

NO. 79025-6

SUPREME COURT OF THE STATE OF WASHINGTON

In re the Personal Restraint Petition of DONALD T. McCARTHY,
Petitioner.

**SUPPLEMENTAL BRIEF OF THE INDETERMINATE
SENTENCE REVIEW BOARD**

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I. ISSUE PRESENTED

Pursuant to RCW 9.95.420, the Indeterminate Sentence Review Board holds a hearing to decide if an offender should be conditionally released to community custody. The decision considers the dangerousness of the offender and the probability that the offender would engage in sex offenses during community custody. The Board does not allow counsel to appear at these “.420 hearings”; and the Board did not appoint counsel for Mr. McCarthy when he requested representation by counsel.

The issue presented to this Court is whether the due process clause of the federal constitution requires appointment of counsel to represent offenders in a .420 hearing concerning possible release to community custody.

II. STATEMENT OF THE CASE

A. The Nature And Scope Of A .420 Hearing

In 2001, the legislature adopted RCW 9.94A.712 and RCW 9.95.420, authorizing indeterminate sentences for certain sex offenders and assigning responsibility to the Board to implement the indeterminate sentences. Laws of 2001, 2d Spec. Sess., ch. 12, §§ 303, 306.¹

¹ The Board also is responsible for indeterminate sentences imposed for crimes committed prior to July 1, 1984. See RCW 9.95.011.

RCW 9.94A.712 defines eligibility for indeterminate sentencing for an offender convicted of certain crimes listed in RCW 9.94A.712(1)(a) or an offender who has a prior conviction for an offense listed in former RCW 9.94A.030(33)(b) and who is convicted of any sex offense committed after September 1, 2001. RCW 9.95.420 mandates that the Department of Corrections conduct, and that an offender sentenced under RCW 9.94A.712 participate in, an examination of an offender using methodologies recognized by experts in the prediction of sexual dangerousness. RCW 9.95.420(1)(a). The purpose of this additional examination of an offender is to allow the Board to assess the future dangerousness of an offender and whether the offender will engage in sex offenses if released to community custody. RCW 9.95.420(3).² Thus, before the end of a minimum term, the Board holds a .420 hearing and decides whether it is more likely than not that an offender will engage in sex offenses if released on conditions set by the Board. RCW 9.95.420(3)(a). Specifically, the statute provides:

The board shall order the offender released, under such affirmative and other conditions as the board determines appropriate, unless the board determines by a preponderance of the evidence that, despite such conditions, it is more likely than not that the offender will commit sex offenses if released.

² RCW 9.95.420 and RCW 9.94A.712 are attached in the Appendix to this brief.

RCW 9.95.420(3)(a); *see also* RCW 9.94A.713 (general authority for the Department to recommend conditions related to community custody for an offender sentenced under RCW 9.94A.712).

If the Board does not order an offender released, it establishes a new minimum term not to exceed an additional two years in duration. RCW 9.94A.712. The hearing contemplated under RCW 9.95.420 is therefore analogous to a parole release hearing for a sentence under RCW 9.95.011, as provided for in RCW 9.95.100. The Board makes a release decision by evaluating the offender and the information provided to the Board by the Department, including the evaluations required by RCW 9.95.420. The Board's release decision thus requires predictive expertise for future behavior, based on the Department's examination of the offender and possible conditions. Neither the statute nor Board policy allow for counsel at a .420 release hearing.³

The nature of the offender's interest in a .420 hearing is therefore quite limited. The offender is still within the term of his or her criminal sentence. Unconditional release is never at stake in a .420 hearing, as RCW 9.95.420(2) contemplates only a possibility of conditional release to

³ If an offender violates his conditions of community custody following a release to community custody under RCW 9.95.420, then RCW 9.95.435 provides several additional procedural rights applicable to a revocation hearing. Among those rights, the legislature expressly provided that an offender will "be represented by counsel if revocation of the release to community custody upon a finding of violation is a probable sanction for the violation." RCW 9.95.435(4)(d).

community custody. And, analogous to a parole release hearing under RCW 9.95.100, the offender is currently confined and has not yet achieved his or her liberty when the Board conducts the .420 hearing.

