

Supreme Court No. 79025-6
Court of Appeals No. 32702-3-II

SUPREME COURT OF THE STATE OF WASHINGTON

In Re The Personal Restraint Petition Of:

DONALD T. MCCARTHY,

14795

Petitioner.

MOTION FOR DISCRETIONARY REVIEW

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
2008 AUG -14 P 3:50
BY CLERK
16/4

ROB MCKENNA
Attorney General

GREGORY J. ROSEN *Dept Corrections*
WSBA #15870
Assistant Attorney General

JAY D. GECK
WSBA #17916
Deputy Solicitor General

Criminal Justice Division
PO Box 40116
Olympia WA 98504-0116
(360) 586-1445

TABLE OF CONTENTS

I. IDENTITY OF MOVANT.....1

II. DECISION1

III. ISSUES PRESENTED FOR REVIEW.....1

IV. STATEMENT OF THE CASE1

V. REASONS WHY REVIEW SHOULD BE ACCEPTED.....6

 A. The Subject and Process in a .420 Hearing.....7

 B. The Decision That The Board Should Appoint Counsel
 For A .420 Hearing Reflects Probable Error By The
 Court of Appeals.....9

 C. The Court of Appeals Decision Is Inconsistent with Other
 Decisions of the Court of Appeals.....14

VI. CONCLUSION18

TABLE OF AUTHORITIES

Cases

<i>Gagnon v. Scarpelli</i> , 411 U.S. 778, 93 S. Ct. 1756, 36 L. Ed. 2d 656 (1973).....	passim
<i>Greenholtz v. Inmates of Nebraska Penal and Corrections Complex</i> , 442 U.S. 1, 99 S. Ct. 2100, 60 L. Ed. 2d 668 (1979).....	9, 12, 13, 14
<i>In re McNeal</i> , 99 Wn. App. 617, 994 P.2d 890 (2000).....	14, 15, 16
<i>Morrissey v. Brewer</i> , 408 U.S. 471, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972).....	10, 12, 15, 16
<i>State v. Newton</i> , 87 Wn.2d 363, 552 P.2d 682 (1976).....	2
<i>State v. Ross</i> , 129 Wn.2d 279, 916 P.2d 405 (1996).....	16

Statutes

2001 Final Legislative Report, 3ESSB 6151	17
Laws of 2001, 2001 2d Sp. Sess., ch. 12, § 303	7
Laws of 2001, 2001 2d Sp. Sess., ch. 12, § 306	7
Laws of 2001, 2d Sp. Sess., ch. 12, § 306	17
RCW 9.94A.712.....	passim
RCW 9.95.100	8, 9, 10, 11

RCW 9.95.420	passim
RCW 9.95.420(1).....	11
RCW 9.95.420(1)(a)	7
RCW 9.95.420(2).....	8, 9
RCW 9.95.420(3).....	12
RCW 9.95.420(3)(a)	8

Rules

RAP 13.4(b).....	7
RAP 13.4(b)(1)	6
RAP 13.4(b)(3)	7
RAP 13.5.....	1, 7
RAP 13.5(b).....	6
RAP 16.14.....	1, 6

I. IDENTITY OF MOVANT

Pursuant to RAP 16.14 and RAP 13.5, the Indeterminate Sentence Review Board (Board) respectfully moves the Court to grant review of the Court of Appeals decision terminating review designated in Part II of this petition.

II. DECISION

On July 5, 2006, the Washington Court of Appeals, Division II, issued an unpublished opinion. Appendix A (Slip Opinion).

III. ISSUES PRESENTED FOR REVIEW

Whether the federal Due Process Clause requires the appointment of counsel for offenders who appear before the Board for hearings under RCW 9.95.420, where the Board decides whether the offender should be released to community custody under conditions set by the Board?

IV. STATEMENT OF THE CASE

Mr. McCarthy is in the custody of the Washington Department of Corrections (DOC) 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. Ex. 1

(Judgment and Sentence, *State v. McCarthy*, Clark County Superior Court Cause No. 02-1-01018-1).¹

The trial court sentenced Mr. McCarthy to 12 months and one 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. Ex. 1 at 6.

The crime arose at a B. Dalton bookstore where Mr. McCarthy pressed his genital area against a woman's buttocks, with one leg raised up, 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 III with Sexual Motivation, and accepted a plea bargain agreement and entered a guilty/*Newton* plea to the charge. See Ex. 2 (Pre-Sentence Investigation, In re Donald T. McCarthy, DOC #707212) at 1-2. See *State v. Newton*, 87 Wn.2d 363, 552 P.2d 682 (1976).

