

NO. 241688-III

**COURT OF APPEALS FOR DIVISION III
STATE OF WASHINGTON**

In re the Detention of:

DAVID JAMES LEWIS

RESPONDENT'S OPENING BRIEF

ROB MCKENNA
Attorney General

SARAH B. SAPPINGTON
Senior Counsel
WSBA #14514
900 Fourth Avenue, Suite 2000
Seattle, Washington 98164
(206) 464-6430

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I. STATEMENT OF ISSUES

- A. Where, shortly before trial, counsel for Appellant had circulated a letter to approximately 125 citizens in the county, soliciting their views on a “hypothetical” sexually violent predator case and misrepresenting both the law and the facts of the case, did the trial court err in ordering, *sua sponte*, a change of venue?
- B. Where Appellant had been continuously confined since being sentenced for his most recent sexual crime, did the State have jurisdiction to file a sexually violent predator case against him?
- C. Where the testimony clearly showed that Appellant, in addition to having sexually assaulted various family members, had assaulted others who were not family members, and had made threats to the children of other inmates at the Washington State Penitentiary, did sufficient evidence support the jury’s determination that Appellate was likely to commit predatory acts of sexual violence if released?

II. STATEMENT OF THE CASE

Respondent accepts Appellant’s Statement of the Case except as otherwise noted below.

III. ARGUMENT

- A. **The Trial Court Did Not Abuse Its Discretion in Ordering A Change of Venue Where Appellant’s Counsel Had Taken Actions That Risked Tainting the Jury Pool.**

Appellant argues that the trial court abused its discretion by ordering a change of venue from Columbia to Garfield County following Appellant’s trial counsel’s circulation of questionnaires to citizens of Columbia County inquiring as to their opinions regarding the sex predator

statute. Appellant's Brief at 13. Appellant's argument is without merit. The trial judge did not abuse his discretion since he had sufficient reason to believe that the State could not obtain a fair trial in Columbia County, and change of venue to Garfield County was appropriate.

Pursuant to RCW 4.12.030, the court may change the place of trial if it is demonstrated:

- (1) That the county designated in the complaint is not the proper county; or,
- (2) That there is reason to believe that an impartial trial cannot be had therein; or,
- (3) That the convenience of witnesses or the ends of justice would be forwarded by the change; or,
- (4) That from any cause the judge is disqualified; which disqualification exists in either of the following cases: In an action or proceeding to which he is a party, or in which he is interested; when he is related to either party by consanguinity or affinity, within the third degree; when he has been of counsel for either party in the action or proceeding.

An abuse of discretion occurs with respect to a venue decision when no reasonable person would adopt the trial court's position.

Unger v. Cauchon, 118 Wash. App. 165, 73 P. 3d 1005 (2003).

Here, Appellant's trial counsel, Charles Thronson, sent questionnaires to approximately 125 people in Columbia County. RP C 13, March 17, 2005. In the enclosed cover letter, counsel begins as follows: "I am writing you about an important constitutional matter. I

need your help in determining whether or not a law on the books of the State of Washington makes sense to you as a citizen, *who might be called upon to apply it as a juror.*” Motion for Order for Respondent’s Counsel to Cease and Desist, CP 33 at 216. Attached as Exhibit 1, at 2.

The mailing invited the recipient to “imagine you are a juror” at an “imagined trial,” and to complete and return an enclosed questionnaire. *Id.* The questionnaire then set out actual, incomplete facts of Appellant’s case, two hypothetical jury instructions, and asked potential jurors a series of confusing questions. *Id.* at 3-4.

Appellant’ counsel’s communications with prospective jurors were grossly improper and could only have resulted in prejudice to the State. For example, at the outset counsel suggested to prospective jurors that it was an open question as to whether RCW 71.09 “can be followed or needs more work.” *Id.* at 2. Then, under the heading “Evidence,” he raised the specter of double jeopardy and misrepresented the purpose of the proceedings, by writing: “*Despite his having done his time*, the State is now suing to *keep him in jail indefinitely* pursuant to RCW 71.09 (1990).” *Id.* at 3 (emphasis added). The mailing failed to identify the commitment trial as a mental health proceeding that requires evidence beyond a reasonable doubt of a mental disorder causing a person to have serious difficulty controlling sexually violent behavior. The mailing provided a

reasonable doubt of a mental disorder causing a person to have serious difficulty controlling sexually violent behavior. The mailing provided a narrow, incomplete and distorted picture of the law and proceedings that would in all likelihood have prejudiced prospective jurors. To ensure the broadest dissemination of this misinformation, Appellant's attorney had informed the readers that they were "welcome to ponder it and talk it over with others (as, indeed, you would in the jury room)." *Id.* at 2.

