



other divisions of the Court of Appeals is not a consideration under RAP 13.5(b). Even if that issue should be considered, there is no conflict.

**A. The Court of Appeals did not Commit Probable Error in its Decision that the Board Must Exercise Discretion in Granting an Offender's Request for Counsel at a .420 hearing**

The Court of Appeals did not commit probable error when it relied on Gagnon v. Scarpelli, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973), Greenholtz v. Inmates of Nebraska Penal and Correctional Complex, 442 U.S. 1, 99 S.Ct. 2100, 60 L.Ed.2d 668 (1979) and Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972) in holding that due process applies to .420 hearings and that the need for counsel at such proceedings must be addressed on a case-by-case basis. The Court of Appeals followed United States Supreme Court precedent in holding that due process applies where a state statute creates an expectancy of release and the offender lacks the mental capacity to understand and present his case and that in the interests of a fundamentally fair proceeding, the Board must exercise its discretion before denying the offender his request for appointed counsel at the .420 hearing.

It is clearly established law that due process protections apply to parole and probation revocation hearings. The revocation of parole and probation, although not stages of criminal prosecution, do result in a loss of liberty. Morrissey v. Brewer, 408 U.S. 471, 480 (1972). The loss of liberty entailed is a serious deprivation requiring that the parolee be accorded due process. Morrissey, 408 U.S. at 482.

The United States Supreme Court has declined to establish a per se rule with regard to the necessity of counsel in a probation or parole revocation hearing. Gagnon v. Scarpelli, 411 U.S. 778, 790, 93 S.Ct. 1756, 36 L. Ed. 2d 656 (1973) . Instead, the Court has held that the need for counsel must be determined on a case-by-case basis by the state authority charged with responsibility for administering the probation and parole system. Id.

The Board argues that the Court of Appeals' reliance on Greenholtz is misplaced. Motion at 10,13-14. However, the Court of Appeals correctly observes that under Greenholtz, a state statute can create an expectancy of release resulting in due process protection at a parole board hearing. The Court of Appeals correctly applies these due process concerns in deciding that the Board must exercise discretion before denying an offender his request for representation at a .420 hearing. In Greenholtz, the Court held that, despite the necessary

subjective and predictive nature of the parole-release decision, state statutes may create liberty interests in parole release that are entitled to protection under the Due Process Clause. Greenholtz, 442 U.S. at 12. The Court concluded that the mandatory language and the structure of the Nebraska statute at issue in Greenholtz created an “expectancy of release,” which is a liberty interest entitled to such protection. Id. As the Court of Appeals correctly points out, the Greenholtz court then noted that “[the Nebraska 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..” Slip Opinion at 6, citing Greenholtz. The Court in Greenholtz compares “parole release” (not a .420 hearing) to “parole revocation”. Greenholtz, 442 U.S. at 9. The Board relies on that comparison when it argues that counsel should not be provided at a .420 hearing. Motion at 12-14. However, a prisoner facing “parole release,” as in Greenholtz, is in a significantly different position than a prisoner facing a .420 hearing. The decision in Greenholtz pre-dated the Sentencing Reform Act (1984) in Washington, as well as the enactment of RCW 9.95.420. The only “parole release” that a Washington State prisoner could have faced at that time is the type now governed by RCW 9.95.100. Under this statute:

“Any person convicted in a state correctional institution, not sooner released under the provisions of this chapter, shall, in accordance with the provisions of law, be discharged from custody on serving the maximum punishment provided by law for the offense of which such person was convicted, or the maximum term fixed by the court where the law does not provide for a maximum term. The board shall not, however, until his or her maximum term expires, release a prisoner, *unless in its opinion his or her rehabilitation has been complete and he or she is a fit subject for release.*”

RCW 9.95.100 (emphasis added).

In a parole hearing under RCW 9.95.100, the Board has virtually unfettered power to determine whether or not a prisoner is released. Id.

In contrast, in a .420 hearing:

*“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 condition, it is more likely than not that the offender will commit sex offenses if released.”*

RCW 9.95.420(3)(a)(emphasis added).