Pursuant to RCW 9.95.420, the Board conducted two separate hearings to determine if Mr. McCarthy was more likely than not to commit sex offenses if released to community custody even on conditions.

¹ The referenced exhibits are in the Court of Appeals record from the personal restraint petition.

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* Ex. 3 (Decision and Reasons of August 5, 2003, In re Donald T. McCarthy, DOC #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, Oregon, for frottage on a female under 12 years of age.

File materials indicate that about 4:47 in the afternoon of May 18 2002, at a B. Dalton Book Store in the Vancouver mall, the defendant, 60 years old, approached a 28 year old developmentally disabled female suffering from Downs Syndrome and began frottage, which was noticeable by her sister. The defendant indicated he was just being friendly and he later admitted that he practiced frottage regularly, two or three times a year. The polygraph that he has taken indicates some deception. He has admitted bestiality with horses and has a high priority for the SOTP.² There appear to be some possible mental health issues. He demonstrates a high level of anxiety, controllable apparently by medications.

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

² Sexual Offender Treatment Program.

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.

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 the remaining 23 months and 26 days to his minimum term. Ex. 4 (Decision and Reasons of September 8, 2004, In re Donald T. McCarthy, DOC #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. As indicated, the Board would expect to

see Mr. McCarthy following completion of the SOTP and detailed community supports for him.

Ex. 4 at 1-3. The record reflects that Mr. McCarthy requested the presence of an attorney for each of his two .420 hearings, but that the Board denied each of his requests for counsel. *See* Mr. McCarthy's Ex. 4 at 1 and Ex. 10 at 1, as filed in the Court of Appeals. The Board denied Mr. McCarthy's request for counsel at his first .420 hearing in 2003 "because the Department of Corrections has decided there would not be attorneys, and in order to avoid economic discrimination we don't allow attorneys at these hearings." *See* Mr. McCarthy's Ex. 4 at 1. The Board denied Mr. McCarthy's request for an attorney at this second .420 hearing in 2004, finding that he was not entitled to an attorney at such a hearing. *See* Mr. McCarthy's Ex. 10 at 1.

Mr. McCarthy filed a personal restraint petition in the Court of Appeals on December 3, 2004, alleging that the Board's denial of counsel to Mr. McCarthy for his .420 hearings violated his due process rights under the Fourteenth Amendment to the U.S. Constitution and the Washington Constitution. On July 5, 2006, the Court of Appeals issued an unpublished opinion holding that .420 hearings implicate due process; that there are cases involving .420 hearings in which counsel should be appointed; and the Board should have exercised its discretion before

denying Mr. McCarthy's requests to have counsel appointed to represent him at his .420 hearings. Appendix A (Slip Opinion) at 8.

V. REASONS WHY REVIEW SHOULD BE ACCEPTED

RAP 16.14 provides that the considerations governing acceptance of review of a personal restraint petition are those set out in RAP 13.5(b). Here, the Court of Appeals committed probable error and that decision substantially alters the status quo by placing a substantial burden on the Board to appoint counsel for sex offenders who come before the Board for hearings under RCW 9.95.420. The Court of Appeals decision directing the Board to exercise its discretion to appoint counsel for offenders who come before the Board for RCW 9.95.420 hearings (".420 hearings") will have significant administrative and fiscal impact on the Board by inserting counsel into a proceeding where statute does not provide for counsel.³

Furthermore, the issue presented by this case reflects a conflict between the Courts of Appeals, which would justify review under the analogous concerns of RAP 13.4(b)(1). Finally, the issue presented is a constitutional question of significant public importance because it directly

³ As of July 2006, there were over 900 sex offenders under the Board's jurisdiction who will ultimately come before the Board for .420 hearings.

affects the manner and costs of implementing the sentencing program for sex offenders under RCW 9.94A.712. *See* RAP 13.4(b)(3).⁴

A. The Subject and Process in a .420 Hearing

In 2001, the Legislature passed two laws relevant to Mr. McCarthy's case. First, the Legislature added a new section to chapter 9.94A RCW, now codified as RCW 9.94A.712. *See* Laws of 2001, 2001 2d Sp. Sess., ch. 12, § 303, at pages 2222-2224. The second new law passed by the Legislature was later codified as RCW 9.95.420. *See* Laws of 2001, 2001 2d Sp. Sess., ch. 12, § 306, at 2225.