B. Statement Of Facts

Mr. McCarthy is in the custody of the Washington Department of Corrections and under the jurisdiction of the Board pursuant to the judgment and sentence of the Clark County Superior Court. Following his guilty plea, Mr. McCarthy was sentenced by the Clark County Superior Court on December 4, 2002, to a sentence under RCW 9.94A.712. McCarthy's Pet., Ex. 1 (Judgment And Sentence, *State v. McCarthy*, Clark County Superior Court Cause No. 02-1-01018-1).⁴ The trial court sentenced Mr. McCarthy to 12 months and 1 day confinement for his crime of assault in the third degree with sexual motivation and also sentenced him to community custody under RCW 9.94A.712 for any period of time that Mr. McCarthy was released from total confinement before the expiration of his maximum sentence of 60 months. McCarthy's Pet., Ex. 1, at 6.

The crime arose at a B. Dalton Bookstore when Mr. McCarthy pressed his genital area against a woman's buttocks, with one leg raised up

⁴ The cited exhibits are in the Court of Appeals record for the personal restraint petition.

in a bent position. The victim had Down's Syndrome and significant developmental deficits. The victim's sister reported that Mr. McCarthy was the man engaging in this inappropriate sexual behavior. Ultimately, he was charged with assault in the third degree with sexual motivation, accepted a plea bargain agreement, and entered a *Newton* plea to the charge. See ISRB Resp., Ex. 2, at 1-2 (Pre-Sentence Investigation, *In re Donald T. McCarthy*, DOC No. 707212); *State v. Newton*, 87 Wn.2d 363, 552 P.2d 682 (1976).

Pursuant to RCW 9.95.420, the Board has conducted two separate hearings to determine if Mr. McCarthy was more likely than not to commit sex offenses if released to community custody. In the first hearing, the Board found by a preponderance of the evidence that Mr. McCarthy was more likely than not to commit sex offenses if released to the community, even on conditions, and added 24 months to his minimum term. See ISRB Resp., Ex. 3, at 2-3 (Decision And Reasons of August 5, 2003, *In re Donald T. McCarthy*, DOC No. 707212). The Board stated:

Mr. McCarthy . . . had a Sex Abuse in the First Degree back in the early 1990s. This was a sentencing in Multnomah county [sic], Oregon, for frottage on a female under 12 years of age.

....

Though Mr. McCarthy demonstrates considerable disgust with his behavior and apologizes profusely, it's more in the vein of a childlike refusal. He is able to write the version of his offense and essentially details his regret over the offense. However, this particular behavior at this age and the type of victims that he specifically targets, for example youngsters in the early 1990s and someone suffering from Downs Syndrome, suggests that Mr. McCarthy is unable to control himself in spite of his best efforts and, therefore, the possibility of developing some insight by completing the SOTP prior to reconsideration for actual release to the community is appropriate. . . . [I]n view of Mr. McCarthy's repeat offending and the fact that he acknowledges doing it in the past, it's the Board's conclusion that unless he has some sex offender treatment in order to learn about his deviant desires and behaviors he would constitute an ongoing danger to the community, especially [to] young, vulnerable, or mentally disabled people.

ISRB Resp., Ex. 3, at 2-3.

About a year later, the Board conducted another hearing in Mr. McCarthy's case under RCW 9.95.420 and, again, found by a preponderance of the evidence that Mr. McCarthy presently constituted a significant risk and was more likely than not to re-offend sexually if he was released to the community, found him not releasable, and added 23 months and 26 days to his minimum term. ISRB Resp., Ex. 4 (Decision And Reasons of September 8, 2004, *In re Donald T. McCarthy*, DOC No. 707212). The Board explained in its decision that:

Mr. McCarthy has a significant history of frottage with vulnerable victims, either young, very old women, or with developmental difficulties. He maintains a highly anxious appearance, needs medications, and this suggests that he

reacts to stress by participating in this sort of behavior. He is making satisfactory progress in the SOTP and he is behaving himself well in the institution. There is an underlying concern about his chemical abuse in the past and he may require intensive outpatient treatment, but Mr. McCarthy has at least some minor mental health problems and focusing on one program at a time seems to be the appropriate steps [sic]. As indicated, the Board would expect to see Mr. McCarthy following completion of the SOTP and detailed community supports for him.

ISRB Resp., Ex. 4, at 1–3.

Mr. McCarthy requested the presence of an attorney at his two .420 hearings. *See* McCarthy's Pet. Ex. 4, at 1; Ex. 10, at 1. The Board denied Mr. McCarthy's request for counsel at his first .420 hearing in 2003, noting that "the Department of Corrections has decided there would not be attorneys" and that the Board did not "allow attorneys at these hearings". *See* McCarthy's Pet., Ex. 4, at 1. The Board denied Mr. McCarthy's request for an attorney at his second .420 hearing, finding no right to an attorney. *See* McCarthy's Pet., Ex. 10, at 1.