The trial judge did not make specific reference to the statutory basis upon which he was changing venue. His comments, however, clearly reveal that his concern was with the impartiality of the jury pool, RCW 4.12.030(2). After conducting a lengthy analysis regarding the content of the mailing and the number of people it could be expected to affect, the court characterized counsel's conduct as "reprehensible" and stated, "you have just poisoned the whole jury venery in Columbia County." RP C at 18.

Given the clearly improper nature of Appellant's attorney's actions and the danger those actions presented to assembling a fair and impartial jury, the trial court's actions were entirely proper. More importantly, Appellant's counsel did not object to the change of venue at the time. Even now, he does not attempt to argue that Appellant was prejudiced, or that the ultimate outcome of the trial was affected in any way by the

B. The Trial Court had Jurisdiction to Hear this Case.

Respondent argues that, because he was awaiting re-trial on the charges that he molested his step-brother when the State filed its case, he was not “about to be released.” As such, he alleges, the State had no jurisdiction to file against him.

The State initially filed an SVP petition against Appellant upon his scheduled release in 1999. CP 1 at 11. That action was dismissed without prejudice when Walla Walla County filed criminal charges related to Appellant’s sexual abuse of his brother. *Id.*

Respondent was convicted of First Degree Rape of a Child for the rape of his brother on November 1, 2000 in Walla Walla County. His case was ultimately overturned on appeal, and the case was remanded to the trial court. *Id.* The prosecuting attorney, James Nagle, noted the case for trial, and trial was set for mid July, 2003. Response In Opposition to the Motions to Dismiss/Vacate, attached as Exhibit 2, at 3, CP 34 at 207.

During the time the case was awaiting retrial, the SVP Unit of the Office of the Attorney General (AGO) received notification that Appellant’s case had been reversed. *Id.* Initially, the AGO was not informed as to whether the case would be re-tried and, if so, on what charges. The AGO later learned that the Prosecuting Attorney for Walla

charges. The AGO later learned that the Prosecuting Attorney for Walla Walla County planned to retry Appellant on the original charges of First Degree Rape of a Child. *Id.*

The Walla Walla county prosecutor, James Nagle, contacted the AGO to determine whether the AGO planned to re-file an SVP petition against Appellant. *Id.* The AGO made arrangements to retrieve their archived files, and asked for all current files and records addressing Appellant's most recent period of incarceration and current functioning. *Id.* Such materials are generally relied upon in making a determination as to whether an SVP petition will be filed. RCW 71.09.025(b). In the course of conversations between Mr. Nagle and the Assistant Attorney General handling the SVP case, Ms. Sappington, Mr. Nagle indicated that, were Appellant to be re-tried and re-sentenced, he would in all likelihood receive no additional prison time, and would be determined to have served his complete sentence. *Id.* Based on this information, the AGO determined that, as a practical matter, Appellant was "about to be released," and immediate filing was appropriate.

C. The State is Not Required to Plead or Prove a Recent Overt Act Under the Facts of This Case

Appellant argues that, because he was not "about to be released" from total confinement, the State is required to plead and prove a recent

overt act (ROA). Appellant's Brief at 16. Appellant's argument is without merit and should be rejected.

Pursuant to statute, the State is required to plead and prove an ROA only if the offender is "living in the community after release from custody," on the date that the petition is filed. RCW 71.09.060. Therefore, any obligation to prove an ROA under these circumstances must arise from due process. Due process, however, does not require any showing of an ROA under the circumstances presented here.

Appellant cites *In re Detention of Albrecht*, 147 Wn. 2d 1, 51 P. 3d 73 (2002) in support of his contention that the State was required to plead and prove an ROA. That citation, however, is inapposite. Robin Albrecht had been released from prison to community placement. While living in the community, he was picked up for a violation of his community placement, sentenced for 120 days in jail for violation, and was incarcerated on that violation at the time of the SVP petition's filing. *Id.* 147 Wn. 2d at 5.