In RCW 9.95.420, the Legislature mandated that the Department of Corrections conduct and that offenders sentenced under RCW 9.94A.712 participate in an examination of the offender incorporating methodologies 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. *See* RCW 9.95.420(1)(a). Based on such information, RCW 9.95.420 further directed the Board to conduct a hearing to determine whether it was more likely than not that the offender would engage in sex offenses if released on conditions to be set by the

⁴ Counsel recognizes that RAP 13.5 does not reference the criteria for petitions of review under RAP 13.4(b). However, as a decision terminating appellate review, the case stands on a footing similar to cases that are reviewed under the criteria of RAP 13.4(b) and therefore we reference them for the Court's convenience.

Board. *See* RCW 9.95.420(3)(a). The same statute further required that the Board

“shall order the offender released, under such affirmative and other conditions as the Board determined appropriate, unless the Board determined 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.”

See id.

Finally, RCW 9.95.420 directed that if the Board did not order the offender released, that the Board shall establish a new minimum term not to exceed an additional two years in duration. *Id.*

The hearing contemplated under RCW 9.95.420 is a “release” hearing analogous to a parole release hearing conducted under RCW 9.95.100. The Board is charged with the responsibility of making a release decision, based upon the information provided to the Board by the DOC. Specifically, the Board’s release decision requires predictive expertise for future behavior, based on the DOC’s examination of the offender, thus making the .420 hearing analogous to a parole release decision. Nor is unconditional release ever at stake in a .420 hearing. RCW 9.95.420(2) as the Board’s decision contemplates only the possibility of release to community custody, not unconditional release. *See* RCW 9.95.420. And, as analogous to a parole release hearing under

RCW 9.95.100, the offender is confined and thus has not yet achieved his or her liberty at the time that the Board conducts the .420 hearing. Nor is unconditional release ever at stake in a .420 hearing. RCW 9.95.420(2).

B. The Decision That The Board Should Appoint Counsel For A .420 Hearing Reflects Probable Error By The Court of Appeals

The Court of Appeals found that the Board's .420 hearing triggered the protections of the due process clause. Appendix A at 8. It then concluded that due process required the Board to consider the appointment of counsel. Appendix A at 8. The opinion cites *Gagnon v. Scarpelli*, 411 U.S. 778, 790, 93 S. Ct. 1756, 36 L. Ed. 2d, 656 (1973) as the basis for requiring the exercise of discretion for appointment of counsel. The Slip Opinion cites *Greenholtz v. Inmates of Nebraska Penal and Corrections Complex*, 442 U.S. 1, 7, 99 S. Ct. 2100, 60 L. Ed. 2d, 668 (1979), for the proposition that the statutory scheme leading to hearings under .420 creates a liberty interest protected by due process.

The Washington Court of Appeals decision reflects probable error in two respects. First, these cases do not demonstrate that the Due Process Clause is triggered for a .420 hearing contemplating release of a sex offender to community custody. Second, even if due process applies to the limited liberty interest in a .420 hearing, these cases do not demonstrate that due process requires appointment of counsel. At most,

they endorse only the more limited due process described in *Morrissey v. Brewer*, 408 U.S. 471, 480, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972) (holding that minimal due process requirements for parole revocation are an inquiry in the nature of a preliminary hearing to determine probable cause to be conducted at or reasonably near the place of the alleged parole violation or arrest and as promptly as convenient after arrest, and a revocation hearing).

Gagnon v. Scarpelli did not involve a release decision, like the .420 hearing or parole release hearings. See RCW 9.95.100 (describing parole release hearing). Rather, it involved the revocation of probation in which the respondent was at liberty, but where probation was to be revoked based on a new violation of law. This required the decision maker to afford a hearing and consider appointment of counsel. See *Gagnon v. Scarpelli*, 411 U.S. at 780. Because a .420 hearing is clearly not a revocation proceeding, *Gagnon* has little application to Mr. McCarthy's case.

Thus, the Court of Appeals was correct to note that “due process applies in parole revocation proceedings because there is a possibility of the deprivation of liberty”. Appendix A at 4. But .420 hearings are not revocation proceedings, nor can they be interpreted to be revocation hearings. See *Morrissey*, 408 U.S. at 480 (holding that liberty interest

protected by due process is implicated when parole is revoked). The discussion in *Gagnon* describing when counsel should be assigned for revocation of probation illustrates how that decision is concerned with matters different than a .420 release hearing.

Presumptively, it may be said that counsel should be provided in cases where, after being informed of his right to request counsel, the probationer or parolee makes such a request, based on a timely and colorable claim (i) that he has not committed the alleged violation of the conditions upon which he is at liberty; or (ii) that, even if the violation is a matter of public record or is uncontested, there are substantial reasons which justified or mitigated the violation and make revocation inappropriate, and that the reasons are complex or otherwise difficult to develop or present.

Gagnon, 411 U.S. at 790-91.