C. Procedural History

Mr. McCarthy filed a personal restraint petition on December 3, 2004, alleging that the Board's refusal to appoint counsel to Mr. McCarthy for his .420 hearing was contrary to due process cases decided under the fourteenth amendment to the United States Constitution. On July 5, 2006, the court of appeals held that .420 hearings implicate due process; that

there are .420 hearings in which counsel should be appointed; and that the Board should have exercised its discretion before denying Mr. McCarthy's requests to have counsel appointed to represent him at his .420 hearings. The court subsequently published its opinion.⁵

III. STANDARD OF REVIEW

In this case, Mr. McCarthy makes no argument that the Board is violating its rules.⁶ Mr. McCarthy does not dispute that Board decisions on release and conditioning are committed to the Board's discretion and reviewed only for abuse of discretion.⁷

Mr. McCarthy has argued that due process requires the Board to consider appointing counsel when deciding on conditional release to community custody in a .420 hearing. Specifically, he argues that the federal constitution requires appointment of counsel using considerations

⁵ Mr. McCarthy made two other challenges to the Board's action that were rejected by the Court of Appeals. He did not raise those issues in response to the Board's motion for discretionary review and they are not before this Court.

⁶ An offender may seek relief by way of a personal restraint petition if he or she demonstrates that the Board failed to follow its own rules making minimum term determinations. *E.g., In re the Personal Restraint of Cashaw*, 123 Wn.2d 138, 150, 866 P.2d 8 (1994).

⁷ The discretionary nature of a release decision is emphasized by this Court's rulings that the courts are "not a super Indeterminate Sentence Review Board, and they will not interfere with a Board determination unless the Board is first shown to have abused its discretion in setting a prisoner's discretionary minimum term." *In re the Personal Restraint of Whitesel*, 111 Wn.2d 621, 763 P.2d 199 (1988); *In re the Personal Restraint of Myers*, 105 Wn.2d 257, 264, 714 P.2d 303 (1986). A decision to release and the conditions for release are reviewed for an abuse of discretion. *See also Pierce Cy. Sheriff v. Civil Serv. Comm'n*, 98 Wn.2d 690, 695, 658 P.2d 648 (1983) (describing deferential and narrow scope of arbitrary and capricious review).

that the United States Supreme Court said were appropriate for considering appointment of counsel during revocation of parole. He makes no argument about the Washington Constitution. The issue before the court is a constitutional question, which is reviewed *de novo*. *Amunrud v. Bd. of Appeals*, 158 Wn.2d 208, 215, 143 P.3d 571 (2006).

**IV. THERE IS NO RIGHT TO COUNSEL AT BOARD
HEARINGS RELATED TO THE DECISION
TO RELEASE AN OFFENDER TO
COMMUNITY CUSTODY**

The court of appeals concluded that because “a .420 hearing implicates due process,” there must be “cases where counsel should be appointed,” and therefore “the ISRB should have exercised its discretion” using the considerations in *Gagnon v. Scarpelli*, 411 U.S. 778, 93 S. Ct. 1756, 36 L. Ed. 2d 656 (1973) (a case that describes potential appointment of counsel in a hearing that revokes parole). See *In re the Personal Restraint of McCarthy*, 134 Wn. App. 752, ¶ 19, 143 P.3d 599 (2006). Although the Court remanded to consider appointment of counsel, the opinion offers little guidance for exercising such power, other than the citation to *Gagnon*.

The court of appeals erred. The opinion does not properly consider the limited liberty interests at stake in a .420 hearing, which have never

been construed by any court to require appointment of counsel. Moreover, the opinion overlooks the nature of a Board decision to release an offender into community custody. Finally, the opinion fails to follow *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 7, 99 S. Ct. 2100, 60 L. Ed. 2d 668 (1979), holding that due process does not require appointment of counsel for parole release hearings.

A. Due Process Requirements Depend Upon The Nature Of A Liberty Interest, If Any, Created By State Law Allowing For Community Custody

It is well established that some minimum due process is required in probation or parole *revocation* hearings, because those situations involve revocation of a significant liberty interest. *Morrissey v. Brewer*, 408 U.S. 471, 489, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972); *Monohan v. Burdman*, 84 Wn.2d 922, 530 P.2d 334 (1975). Due process, however, does not require that indigent prisoners must be provided with counsel in such probation or parole revocation hearings, except in certain case-by-case situations described in *Gagnon*, 411 U.S. at 790 (the “need for counsel [in parole revocation hearing] must be made on a case-by-case basis in the exercise of a sound discretion by the state authority charged with responsibility for administering the probation and parole system”).

