriage of Knutson*, 114 Wn.App. 866, 872, 60 P.3d 681 (2003), to argue that CR 60(b)(3) applies only to evidence in existence at the time the commitment order in this case was entered. *Knutson* is distinguishable based on the type of evidence under consideration.

In *Knutson*, the alleged “newly discovered evidence” was the value of a retirement plan, which had dropped precipitously with a fall in the stock market. The *Knutson* court stated, “the transitory nature of the ‘evidence’ does not lend itself to application of CR 60(b)(3).” *Knutson*, 114 Wn.App. 872, 60 P.3d 681. “The value of such a plan necessarily fluctuates with the ever-changing market.” *Knutson*, 114 Wn.App. at 872, 60 P.3d 681. At the time of the dissolution of the Knutson’s marriage, the retirement plan had a value, which was determined by the court. The method for determining the value of the plan did not change: only the “ever-changing” market value of the plan changed. That the value did, in fact, change was not “newly discovered evidence.” *Knutson* is inapposite here.

Here, the “newly discovered evidence” is both the ultimate diagnosis of whether or not Mr. Mitchell meets the definition of an SVP, and also the *method of making* that diagnosis. Unlike the value of the retirement plan in *Knutson*, the determination that an individual is an SVP is not “transitory” or a determination that “necessarily fluctuates.” Given the same criteria and the symptoms and the same methodology for interpreting those symptoms, the determination of whether or not someone is an SVP would be unchanged. Such a determination is nothing like the value of a retirement plan based on the value of stocks. In Mr. Mitchell’s case, the “newly discovered

evidence” is not only that Mr. Mitchell does not meet the definition of a sexually violent predator, but that the decision that Mr. Mitchell was an SVP was not based on proper methodology. “Newly discovered evidence” relating to a committing diagnosis is permitted under both CR 60(b)(3) and CR 60(b)(11). *In re Detention of Elmore*, 162 Wn.2d 27, 41, 168 P.3d 1285 (2007). *Knutson* does not apply here.

3. The trial court’s denial of Mr. Mitchell’s motion for an evidentiary hearing because CR 60(b)(3) did “not apply” was an abuse of discretion.

The trial court gave no reason for its denial of Mr. Mitchell’s CR 60(b) motion except for a comment during her oral ruling that CR 60(b)(3) did “not apply.” RP 13-14. This was clear error, as discussed in section 1, *supra*.

If the trial court based its ruling on the arguments presented by the State, it was an abuse of discretion because, as discussed above, the CR 60(b) motion was timely under CR 60(b)(3), and the evidence presented at the July 2008 hearing was “newly discovered” under CR 60(b)(3).

The final argument raised by the State was that the evidence presented at the July 2008 hearing was “simply cumulative of evidence presented at trial and would not change the result reached at trial.” CP 435. In light of the fact that the trial took place in 2003, before the

2008 evidence existed, this argument is meritless.

b. *The trial court erred in ruling that CR 60(b)(11) did not apply in Mr. Mitchell's circumstances.*

CR 60(b)(11) provides that a court may grant relief from an order for “any other reason” than those listed in CR 60(b)(1) – (10) “justifying relief from the judgment.” As stated in *Elmore*, a challenge to a committing diagnosis is permitted under CR 60(b)(11). *Elmore*, 162 Wn.2d at 41, 168 P.3d 1285. As discussed in section 1, CR 60(b)(11) does certainly apply to sexually violent predator proceedings. It was clear error for the trial court to rule that it did not apply in Mr. Mitchell's circumstances.

If the court's ruling was based on the arguments presented by the State, it was an abuse of discretion. The only argument presented by the State regarding CR 60(b)(11) is found at CP 431, where it quotes language from CR 60(b) that motions brought under CR 60(b)(11) must be brought “within a reasonable time.” The State argued, “a motion filed in 2009 based on cases issued in 2007 and 2002 is untimely within the meaning of CR 60(b)(11).” CP 431. This argument fails for several reasons.

First, the motion filed in 2009 was based on the decision of the court entered in 2008.