Again, the distinction between *Gagnon* and a .420 hearing is that the liberty interest affected by probation or parole revocation is substantial – the parolee or probationer has already achieved his liberty and therefore has a strong interest in maintaining such liberty. In contrast, .420 hearings involve sex offenders who are confined according to the terms of their sentence at the time the hearing is conducted. *See* RCW 9.95.420(1). Therefore, the liberty interest at stake in a .420 hearing is not like a parole or a probation revocation hearing. It is analogous to a parole release hearing under RCW 9.95.100.

In light of the different liberty interest at stake and different decision facing the Board in a .420 hearing, the Court of Appeals opinion reflects probable error. *Gagnon* and *Morrisey* do not demonstrate that an offender like Mr. McCarthy is constitutionally entitled to appointment of counsel for a hearing contemplating release to community custody.

The Court of Appeals reliance on *Greenholtz v. Inmates of Nebraska Penal and Corrections Complex* was similarly misplaced. The Court of Appeals relied on the similarity between the Nebraska parole statute in *Greenholtz* and RCW 9.95.420(3), noting that both statutes reflect a presumption or expectancy of release because of the burden placed on the government. This created, in the Court of Appeal's view, a liberty interest protected by the Due Process Clause. Appendix A at 8. But as in *Gagnon* and *Morrissy*, the Court in *Greenholtz* recognized the significant difference between parole *release* and parole *revocation* hearings. *See Greenholtz*, 442 U.S. at 9. The expectancy of release created by the Nebraska parole statute 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* even emphasized that even the *Morrisey v. Brewer* due process requirements need not be followed, thus stopping far short of concluding that counsel should be

appointed to represent inmates at the Nebraska parole release hearings.

See id. As the Court explained in *Greenholtz*:

. . . [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. . . .

A secondary 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, 92 S. Ct at 2599. "The first step in a revocation decision thus involves a wholly retrospective factual question." *Id.*, at 479, 92 S. Ct. at 2599.

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. . . .

. . . That the state holds out the *possibility* of parole provides no more than a mere hope that the benefit will be obtained. *Board of Regents v. Roth*, 408 U.S., at 577, 92 S. Ct., at 2709. To that extent the general interest asserted here is no more substantial than the inmate's hope that he will not be transferred to another prison, a hope which is not protected by due process. *Meachum v. Fano*, 427 U.S., at 225, 96 S. Ct., at 2538; *Montayne v. Haymes*, *supra*.

Greenholtz, 442 U.S. at 9-10 (emphasis added and in original).

The *Greenholtz* Court thus held that due process was satisfied by processes that are satisfied in a .420 hearing; it did not hold that due process required representation of counsel at the Nebraska parole release hearings. The Court of Appeals therefore committed probable error by relying on *Greenholtz* to hold that the hearing under RCW 9.95.420 demonstrated a sufficient conditional interest in release that the offender was constitutionally entitled to have the Board consider assigning counsel in the manner described in *Gagnon*. Regardless of any similarity between the conditional release to community custody directed by RCW 9.95.420 and the Nebraska parole statute, the statutory program for conditional release of a sex offender sentenced under RCW 9.94A.712 does not require this court to extend *Gagnon* to require representation by counsel at the .420 hearing.

C. The Court of Appeals Decision Is Inconsistent with Other Decisions of the Court of Appeals

The Court of Appeals relied on its conclusion that while a .420 hearing has a primary interest in protecting the public from high-risk offenders, it also has a rehabilitative component. Appendix A at 7. As shown below, the opinion relies on this fact and reaches a conclusion inconsistent with *In re McNeal*, 99 Wn. App. 617, 994 P.2d 890 (2000). Moreover, the opinion fails to reflect the legislative purpose for sex

offender sentencing under RCW 9.94A.712 and RCW 9.95.420, which is rooted in community protection and criminal punishment. The rehabilitative component of the sentencing scheme does not require appointment of counsel for the Board's .420 hearing.

Previously, the Court of Appeals has held that an individual facing revocation of community custody was entitled to the procedural protections established in *Morrissey*, but that this did not include appointment of counsel to represent that individual. *See In re McNeal*, 99 Wn. App. at 636. In contrast, the Court of Appeals in the instant case reached a contrary result and held that counsel can be required for a Board hearing considering the potential of release to community custody. As explained in *McNeal*:

In *Gagnon v. Scarpelli*, the United States Supreme Court held that although probationers and parolees do not have an absolute due process right to appointed counsel in a revocation hearing, the “need for counsel 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.” *McNeal* asks us to extend *Scarpelli* to community custody hearings. . . . We disagree because, at this juncture, the distinction between the goals of parole and community custody we discussed earlier in this opinion becomes critical.