The court of appeals opinion cites *Morrissey* and *Greenholtz* for its conclusions that the .420 hearing decision implicates a liberty interest and,

therefore, the Board should consider appointing counsel according to *Gagnon*. While *Greenholtz* is relevant to analyzing whether state law creates a liberty interest, it held that due process did not require appointment of counsel for parole release.

Greenholtz starts by rejecting the general argument that a possibility of parole creates a liberty interest protected by due process. The Court addressed this point to clarify that its prior holdings about minimum due process in *Morrissey* and *Gagnon* were based on the liberty interest at stake in a *parole revocation* decision. The Court explained the “fallacy” in applying *Morrissey* to parole release:

[P]arole *release* and parole *revocation* are quite different. There is a crucial distinction between being deprived of a liberty one has, as in parole and being denied a conditional liberty that one desires.

Greenholtz, 442 U.S. at 9.

The opinion goes on to illustrate other differences between revocation and release that affect what process is constitutionally required.

A second important difference between discretionary parole *release* from confinement and *termination* of parole lies in the nature of the decision that must be made in each case. As we recognized in *Morrissey*, the parole-revocation determination actually requires two decisions: whether the parolee in fact acted in violation of one or more conditions of parole and whether the parolee should be recommitted either for his or society’s benefit. *Id.*, at 479–480, 33 L. Ed. 2d 484, 92 S. Ct. at 2593. “The first step in a revocation decision thus

involves a wholly retrospective factual question.” *Id.*, at 479, 33 L. Ed. 2d 484, 92 S. Ct. at 2593.

The parole-release decision, however, is more subtle and depends on an amalgam of elements, some of which are factual but many of which are purely subjective appraisals by the Board members based upon their experience with the difficult and sensitive task of evaluating the advisability of parole release.

Greenholtz, 442 U.S. at 9–10. Parole release “turns on a discretionary assessment of a multiplicity of imponderables, entailing primarily what a man is and what he may become rather than simply what he has done”. *Id.* at 10 (internal quotation marks omitted).

Greenholtz next addressed whether an offender might have a liberty interest at stake if state law contemplates release. Nebraska’s statute provided for release unless the parole board predicted that release would have particular negative consequences.⁸ The Court held that the “unique” Nebraska statutory scheme created a liberty interest protected by due process such that the “expectancy of release . . . is entitled to some measure of constitutional protection”. *Greenholtz*, 442 U.S. at 12.

⁸ The Nebraska statute provided for release unless the board found: “(a) There is a substantial risk that he will not conform to the conditions of parole; (b) His release would depreciate the seriousness of his crime or promote disrespect for law; (c) His release would have a substantially adverse effect on institutional discipline; or (d) His continued correctional treatment, medical care, or vocational or other training in the facility will substantially enhance his capacity to lead a law-abiding life when released at a later date.” *Greenholtz*, 442 U.S. at 11 (internal quotation marks omitted) (quoting Neb. Rev. Stat. § 83-1,114(1) (1976)).

The similarity between the release decision in *Greenholtz* and the decision in RCW 9.95.420 about releasing to community custody is relevant to showing whether an offender has a liberty interest protected by due process. But this is the beginning, not the end, of analyzing what processes are constitutionally required. As stated in *Greenholtz*: “We therefore turn to an examination of the statutory procedures to determine whether they provide the process that is due” *Greenholtz*, 442 U.S. at 12.

B. *Greenholtz* Holds That A Parole Release Decision Does Not Require A Formal Hearing With A Right To Counsel

Whether due process requires appointment of counsel for community custody decisions begins with recognizing that “due process ‘is flexible and calls for such procedural protections as the particular situation demands.’” *Greenholtz*, 442 U.S. at 12 (quoting *Morrissey*, 408 U.S. at 481). Very few cases have found that due process requires appointing counsel and none involve the limited liberty interest in potential release to community custody.