In a .420 hearing, there is a *presumption* that the prisoner will be released, unless the Board finds by a preponderance of evidence that it is more likely than not that the offender will commit another crime. Id. Even though prisoners facing both “parole release” and a .420 hearing are incarcerated at the time of their hearings, there is

arguably a significant difference in the “expectancy of release” between the two. *See generally* Greenholtz, 442 U.S. at 12. In the case of a prisoner facing a RCW 9.95.100 hearing, based on the language of the statute, there is no presumption of release- the prisoner’s potential liberty is subject entirely to the “opinion” of the Board. RCW 9.95.100. Conversely, in the case of a prisoner facing a .420 hearing, there is a presumption of release- the prisoner’s opportunity to obtain liberty is much better because the Board must find against the prisoner’s presumption of release by a preponderance of evidence. Therefore, a prisoner facing a .420 hearing would have a higher “expectancy of release”, and a more tangible liberty interest than a prisoner facing a RCW 9.95.100 hearing.

Because of the higher “expectancy of release” of a prisoner facing a .420 hearing, the .420 is much more like a parole revocation hearing, than a RCW 9.95.100 hearing. In a parole revocation hearing, like in a .420 hearing, the Board must find by a “preponderance of evidence” that there is evidence sufficient to challenge a presumption in favor of the parolee. RCW 9.95.125. As the Supreme Court finds in Greenholtz, there is a significant difference in the liberty interest between a prisoner facing “parole release”, and one facing “parole

revocation”. See generally Greenholtz, 442 U.S. at 12. But it is the language of the controlling statute that distinguishes a .420 hearing from RCW 9.95.100 hearing, and makes it much more like a parole revocation hearing, where one is entitled to legal representation. It should be noted that the Greenholtz court did not address whether counsel is needed when the offender is incapable of understanding his own records and presenting any special considerations demonstrating why he is an appropriate candidate for parole. However, that issue was addressed in Gagnon v. Scarpelli, 411 U.S. 778, 93 S.Ct. 1756 (1973).

The Court of Appeals correctly observes that the .420 hearing shares the same rehabilitative goal as probation and parole. Slip Opinion at 6 The court also correctly finds Scarpelli applicable to .420 hearings. “The focus of the Scarpelli opinion is on the rehabilitative goal of probation and parole.” In re Personal Restraint of McNeal, 99 Wn.App. 617,634, 944 P.2d 890 (2000) The Court of Appeals points out that, in support of its conclusion that RCW 9.95.420 has a rehabilitative component, that the Final Legislative report on 3ESSB 6161 contains language indicating that “because of risks sex offenders pose, a comprehensive approach, both civil and criminal, is needed.”

Slip Opinion at 7. In addition, the Legislative Report requires the DOC End of Sentence Review Committee to “[assess the offender’s] risk level and that report is given to the ISRB...DOC must make recommendations related to the conditions of release to the ISRB...” Board Response to Personal Restraint Petition (PRP), Ex. 5, Final Legislative report at 235.<sup>2</sup> Prior to the Board making its release decision at a .420 hearing, RCW 9.95.420 requires DOC to conduct an end of sentence review, which is a comprehensive process pursuant to RCW 72.09.345. The End of Sentence Review Committee must have access to all relevant records, including sex offender treatment program reports. RCW 72.09.345(3). The Board itself, in Mr. McCarthy’s case, recognized the rehabilitative nature of the statutory scheme when it required sex offender treatment: “....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...” PRP, Exhibit 3, Decision and Reasons, 9/16/03.

The Court of Appeals did not commit probable error in finding that due process applies to a .420 hearing, that RCW 9.95.420 includes a patently rehabilitative component and that McCarthy’s case

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<sup>2</sup> See Court of Appeals record from the PRP for all referenced exhibits.

is one of the “doubtful ones’ that, under Scarpelli, the Board should have appointed counsel. Contrary to the argument of the Board (Motion at 1) the Court of Appeals did not hold that the Board is required to appoint counsel. It held that due process concerns apply to .420 hearings and, therefore, the Board must exercise its discretion, under Scarpelli, as to whether or not to grant McCarthy’s request for appointment of counsel.

In Scarpelli, the Court found that, “In passing on a request for the appointment of counsel, the responsible agency also should consider, especially in doubtful cases, whether the probationer appears capable of speaking effectively for himself.” Scarpelli, 411 U.S. at 791.

This principle enunciated in Scarpelli is cited repeatedly by the Washington Supreme Court with regard to Board hearings. See In re Personal Restraint Petition of Douglas Boone, 103 Wn.2d 224, 230, 691 P.2d 965 (1984); Arment v. Henry, 98 Wn.2d 663, 778, 658 P.2d 663 (1983).