McNeal, 99 Wn. App. at 634-35. The *McNeal* Court went on to explain why there is a different due process interest owed in community custody decisions:

[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 of the State of providing counsel, including delay in and formalization of the hearing, 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.

Id. (emphasis added). See also *State v. Ross*, 129 Wn.2d, 279, 286, 916 P.2d 405 (1996) (recognizing that community placement was not rehabilitative, but “primarily furthers the punitive purposes of deterrence and protection.”)

The holdings in *McNeal* and by the Court of Appeals in this case cannot be reconciled. In *McNeal*, the liberty interest is undoubtedly more substantial, as it involves revocation of community custody and changing the status quo to the detriment of the offender’s interest in greater liberty. Under *McNeal*, the *Morrissey* requirements sufficiently protect against a wrongful revocation of community custody such that the State is not required to provide counsel for community custody revocation hearings, rejecting extension of *Gagnon* to that setting. *McNeal*, 99 Wn. App. at 635.

Nor can the difference in these cases be explained by suggesting that Mr. McCarthy's release hearing involves a rehabilitative component. The 2001 Final Legislative Report the bill which created RCW 9.95.420 describes a broader purpose for making release decisions in a .420 hearing.:

The presence of risk level III sex offenders and civilly committed sex offenders on court ordered less restrictive alternatives in the community **has created considerable concern about the risks these high risk offenders present for community safety**. There is concern that the state needs to address both the issues of appropriate housing and reintegration of persons being released from civil commitment and of the appropriate sentencing of sex offenders in a comprehensive manner so that both the civil and criminal processes effectively address the need to protect the community and permit the state to meet its constitutional and statutory duties.

Ex. 5, 2001 Final Legislative Report, 3ESSB 6151, at 233 (emphasis added); *see also* Laws of 2001, 2d Sp. Sess., ch. 12, § 306, p. 2225.

Thus, the purpose of the .420 hearing serves public safety above and beyond rehabilitation goals that have been the focus of some cases involving parole revocation hearings. Mr. McCarthy had no due process right to appointment of counsel under the extension of *Gagnon* adopted by the Court of Appeals, because the liberty interest of an offender at a .420 hearing is less than a person already in community custody, and because the purpose of a .420 hearing is to provide general community safety.

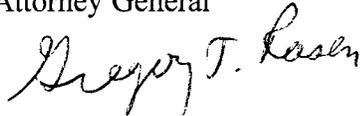
The Court should therefore accept review of this case because the ruling of the Court of Appeals reflects probable error. The holding is in conflict with another decision of the Court of Appeals and presents a question of constitutional significance that should be answered by this Court.

VI. CONCLUSION

The Respondent respectfully requests that this Court grant review of the Washington Court of Appeals decision in this case.

RESPECTFULLY SUBMITTED this 4 day of August, 2006.

ROB MCKENNA
Attorney General



GREGORY J. ROSEN, WSBA #15870
Assistant Attorney General
JAY D. GECK, WSBA # 17916
Deputy Solicitor General

Attorney General's Office
P.O. Box 40116
Olympia, WA 98504-0116
(360) 586-1445

CERTIFICATE OF SERVICE

I certify that I served a copy of the MOTION FOR DISCRETIONARY REVIEW on all parties or their counsel of record as follows:

- US Mail Postage Prepaid
- United Parcel Service, Next Day Air
- ABC/Legal Messenger
- State Campus Delivery
- Hand delivered By: _____

TO:

RICHARD A. LINN
LINN-BARNES LAW OFFICES, PLLC
1370 STEWART ST, SUITE 101
SEATTLE, WA 98109

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

EXECUTED this 4th day of August, 2006 at Olympia, WA.

Betty Good
BETTY GOOD

APPENDIX A

RECEIVED

JUL 06 2006

FILED
COURT OF APPEALS
DIVISION II
ATTORNEY GENERAL'S OFFICE
CRIMINAL JUSTICE DIV-OLYMPIA

06 JUL -5 AM 9:19

STATE OF WASHINGTON

BY _____
DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In re the Personal Restraint Petition of

No. 32702-3-II

DONALD T. McCARTHY,

Appellant.

UNPUBLISHED OPINION

ARMSTRONG, J. – Donald T. McCarthy seeks relief from unlawful restraint following his 2002 guilty plea to a charge of third degree assault with sexual motivation. He claims that his restraint is unlawful because the Indeterminate Sentence Review Board (ISRB) increased his minimum term of confinement without having a jury make the necessary factual determinations and without allowing him legal representation. He also claims that he was ineligible for an indeterminate sentence because he did not commit and has not committed an enumerated predicate offense. His first and third claims fail but we remand to the ISRB to consider his request for legal representation.