Most prominently, *Greenholtz* approved processes that did not appoint counsel, and the Court’s reasoning confirms that counsel is similarly not constitutionally required for a .420 hearing. The Court started by explaining that the Nebraska statute “is necessarily subjective in part

and predictive in part. Like most parole statutes, it vests very broad discretion in the Board.” *Greenholtz*, 442 U.S. at 13. A Board decision using a .420 hearing similarly relies on the Board’s subjective prediction of future conduct. Nebraska statutes were concerned with a risk that the parolee will not conform to conditions of parole. The Board in a .420 hearing is also concerned with whether the offender will comply with conditions of community custody.

Second, the Court noted that the Nebraska statute served

the ultimate purpose of parole which is a component of the long-range objective of rehabilitation. . . . The objective of rehabilitating convicted persons to be useful, law-abiding members of society can remain a goal no matter how disappointing the progress. *But it will not contribute to these desirable objectives to invite or encourage a continuing state of adversary relations between society and the inmate.*

Id. 13–14 (emphasis added). Inserting counsel into the .420 hearing similarly converts it into an adversarial hearing that frustrates, rather than furthers, the Board’s responsibility to consider community custody as part of overall goals of rehabilitation, societal protection, and as part of an individual punitive sentence.

Third, the Court in *Greenholtz* recognized that procedures designed to elicit specific facts as in *Morrissey* and *Gagnon* are not

necessarily appropriate to parole release. A .420 hearing similarly does not adjudicate past violations as in parole revocation.

Moreover, a .420 hearing already includes procedures that protect an offender's interest in the potential release to community custody. Significantly, offenders are given many of the procedures approved in *Morrissey* for parole revocation: (1) an opportunity to be heard in person and to present relevant information to the Board; (2) the right to question other persons providing information to the Board; (3) a neutral and detached hearing body; and (4) a written statement by the Board regarding the reasons upon which the Board made its decision to either release the offender to community custody or its decision not to release the offender. Moreover, the Board decision is recorded and subject to judicial oversight in a personal restraint petition protecting against arbitrary and capricious action.

The court of appeals, however, misinterpreted *Greenholtz*. *Greenholtz* held that the liberty interest in potential release was adequately protected by processes affording the inmate an opportunity to be heard and, when parole was denied, informing the inmate how he fell short of qualifying for parole. See *Greenholtz*, 442 U.S. at 16. *Greenholtz* emphasized that the minimal *Morrissey* due process requirements were not

necessary. By thus distinguishing *Morrissey*, the Court confirmed that less process is due for the liberty interest in a *release* decision.

It is the limited liberty interest at stake in a .420 hearing that distinguishes *Gagnon*. A .420 hearing involves an offender who has been lawfully sentenced and does not involve curtailing existing liberty. The offender's interest is akin to the interest in a parole release decision. Although state law creates a possibility of community custody to fulfill state interests in sentencing, *Greenholtz* confirms that such limited liberty interests do not require appointment of counsel.

C. Other Cases Reject A Due Process Right To Counsel For Decisions Involving Interests Similar To A Sex Offender's Interest In Potential Release To Community Custody

Greenholtz is consistent with other Washington case law concerning the right to counsel in analogous situations. *In re the Personal Restraint of Whitesel*, 111 Wn.2d 621, 763 P.2d 199 (1988), addressed offenders whose minimum sentences were set by the Indeterminate Sentencing Review Board. The offenders argued that their right to due process was violated because the procedures did not in every case include an in-person hearing before the Board, notice of adverse information used to set the exceptional sentence, or representation by counsel. "[D]ue process is flexible and calls for procedural protections that the given situation demands." *In re Whitesel*, 111 Wn.2d at 630.

[D]ue process requirements at the setting of minimum terms must include advisement of adverse information in the inmate's file and the opportunity to rebut or to explain adverse file information. We similarly hold here that these requirements should also apply when the Indeterminate Sentencing Review Board sets and redetermines minimum terms.

In re Whitesel, 111 Wn.2d at 630 (footnote omitted). This Court held that "the presence of counsel is not required in the setting and redetermination of minimum terms". *Id.* Inmates "have no right to an attorney during the type of postconviction proceeding involved herein, namely, a minimum term redetermination by the Indeterminate Sentencing Review Board". *Id.*⁹

In *Arment v. Henry*, 98 Wn.2d 775, 778, 658 P.2d 663 (1983), the Court declined to adopt a rule mandating appointment of counsel at disciplinary proceedings before the parole board, even though the offenders faced significant extension of time in custody. Lesser due process is required in disciplinary proceedings because the prisoner is already incarcerated, not on probation or parole. *Arment* explains that "[n]ot only is the sanction in prison disciplinary hearings 'qualitatively and quantitatively different from the revocation of parole or probation' but