Second, the measure of time before a CR 60(b) motion is filed

is not dispositive on the issue of whether it has been filed “within a reasonable time.” Rather, “[w]hat constitutes a reasonable time depends on the facts and circumstances of each case.” *Luckett v. Boeing Co.*, 98 Wn.App. 307, 312, 989 P.2d 1144 (1999) (citing *In re Marriage of Thurston*, 92 Wn.App. 494, 500, 963 P.2d 947 (1998), *review denied*, 137 Wn.2d 1023, 980 P.2d 1282 (1999); *State ex rel. Campbell v. Cook*, 86 Wn.App. 761, 766, 938 P.2d 345, *review denied*, 133 Wn.2d 1019, 948 P.2d 387 (1997)).

“Major considerations in determining a motion's timeliness are: (1) prejudice to the nonmoving party due to the delay; and (2) whether the moving party has good reasons for failing to take appropriate action sooner.” *Id.*

The trial court did not address these “major considerations” orally or in writing, nor did the State address these “major considerations” in its arguments. Had it done so, it would not have been able to show any prejudice to the State arising from the nine-month delay between the July 2008 hearing and the April 2009 hearing on the CR 60(b) motion. The second factor, whether Mr. Mitchell had “good reasons for failing” to file the CR 60(b) motion sooner, is more than satisfied. Between July 2008 and April 2009, Mr. Mitchell sought relief from the trial court’s decision by bringing a motion for discretionary review. Both “major considerations” weigh heavily in

favor of a finding that Mr. Mitchell's CR 60(b) motion was timely under CR 60(b)(11).

It was an abuse of discretion to rule that CR 60(b)(11) did not apply because it was not "timely."

*c. Mr. Mitchell presented sufficient evidence at the July 25, 2008 hearing that, if believed, showed Mr. Mitchell no longer suffered from a mental abnormality or personality disorder.*

Even if the State carries its burden to prove a prima facie case for continued imprisonment, the prisoner may present his own evidence which, if believed, would show...the prisoner no longer suffers from a mental abnormality or personality disorder, i.e., the prisoner has 'so changed'...If the prisoner makes [this] showing, there is probable cause that continued incarceration is not warranted.

*In re Petersen*, 145 Wn.2d at 798-799, 42 P.3d 952.

Here, Mr. Mitchell presented the testimony and evaluation report of Dr. Halon. CP 20-308, Attachment A and Attachment B. Dr. Halon is a Ph.D. and has been a licensed psychologist since 1977. CP 20-308, Attachment A, page 8. Dr. Halon has been dealing with sex offenders for 30 years and has evaluated over 2,000 sex offenders. CP 20-308, Attachment A, page 9. In California, Dr. Halon helped design and evaluate a program for evaluating family members, including the offending family member, where incest had occurred. CP 20-308, Attachment A, page 10-11.

In early 1986, Dr. Halon was contacted by the California

Department of Mental Health and the California Department of Corrections and was asked to perform forensic evaluations on male and female violent offenders who were scheduled for parole but were thought to have some form of major or severe mental disorder. CP 20-308, Attachment A, page 11-12. The purpose of the evaluations was to determine whether the offender's mental disorder, if one existed, was instrumental or causal in the commission of the crime and whether the mental condition continued to exist at the time the offender was due for parole. CP 20-308, Attachment A, page 12. Since 1986, Dr. Halon has done between fifteen and sixteen hundred such evaluations, many of them of violent sex offenders. CP 20-308, Attachment A, page 12.

Additionally, Dr. Halon was appointed by the superior courts in both Santa Barbara and San Luis Obispo counties to evaluate sex offenders to determine what motivated sex offenses and to determine if the offenders were amenable to treatment or could be released on some kind of probation instead of prison. CP 20-308, Attachment A, page 13.

Dr. Halon has also conducted numerous evaluations of sex offenders pursuant to RCW 71.09. CP 20-308, Attachment A, page 14.

Dr. Halon conducted an evaluation of Mr. Mitchell (CP 20-308, Attachment A, page 27) and reviewed Dr. Saari's report regarding Mr. Mitchell, as well as the reports of Dr. Linda Thomas and Dr. Jason

Dunham. CP 20-308, Attachment A, page 26-27. Dr. Thomas' report was completed September 14, 2001, and Dr. Dunham's report was completed February 15, 2005. CP 20-308, Attachment A, page 26. Dr. Halon reviewed over 780 pages of discovery, Mr. Mitchell's 2003 deposition taken by Assistant Attorney General Bowers, met with Mr. Mitchell and administered psychological tests. CP 20-308, Attachment A, page 137-163.