FACTS

McCarthy pleaded guilty on July 25, 2002. On December 4, 2002, the superior court imposed a stipulated exceptional sentence of one year and one day with a maximum term of 60 months.

On August 5, 2003, the ISRB held an RCW 9.95.420(3) release hearing (.420 hearing). McCarthy requested that an attorney represent him but the ISRB denied his request, reasoning that the Department of Corrections's policy prohibited representation. The ISRB found that McCarthy needed sex offender treatment, added 24 months to his minimum term, and concluded: "[U]nless 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 young, vulnerable, or mentally disabled people." Exhibit 3 at 3.

McCarthy was under the care of Mr. Merloni, who explained that McCarthy's referral was because he is "extremely fearful, anxious and paranoid. History of paranoid schizophrenia." Exhibit 4 at 4. He explained that McCarthy's resultant medications are diazepam (an anti-anxiety medication), risperidone (an anti-psychotic medication), and celexa (an anti-depressant medication). McCarthy was on medications during the hearing.

On September 8, 2004, the ISRB again conducted a .420 hearing. Again, McCarthy requested counsel and again the ISRB denied his request. It then again found by a preponderance of the evidence that McCarthy presented a significant risk and was more likely than not to reoffend sexually if released to the community. It then added the remaining 23 months and 26 days to his minimum term. The ISRB reasoned:

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.

DISCUSSION

I. EXCEPTIONAL SENTENCE

McCarthy first claims that when the ISRB increased his minimum term sentence following his .420 hearings, it violated his Sixth Amendment right to a jury trial. Citing *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), he claims that his restraint is unlawful because the ISRB imposed an exceptional sentence without giving him an opportunity to have a jury decide, beyond a reasonable doubt, the facts supporting such a sentence.

Relying on *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), the *Blakely* Court held that other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. *Blakely*, 124 S. Ct. at 2537. Thus, if a sentencing court imposes a sentence based on facts beyond those found by the jury beyond a reasonable doubt, it violates the Sixth Amendment and imposes an invalid sentence. *Blakely*, 124 S. Ct. at 2538.

The ISRB increased McCarthy's minimum term of confinement by 24 months following his 2003 .420 hearing and 23 months and 26 days following his 2004 hearing. In doing so, it relied on documentation from McCarthy's prison files, testimony presented during the hearing, and the ISRB's discussions with McCarthy. Thus, McCarthy argues, it increased the penalty for his crime beyond the prescribed statutory maximum without submitting the supporting facts to a jury to be proven beyond a reasonable doubt, violating his jury trial right.

The Department argues that *Blakely* does not apply because, unlike *Blakely*, McCarthy was sentenced under an indeterminate sentencing scheme. We agree. In *State v. Clarke*, No. 76602-9, 2006 Wash. LEXIS 425 (May 11, 2006), our Supreme Court addressed this very issue and held that *Blakely* does not apply to an exceptional minimum sentence imposed under RCW 9.94A.712 because the statutory maximum sentence under that provision is mandatory, not the outside limit of available sentences. *Clarke*, No. 76602-9, 2006 Wash. LEXIS 425, at *4 (May 11, 2006).

Under this reasoning, the statutory maximum that McCarthy may serve is 60 months imprisonment. Since McCarthy has no right to a lesser sentence than his maximum, judicial fact-finding was not required before the ISRB could increase McCarthy's minimum term. *Clarke*, No. 76602-9, 2006 Wash. LEXIS 425, at *6 (May 11, 2006).

II. REPRESENTATION AT .420 HEARING

McCarthy next contends that the ISRB denied him his due process rights when it denied him representation at the .420 hearing both in 2003 and again in 2004. His argument is two-fold. First, he argues that a .420 hearing is comparable to a parole or probation revocation hearing, thus invoking due process protections. And second, he argues that the ISRB should have granted his request for counsel because he was not mentally competent to present his case to the ISRB.