The Court of Appeals referred to Arment (Opinion at 4). In Arment, the issue considered by the Court was whether the Board is constitutionally required to appoint counsel for an indigent inmate

before increasing the inmate's minimum sentence at a disciplinary hearing held pursuant to RCW 9.95.080. Arment, 98 Wn.2d at 777. The Court distinguished such disciplinary hearings from probation or parole revocation hearings. Arment, 98 Wn.2d at 779. It found that disciplinary hearings held pursuant to RCW 9.95.080 were comparable to the proceeding in Wolff v. McDonnell, 418 U.S. 539, 41 L.Ed. 2d 935, 94 S.Ct. 2963 (1974), and held that due process did not require a right of counsel in an RCW 9.95.080 hearing. Arment, 98 Wn.2d at 781.

However, in the context of a parole or probation revocation hearing, the Court recognized that "prisoners who are illiterate and uneducated have a greater need for assistance in exercising their rights." Arment, 98 Wn.2d at 779, *citing* Scarpelli, 411 U.S. at 786-787; Wolff, 418 U.S. at 570. In Arment, the Court found further that, "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." Arment, 98 Wn.2d at 779.

Based on the findings in Scarpelli, Arment and In re Boone, it is well established in Washington that an inmate's mental capacity and mental health, as well as their financial situation, should be an important consideration in determining whether or not the state provides counsel to inmates subject to an Board hearing.

The Court of Appeals correctly concluded that the Board acted in an arbitrary and capricious manner in denying McCarthy's requests for counsel. File records show that Mr. McCarthy is over 60 years of age, and has an I.Q. of 72, which in the range of mild retardation. PRP Ex. 5. He was unable to finish his high school education, and last worked as a painter. Mr. McCarthy has been receiving mental health treatment since 1980, and has been diagnosed with paranoid schizophrenia. PRP, Ex. 6, 7

Although Mr. McCarthy may have been able to answer some of the Board's questions at the .420 hearing, that does not mean that he was able to adequately represent himself. The effectiveness of the due process rights guaranteed by Morrissey v. Brewer, 408 U.S. 471, 480 (1972) may depend on the use of skills that a probationer or parolee is unlikely to possess. Scarpelli, 411 U.S. at 786. Despite the informal nature of the proceeding and the absence of technical rules of

procedure or evidence, the unskilled or uneducated probationer or parolee may well have difficulty in presenting his version of a disputed set of facts where the presentation requires the examination or cross-examination of witnesses or the offering or dissecting of complex documentary evidence. Scarpelli, 411 U.S. at 786-787.

**B. The Court of Appeals Decision does not Conflict with Decisions in other Divisions of that Court and that Claim does not Meet the Criteria for Review of the Court of Appeal Decision under RAP 13.5(b)**

The Board argues that the Court of Appeals' decision is inconsistent with other decisions of the Court of Appeals. Under RAP 13.5(b), a conflict among the divisions is not a criteria for discretionary review, nor does the Board claim that the decision "has so far departed from the accepted and usual course of judicial proceedings or so far sanctioned such a departure by...an administrative agency, as to call for the exercise of revisory jurisdiction by the Supreme Court. See RAP 13.5(b)(3)

Even if the claim raised by the Board meets the criteria of RAP 13.5(b), contrary to the Board's argument, the Court of Appeals decision in this case is not inconsistent with In re McNeal, 99

Wn.App.617, 994 P.2d 890 (2000). In addition, the Court of Appeals' decision is not inconsistent with the legislative purpose of offender sentencing under RCW 9.94A.712 and 9.95.420.

In McNeal, the Court of Appeals, Division I, found that counsel is not required at community custody revocation hearings and refused to apply Scarpelli. However, even Division I has noted, in a subsequent decision that, "...McNeal was decided when community custody referred only to DOC supervision in lieu of earned early release." State v. Ziegenfuss, 118 Wn.App. 110, n.24, 74 P.3d 1205 (2003) In fact, RCW 9.95.435, enacted after McNeal was decided and as part of the 3ESSB 6151 statutory scheme, requires the Board to exercise discretion on appointment of counsel at community custody violation hearings for offenders previously released after a .420 hearing: "The offender shall have the right to...(vi) be represented by counsel if revocation of the release to the community custody upon a finding of violation is a probable sanction for the violation. The Board may not revoke the release to community custody of any offender who was not represented by counsel at the hearing, unless the offender has waived the right to counsel." RCW 9.95.435(4)(d)(vi) Clearly, the court in McNeal addressed a different type of hearing than a .420

hearing, did not contemplate the .420 hearing and, therefore, that Division I's decision not to apply Scarpelli to a community custody revocation hearing is not inconsistent with the Court of Appeals' decision in the instant case.