⁹ To make this point, the *In re Whitesel* opinion cites to *Pennsylvania v. Finley*, 481 U.S. 551, 557, 107 S. Ct. 1990, 95 L. Ed. 2d 539 (1987), noting that the Court recently held, "states have no obligation to provide postconviction relief, and when they do, the fundamental fairness mandated by the Due Process Clause does not require that the State supply a lawyer as well." *In re Whitesel*, 111 Wn.2d at 631. Under *Finley*, a convicted person is not entitled to court-appointed counsel in collateral proceedings following appeal as a matter of right.

the State also has a far different stake in prison disciplinary hearings than in the revocation of probation or parole.” *Arment*, 98 Wn.2d at 778 (quoting *Wolff v. McDonnell*, 418 U.S. 539, 561–62, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974)). This same logic from *Arment* applies to an offender’s interest in a community custody decision under RCW 9.95.420.

Previous to *Arment*, this Court decided *Monohan v. Burdman*, 84 Wn.2d 922, 530 P.2d 334 (1975), holding that minimal due process was required in the circumstances of parole rescission. This Court, however, did not list right to counsel in its catalog of minimum due process requirements, which was later approved in *Arment*, where the Court noted that “[r]ight of counsel is conspicuous by its absence.” *Arment*, 98 Wn.2d at 780.

The court of appeals previously rejected extending *Gagnon* to decisions *revoking* community custody. *In re the Personal Restraint of McNeal*, 99 Wn. App. 617, 636, 994 P.2d 890 (2000). The court explained that “the distinction between the goals of parole and community custody we discussed earlier in this opinion becomes critical” in evaluating whether due process required appointment of counsel. *In re McNeal*, 99 Wn. App. at 634.

[O]ur Supreme Court had held that community custody, despite some rehabilitative adjuncts, is primarily punitive in nature. Absent the rehabilitative goal of probation and

parole, the rationale of *Scarpelli* does not apply. And the burden on the State of providing counsel, including delay in and formalization of the hearings, the added expense and the administrative burden, override the marginal value counsel would provide at these in-custody hearings. . . . Thus, we conclude that the *Morrissey* requirements are sufficient to protect against a wrongful revocation of community custody and hold that the State is not required to provide counsel to participate in community custody revocation hearings beyond the level authorized by current statutes and regulations.

In re McNeal, 99 Wn. App. at 634 (footnote omitted) (citing *State v. Ross*, 129 Wn.2d 279, 286, 916 P.2d 405 (1996) (community custody “primarily furthers the punitive purposes of deterrence and protection”)). Requiring counsel for a .420 release hearing cannot be reconciled with *In re McNeal*, which rejects appointment of counsel for a hearing that revokes community custody.

Last, the United States Supreme Court has held that due process does not require appointment of counsel before a hearing that determines if an inmate requires involuntary medication. See *Washington v. Harper*, 494 U.S. 210, 110 S. Ct. 1028, 108 L. Ed. 2d 178 (1990). The liberty interests in *Harper* were substantial. *Harper*, 494 U.S. at 229 (“forcible injection of medication into a nonconsenting person’s body represents a substantial interference with that person’s liberty”). The Court, however, held that “an inmate’s interests are adequately protected, and perhaps

better served, by allowing the decision to medicate to be made by medical professionals rather than a judge”. *Harper*, 494 U.S. at 231.

D. The Record Here Does Not Show That Due Process Requires Counsel For Release To Community Custody

The court of appeals supported its decision by comparing Mr. McCarthy to the descriptions of persons who might be entitled to appointment of counsel under *Gagnon*. The court of appeals’ analogy is irrelevant because the liberty interests in parole revocation under *Gagnon* are significantly different than the lesser liberty interests at stake in a release decision under RCW 9.95.420. Moreover, the record itself confirms that Mr. McCarthy participated in the .420 hearing without the aid of counsel.

Mr. McCarthy cogently spoke to the various concerns that would be relevant to a Board release decision. He effectively pointed out, for example, that he was his mother’s caregiver; he demonstrated insight when stating rubbing up against a boy in an arcade was “very inappropriate”; and he argued that the victim in his criminal case “hallucinates, and she can’t control it, and the medicine they put her on can’t control the hallucinations” *See McCarthy’s Pet.*, Ex. 4, at 8, 9, 12.