Due process applies in parole revocation proceedings because there is the possibility of the deprivation of liberty. See *Morrissey v. Brewer*, 408 U.S. 471, 480, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972). While there is no right to representation, the need for counsel at such proceedings needs to be addressed on a case-by-case basis. *Gagnon v. Scarpelli*, 411 U.S. 778, 790, 93 S. Ct. 1756, 36 L. Ed. 2d 656 (1973) (need for counsel must be determined on a case-by-case basis). See also *Arment v. Henry*, 98 Wn.2d 775, 779, 658 P.2d 663 (1983) (quoting *Vitek*

No. 32702-3-II

v. *Jones*, 445 U.S. 480, 496-97, 100 S. Ct. 1254, 63 L. Ed. 2d 552 (1980) (“A prisoner thought to be suffering from a mental disease or defect requiring involuntary treatment probably has an even greater need for legal assistance, for such a prisoner is more likely to be unable to understand or exercise his rights. In these circumstances, it is appropriate that counsel be provided to indigent prisoners whom the State seeks to treat as mentally ill.”).

McCarthy claims that a .420 hearing is similar to a parole revocation hearing because it may result in lost liberty, applies the same legal standard, involves similar technical arguments, and is rehabilitative.

In *Greenholtz v. Inmates of Nebraska Penal & Corrections Complex*, 442 U.S. 1, 7, 99 S. Ct. 2100, 60 L. Ed. 2d 668 (1979), inmates sought greater due process protections because of an expectation of release in parole release decisions. They reasoned, in part, that the statute created an expectation that they would be released. Similar to that at issue here, the governing Nebraska statute provided:

Whenever the Board of Parole considers the release of a committed offender who is eligible for release on parole, it *shall order his release unless* it is of the opinion that his release should be deferred because:

- (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 (quoting Neb. Revised Statute 83-1,114 (1) (1976)) (emphasis added).

The court then noted:

We can accept respondents' view that the expectancy of release provided in this statute is entitled to some measure of constitutional protection. However, we emphasize that this statute has unique structure and language and thus whether any other state statute provides a protectible entitlement must be decided on a case-by-case basis.

Greenholtz, 442 U.S. at 12. The court then considered what process was due to an inmate and concluded:

The Nebraska procedure affords an opportunity to be heard, and when parole is denied it informs the inmate in what respects he falls short of qualifying for parole; this affords the process that is due under these circumstances. The Constitution does not require more.

Greenholtz, 442 U.S. at 16.

Similar to the inmates in *Greenholtz*, McCarthy argues that RCW 9.95.420(3) creates an "expectancy of release" and thus that he has a due process right. That statute provides: "The board *shall order the defendant 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 condition, it is more likely than not that the offender will commit sex offenses if released." (Emphasis added.)

Because the statute affirmatively places the burden of proving the need for further confinement on the ISRB, McCarthy argues that he should have the same rights afforded to parolees. Additionally, he argues, the .420 hearing shares the same rehabilitative goal as probation and parole. For example, if the ISRB determines that an inmate is not ready for release, it can order further treatment to help rehabilitate the offender. And, considering that the ISRB's decision will rest on the offender's history, which can be lengthy and complicated, and

will undoubtedly involve medical and treatment reports, most offenders lack the skills needed to effectively advocate their own case.

While we agree with the ISRB that RCW 9.94A.420 has a primary interest in protecting the public from high-risk sex offenders, it also has a rehabilitative component. See 2001 FINAL LEGISLATIVE REPORT, 3ESSB 6151, 56th Leg., 2d. Sp. Sess. 144, at 6151 (because of risks sex offenders pose, comprehensive approach, both civil and criminal, is needed). This rehabilitative component is patently obvious here where the ISRB concluded that McCarthy needed more time institutionalized in order to complete the SOTP program, to obtain treatment for his chemical abuse, and to focus, one program at a time, on his mental health problems.

Considering all of this, McCarthy argues that the ISRB acted in an arbitrary and capricious manner in denying his requests for counsel. At the very least, he argues, the ISRB should have made an individualized decision, especially considering his lengthy history of mental illness, his age, his limited IQ, his lack of education, and his lack of necessary skills to rebut or even competently present his case. His, he argues, is one of the "doubtful cases" discussed in *Scarpelli* where the inability to effectively speak for himself should have caused the ISRB to appoint counsel. We agree. As the *Scarpelli* court explained:

We thus find no justification for a new inflexible constitutional rule with respect to the requirement of counsel. We think, rather, that the decision as to the need for counsel 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. Although the presence and participation of counsel will probably be both undesirable and constitutionally unnecessary in most revocation hearings, there will remain certain cases in which fundamental fairness -- the touchstone of due process -- will require that the State provide at its expense counsel for indigent probationers or parolees.

Scarpelli, 411 U.S. at 790. Here, the ISRB did not give McCarthy any opportunity to explain his need for appointed counsel and the ISRB simply ruled that petitioner had no such right under the Department of Corrections's policy. It is clear to us (1) a .420 hearing implicates due process; (2) there are cases where counsel should be appointed; and (3) the ISRB should have exercised its discretion before denying McCarthy's requests. While the presence of counsel may disrupt the informal nature of these proceedings, this consideration is less important than the need for a fundamentally fair proceeding. As such, this matter is remanded to the ISRB to exercise its discretion and, if necessary, to provide McCarthy with a new hearing should it find that counsel was necessary.