Dr. Halon's conclusion after reviewing this evidence, meeting and interviewing Mr. Mitchell, and administering psychological tests on Mr. Mitchell, was that Mr. Mitchell never had a mental abnormality or, alternatively, that he was fully in remission. CP 20-308, Attachment A, page 33-36. Dr. Halon similarly concluded that Mr. Mitchell's personality disorder was either initially misdiagnosed or in full remission. CP 20-308, Attachment A, page 36-38. Dr. Halon testified that Mr. Mitchell's test results indicated a criminal mentality but no mental disorder. CP 20-308, Attachment A, page 34-35. Dr. Halon's ultimate conclusion was that there was no evidence that Mr. Mitchell's present mental condition impaired his ability to control any sexually violent behavior, and that Mr. Mitchell either never had a personality disorder or, if ever present, it was "absolutely in remission." CP 20-308, Attachment A, page 40-41.

Dr. Halon acknowledged that Mr. Mitchell participated in the

sex offender treatment program for the first three years he was at the SCC. CP 20-308, Attachment A, page 32. Dr. Halon testified that the treatment had “fundamentally changed” Mr. Mitchell’s mindset. CP 20-308, Attachment A, page 35. Further, Dr. Halon testified that, during his eight years at the SCC, Mr. Mitchell had exhibited no signs of an interest in raping or stalking or other “angry-type” behavior, showed no signs of sexually inappropriate behavior, no signs of aggressive behavior, no signs of stalking, and no signs of pornography. CP 20-308, Attachment A, page 32-33. Dr. Halon testified that Mr. Mitchell’s behavior for the past eight years has shown no indication that his personality is disordered. CP 20-308, Attachment A, page 37.

Mr. Mitchell’s burden at the show cause hearing was simply to present evidence which, if believed, would show that Mr. Mitchell no longer suffers from a mental abnormality or personality disorder. Here, Mr. Mitchell presented evidence that he had participated in treatment at the SCC for three years and that this treatment had fundamentally changed his mindset. Mr. Mitchell presented further evidence that for the past eight years he has exhibited no signs of sexually inappropriate or sexually aggressive behavior. Finally, Mr. Mitchell presented the expert opinion of Dr. Halon that Mr. Mitchell no longer met the definition of being a sexually violent predator since either (a) he was initially misdiagnosed, or (b) his personality disorder and mental

abnormality were in complete remission.

If believed, the evidence presented by Mr. Mitchell was more than sufficient to show that Mr. Mitchell no longer suffered from a mental abnormality or personality disorder. The trial court erred in failing to order an evidentiary hearing.

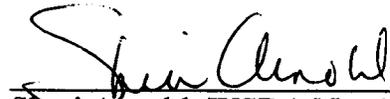
Mr. Mitchell met his burden of making a prima facie case that he no longer meets the definition of a sexually violent predator. The trial court erred in failing to grant Mr. Mitchell an evidentiary hearing. The trial court perpetuated this error and abused its discretion in failing to grant Mr. Mitchell's CR 60(b) motion.

## VI. CONCLUSION

The trial court's denial of Mr. Mitchell's motion was both an abuse of discretion and a denial of Mr. Mitchell's right to access to the courts. This court should vacate the order denying Mr. Mitchell's motion and remand this case for either an evidentiary hearing or a new hearing on the CR 60 motion.

DATED this 28<sup>th</sup> day of January, 2010.

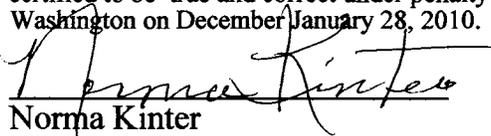
Respectfully submitted,



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**CERTIFICATE OF SERVICE**

The undersigned certifies that on January 28, 2010, she delivered by United States Mail to: Todd Richard Bowers, Office of the Attorney General, Criminal Justice Division, 800 5<sup>th</sup> Avenue, Suite 2000, Seattle, Washington 98104, and to George Mitchell, Special Commitment Center, McNeil Island Corrections Center, Post Office Box 88600, Steilacoom, Washington 98388, true and correct copies of this brief. This statement certified to be true and correct under penalty of perjury. Signed at Tacoma, Washington on December January 28, 2010.

  
Norma Kinter