Further, Mr. McCarthy directly discussed his prospects for success in community custody:

Yes, I'm gonna go to treatment and [sic] Columbia Mental Health and do a bunch of things to improve my life and I've got a lot of safety precautions. I got this letter here from my support group, friends and family.

McCarthy's Pet., Ex. 4, at 13. Similarly, Mr. McCarthy responded to a Board member's question about whether there were important things he thought the Board should consider:

Yes there is. I'm going to go to Columbia Mental Health and get my counseling and guidance and my medication there. I have a very good family and friends support system. I was my mother's caregiver. We were close. She was getting sicker when I got arrested and died when I was going through the courts. I went through a lot of trauma. I already said that, but anyway. I went through some scary times in prison with people talking about me, and had two scary cellmates which I also talked about, and ah, I would like to add that this has been a very scary time for me and I feel that I've learned my lesson and ah, I'm getting pretty old and I feel that I will not offend again. It's just simply not worth it. And its the wrong thing to do. I'm deeply ashamed of myself. I'm disgusted with myself for what I did.

McCarthy's Pet., Ex. 4, at 17–18.

Mr. McCarthy's comments disprove his assertion that he did not possess the skills or education necessary to competently present his case to the Board without assistance of counsel at his .420 hearing. It instead demonstrates that the processes allowed him to convey information

relevant to the Board. He addressed his proposed support system, he claimed he had learned his lesson and would not re-offend. Mr. McCarthy's petition therefore shows, at most, a generalized speculation that an attorney might be helpful in presenting information to the Board. Due process, however, has never been held to require an attorney simply because the attorney could be helpful.

V. CONCLUSION

The Board asks the Court to reverse the court of appeals and hold that due process does not require appointment of counsel in a hearing under RCW 9.95.420.

Signed and dated this 24th day of January 2007.

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APPENDIX

RCW 9.95.420

Sex Offenders – End of sentence review – Victim input.

(1) (a) Except as provided in (c) of this subsection, before the expiration of the minimum term, as part of the end of sentence review process under RCW 72.09.340, 72.09.345, and where appropriate, 72.09.370, the department shall conduct, and the offender shall participate in, an examination of the offender, incorporating methodologies that are recognized by experts in the prediction of sexual dangerousness, and including a prediction of the probability that the offender will engage in sex offenses if released.

(b) The board may contract for an additional, independent examination, subject to the standards in this section.

(c) If at the time the sentence is imposed by the superior court the offender's minimum term has expired or will expire within one hundred twenty days of the sentencing hearing, the department shall conduct, within ninety days of the offender's arrival at a department of corrections facility, and the offender shall participate in, an examination of the offender, incorporating methodologies that are recognized by experts in the prediction of sexual dangerousness, and including a prediction of the probability that the offender will engage in sex offenses if released.

(2) The board shall impose the conditions and instructions provided for in RCW 9.94A.720. The board shall consider the department's recommendations and may impose conditions in addition to those recommended by the department. The board may impose or modify conditions of community custody following notice to the offender.

(3) (a) Except as provided in (b) of this subsection, no later than ninety days before expiration of the minimum term, but after the board receives the results from the end of sentence review process and the recommendations for additional or modified conditions of community custody from the department, the board shall conduct a hearing to determine whether it is more likely than not that the offender will engage in sex offenses if released on conditions to be set by the board. The board may consider an

offender's failure to participate in an evaluation under subsection (1) of this section in determining whether to release the offender. The board shall order the offender released, under such affirmative and other conditions as the board determines appropriate, unless the board determines by a preponderance of the evidence that, despite such conditions, it is more likely than not that the offender will commit sex offenses if released. If the board does not order the offender released, the board shall establish a new minimum term, not to exceed an additional two years.

(b) If at the time the offender's minimum term has expired or will expire within one hundred twenty days of the offender's arrival at a department of correction's facility, then no later than one hundred twenty days after the offender's arrival at a department of corrections facility, but after the board receives the results from the end of sentence review process and the recommendations for additional or modified conditions of community custody from the department, the board shall conduct a hearing to determine whether it is more likely than not that the offender will engage in sex offenses if released on conditions to be set by the board. The board may consider an offender's failure to participate in an evaluation under subsection (1) of this section in determining whether to release the offender. The board shall order the offender released, under such affirmative and other conditions as the board determines appropriate, unless the board determines by a preponderance of the evidence that, despite such conditions, it is more likely than not that the offender will commit sex offenses if released. If the board does not order the offender released, the board shall establish a new minimum term, not to exceed an additional two years.