III. SENTENCING ELIGIBILITY

McCarthy argues that he was ineligible for an indeterminate sentence because neither his current offense nor his prior offense is in the enumerated list of prerequisite offenses. RCW 9.94A.712, which defines eligibility for the indeterminate sentencing scheme, provides, in part:

(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, 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(32)(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.

Petitioner's current offense, third degree assault with sexual motivation, is not an offense enumerated in RCW 9.94A.712(1)(a). Thus, to qualify under section (1)(b) of this statute, his prior offense must be one of those enumerated in former RCW 9.94A.030(32)(b) (2002), which provides:

(33) "Persistent offender" is an offender who:

....
(b)(i) Has been convicted of: (A) Rape in the first degree, rape of a child in the first degree, child molestation in the first degree, rape in the second degree, rape of a child in the second degree, or indecent liberties by forcible compulsion; (B) 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, or burglary in the first degree; or (C) an attempt to commit any crime listed in this subsection (32)(b)(i); and

(ii) Has, before the commission of the offense under (b)(i) of this subsection, been convicted as an offender on at least one occasion, whether in this state or elsewhere, of an offense listed in (b)(i) of this subsection or any federal or out-of-state offense or offense under prior Washington law that is comparable to the offenses listed in (b)(i) of this subsection. A conviction for rape of a child in the first degree constitutes a conviction under (b)(i) of this subsection only when the offender was sixteen years of age or older when the offender committed the offense. A conviction for rape of a child in the second degree constitutes a conviction under (b)(i) of this subsection only when the offender was eighteen years of age or older when the offender committed the offense.

Petitioner's prior sex offense is a 1992 Oregon conviction of Sex Abuse I. That offense, defined in ORS 163.427, provides:

(1) A person commits the crime of sexual abuse in the first degree when that person:

(a) Subjects another person to sexual contact and:

(A) The victim is less than 14 years of age;

(B) The victim is subjected to forcible compulsion by the actor;

or

(C) The victim is incapable of consent by reason of being mentally defective, mentally incapacitated or physically helpless; or

(b) Intentionally causes a person under 18 years of age to touch or contact the mouth, anus or sex organs of an animal for the purpose of arousing or gratifying the sexual desire of a person.

(2) Sexual abuse in the first degree is a Class B felony.

We apply a three-part test when deciding how to characterize an out-of-state conviction under Washington law during sentencing. First, we convert the out-of-state crime into its Washington counterpart. Second, we determine the sentencing consequences of the Washington counterpart. And third, we assign those consequences to the out-of-state conviction. *State v. Russell*, 104 Wn. App. 422, 440, 16 P.3d 664 (2001) (citing *State v. Berry*, 141 Wn.2d 121, 130-31, 5 P.3d 658 (2000)).

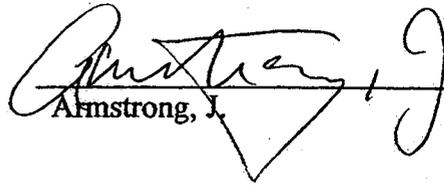
The Washington counterpart to this Oregon offense is first degree child molestation, which is defined in RCW 9A.44.083:

- (1) A person is guilty of child molestation in the first degree when the person has, or knowingly causes another person under the age of eighteen to have, sexual contact with another who is **less than twelve years old** and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim.
- (2) Child molestation in the first degree is a class A felony.

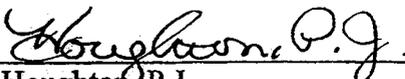
Because Washington's offense of first degree child molestation requires that the victim be less than twelve years old, and because the record did not show the Oregon victim's age, we remanded this petition for a reference hearing under RAP 16.12. After taking further evidence, the superior court found that the Oregon victim was less than twelve years old at the time of the offense. Thus, McCarthy's Oregon offense was equivalent to Washington's offense of first degree child molestation. Because it is an offense enumerated in former RCW 9.94A.030(32)(b), one consequence of this offense is that it serve as a predicate offense under RCW 9.94A.712(1)(b). There was no error in finding that he is a persistent offender.

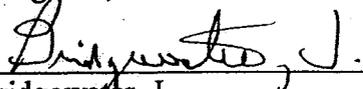
Affirmed in part and remanded in part.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.


Armstrong, J.

We concur:


Houghton, P.J.


Bridgewater, J.