A .420 hearing has almost nothing in common with the community custody revocation at issue in McNeal. A community custody revocation is considered as inmate disciplinary proceedings. RCW 9.94A.205(3). See In Re McNeal at 623-624. This gives the Department of Corrections (DOC) the sole authority to conduct community custody revocation hearings. Id. A .420 hearing, like a parole revocation hearing, is conducted by the Board. The DOC's primary function is to oversee internal institutional matters, while the Board is a separate agency whose function is to determine whether or not an offender is fit for release in the community. RCW 9.95.100.

The Board cites a quote from McNeal stating that this court has held that community custody is primarily punitive. Motion at 16 In that quote, the court was citing State v. Ross, 129 Wn.2d 279, 286, 916 P.2d 405 (1996). See In Re McNeal at 635, n. 49. *Community placement* is not analogous to probation or parole- it is a sentence enhancement. State v. Ross, 129 Wn.2d 279, 286, 916 P.2d 405

(1996). (emphasis added) The Board's reference to McNeal and State v. Ross is misplaced. Motion at 16. In Ross, this court stated that there is a fundamental distinction between community placement and the related effects of probation and parole: Community placement occurs in addition to the period of confinement, while probation and parole occur in lieu of confinement. Ross, 129 Wn.2d at 286. Community placement is purely punitive. Ross was decided before the legislation creating .420 hearings and indeterminate sentences for sex offenders was enacted. "The decision to revoke community custody is based primarily on factual determinations about whether the individual violated the conditions of community custody. The success or failure of the rehabilitative process *is not even a factor.*" In re McNeal, 99 Wn.2d at 635(emphasis added). If .420 hearings were not rehabilitative, then the Board would not recommend that an offender enter into and complete rehabilitative treatment. However, in Mr. McCarthy's case, the Board did just that. PRP, Ex.3 at 3 ("...[i]t'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 young, vulnerable, or mentally disabled people.").

An offender who is subject to a .420 hearing may be released into community custody, but that does not mean that community custody is the primary focus of a .420 hearing. The only decision the Board makes in a .420 hearing is whether or not to *release* an offender from confinement onto community custody. The Board essentially makes a judicial decision (as a fact finder and jury). If the Board releases the offender, the DOC becomes solely responsible for enforcing the terms of community custody as set out in the offender's judgment and sentence. See PRP, Ex. 1, at 6 ("The defendant shall be on community supervision/community custody under the charge of the Department of Corrections and shall follow and comply with the instructions, rules and regulations promulgated by said Department...").

Since In re McNeal addressed the application of Scarpelli to a fundamentally different set of facts and statutory scheme than the Court of Appeals addressed in this case, there is no conflict or inconsistency with another division of the Court of Appeals.

In Scarpelli, the Supreme Court held that parolees may require the assistance of counsel in some circumstances because:

“[T]he effectiveness of the rights guaranteed by *Morrissey* may in some circumstances depend on the use of skills which the probationer or parolee is unlikely to possess....The unskilled or uneducated probationer or parolee may well have difficulty in presenting his version of a disputed set of facts where the presentation requires the examining or cross-examining of witness or the offering or dissecting of complex documentary evidence.” Scarpelli at 786-787.

Regardless of whether the hearing is concerned solely with a factual determination or with the rehabilitative process, if the offender has difficulty in presenting his case, he might require the assistance of a counsel. The issue concerns the rights guaranteed for a particular hearing. If an offender cannot competently present or understand his case, then the fundamental fairness – the touchstone of due process – will require that the State appoint counsel. See Slip Opinion at 7-8, citing Scarpelli at 790. The Court of Appeals correctly concluded that “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. Id

### C. CONCLUSION

For the reasons stated above, the Respondent respectfully asks this Court to deny review of the Washington Court of Appeals decision in this case.

RESPECTFULLY SUBMITTED this 8<sup>th</sup> day of  
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Richard Linn  
WSBA #16795  
Attorney for Donald McCarthy  
Law Office of Richard Linn, PLLC  
1370 Stewart St. Ste. 101  
Seattle, WA 98109  
Tel: (206) 545-6871  
Fax: (206) 260-7570

CERTIFICATE OF SERVICE

On this day, the undersigned sent to: (1) Gregory J. Rosen, Assistant Attorney General; (2) Jay D. Geck, Deputy Solicitor General; and (3) Michael Kinnie, Clark County Prosecutor's Office a copy of this document via First Class Mail. I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Richard Linn      9/8/06      Seattle      WA  
Signed                      Date                      Place