(4) In a hearing conducted under subsection (3) of this section, the board shall provide opportunities for the victims of any crimes for which the offender has been convicted to present oral, video, written, or in-person testimony to the board. The procedures for victim input shall be developed by rule. To facilitate victim involvement, county prosecutor's offices shall ensure that any victim impact statements and known contact information for victims of record are forwarded as part of the judgment and sentence.

RCW 9.94A.712

Sentencing of nonpersistent offenders.

(1) An offender who is not a persistent offender shall be sentenced under this section if the offender:

(a) Is convicted of:

(i) Rape in the first degree, rape in the second degree, rape of a child in the first degree, child molestation in the first degree, rape of a child in the second degree, or indecent liberties by forcible compulsion;

(ii) Any of the following offenses with a finding of sexual motivation: Murder in the first degree, murder in the second degree, homicide by abuse, kidnapping in the first degree, kidnapping in the second degree, assault in the first degree, assault in the second degree, assault of a child in the first degree, assault of a child in the second degree, or burglary in the first degree; or

(iii) An attempt to commit any crime listed in this subsection (1)(a);

committed on or after September 1, 2001; or

(b) Has a prior conviction for an offense listed in RCW 9.94A.030(33)(b), and is convicted of any sex offense which was committed after September 1, 2001.

For purposes of this subsection (1)(b), failure to register is not a sex offense.

(2) An offender convicted of rape of a child in the first or second degree or child molestation in the first degree who was seventeen years of age or younger at the time of the offense shall not be sentenced under this section.

(3) (a) Upon a finding that the offender is subject to sentencing under this section, the court shall impose a sentence to a maximum term and a minimum term.

(b) The maximum term shall consist of the statutory maximum sentence for the offense.

(c) (i) Except as provided in (c)(ii) of this subsection, the minimum term shall be either within the standard sentence range for the offense, or outside the standard sentence range pursuant to RCW 9.94A.535, if the offender is otherwise eligible for such a sentence.

(ii) If the offense that caused the offender to be sentenced under this section was rape of a child in the first degree, rape of a child in the second degree, or child molestation in the first degree, and there has been a finding that the offense was predatory under RCW 9.94A.836, the minimum term shall be either the maximum of the standard sentence range for the offense or twenty-five years, whichever is greater. If the offense that caused the offender to be sentenced under this section was rape in the first degree, rape in the second degree, indecent liberties by forcible compulsion, or kidnapping in the first degree with sexual motivation, and there has been a finding that the victim was under the age of fifteen at the time of the offense under RCW 9.94A.837, the minimum term shall be either the maximum of the standard sentence range for the offense or twenty-five years, whichever is greater. If the offense that caused the offender to be sentenced under this section is rape in the first degree, rape in the second degree with forcible compulsion, indecent liberties with forcible compulsion, or kidnapping in the first degree with sexual motivation, and there has been a finding under RCW 9.94A.838 that the victim was, at the time of the offense, developmentally disabled, mentally disordered, or a frail elder or vulnerable adult, the minimum sentence shall be either the maximum of the standard sentence range for the offense or twenty-five years, whichever is greater.

(d) The minimum terms in (c)(ii) of this subsection do not apply to a juvenile tried as an adult pursuant to RCW 13.04.030(1)(e) (i) or (v). The minimum term for such a juvenile shall be imposed under (c)(i) of this subsection.

(4) A person sentenced under subsection (3) of this section shall serve the sentence in a facility or institution operated, or utilized under contract, by the state.

(5) When a court sentences a person to the custody of the department under this section, the court shall, in addition to the other terms of the sentence, sentence the offender to community custody under the supervision of the department and the authority of the board for any period of time the person is released from total confinement before the expiration of the maximum sentence.

(6) (a) (i) Unless a condition is waived by the court, the conditions of community custody shall include those provided for in RCW 9.94A.700(4). The conditions may also include those provided for in RCW 9.94A.700(5). The court may also order the offender to participate in rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community, and the department and the board shall enforce such conditions pursuant to RCW 9.94A.713, 9.95.425, and 9.95.430.

(ii) If the offense that caused the offender to be sentenced under this section was an offense listed in subsection (1)(a) of this section and the victim of the offense was under eighteen years of age at the time of the offense, the court shall, as a condition of community custody, prohibit the offender from residing in a community protection zone.

(b) As part of any sentence under this section, the court shall also require the offender to comply with any conditions imposed by the board under RCW 9.94A.713 and 9.95.420 through 9.95.435