Appellant appears to argue that being held pending re-trial on a criminal matter for which one had previously been convicted is akin to being held on a violation of community placement. The two situations are, however, entirely different. In Appellant's case, he had been continuously incarcerated since he was sentenced for the rape of his

brother.² Although he had been incarcerated on different theories (first, following his criminal conviction, then, at the time of the petition's filing, awaiting retrial on that criminal charge), the fact remains that he was continuously incarcerated, and was never released into the community, even for the shortest period of time. Under such circumstances, there is no requirement that the State to plead or prove a recent overt act. Appellant's argument is without merit and should be rejected.

D. The Jury's Verdict was Supported by the Evidence

Appellant argues that there was insufficient evidence to support the jury's finding that Appellant is an SVP. Specifically, he finds fault with the fact that Dr. Phenix considered an offense against T.W. as evidence of his paraphilia. Appellant's Brief at 20.

At trial, R.D. (or P.D., as referred to in Appellant's Brief), testified that, in the spring of 1991, when she was 10 or 11 years old, she was living in Walla Walla. RP E at 11. She testified that Appellant, her cousin, is seven or eight years older than she. While her mother was giving a Tupperware party and she was in the backyard playing, Appellant touched her on the breasts and vagina on the outside of her clothing. RP E at 13. Her friend, T.W., told R.D. that Appellant had also touched her, but

² Indeed, he had been continuously confined since his 1992 conviction for Rape of a Child in the First Degree and Child Molestation in the First Degree stemming from his assault of his sister, J.F. CP 1 at 1, 2, and 8.

that T.W. had not told anyone because she was afraid that she would get in trouble and get a spanking if she told. *Id.* at 13.

At trial, Appellant's counsel questioned Dr. Phenix about the allegations regarding T.W., pointing out that T.W. had denied to the police that any sexual contact had occurred. RP J at 417. Dr. Phenix agreed, but noted that T.W. had told her good friend, R.D., that the offense had occurred. The offense against T.W. was, in Dr. Phenix's mind, "consistent with what had happened to R....when he was already sexually inappropriate with R." *Id.* at 417. When Appellant's trial counsel suggested that Dr. Phenix's approach was unduly subjective, she noted that T.W. had "said why she didn't tell her parents, that she was scared that she would get in trouble, which is a very common reason why children don't report these kinds of things." *Id.* at 418. Given her knowledge of the facts of the case and her familiarity with the record, Dr. Phenix properly determined that T.W.'s report was credible and relied on that information.

Appellant also argues that "most of the incidents involving Appellant were against relatives, thus the facts do no [sic] meet even Dr. Phenix's own understanding of "predatory," nor do they meet the definition given to jurors in the instructions." Appellant's Brief at 20. This argument misapprehends the statutory requirements. RCW 71.09

does not require that all offenses committed by a respondent be predatory.³ Rather, the statute simply requires that Appellant be likely to commit *future* predatory acts. Given the record before it, the jury properly determined that Appellant was likely to commit predatory acts of sexual violence in the future.

At trial, the jury heard the testimony of Donna Hubbs, who worked as a classification counselor at the Washington State Penitentiary (WSP) in 1999. As part of her job, she was required to review inmates' records from other institutions. Ms. Hubbs testified regarding information she had received about Appellant's behavior while at Twin Rivers Sex Offender Treatment Program (SOTP), where he had had many problems related to his inability to control his sexual behavior. Ms. Hubbs testified that, while at Twin Rivers SOTP, Appellant had been removed from a cell for misbehavior with other inmates, who had complained about his constant masturbation, exposure, and sexual harassment. RP F at 161, 163.

Appellant's sexual acting out continued at WSP, where two other inmates, Mr. Evans, and Mr. Parks, complained about Appellant's behavior. Mr. Evans complained to Ms. Hubbs that Appellant had touched him at least ten times on the buttocks, and at least seven times on

³ RCW 71.09.020(9) defines "predatory" as "acts directed towards: (a) strangers; (b) individuals with whom a relationship has been established or promoted for the primary purpose of victimization; or (c) persons of casual acquaintance with whom no substantial personal relationship exists."

his penis and scrotum. RP F at 169. Mr. Parks told Ms. Hubbs that Appellant had exposed himself to him a number of times, had tried to grab Parks' penis, and had tried to "touch him in the inappropriate areas." RP F at 169. Ms. Hubbs indicated that Mr. Parks was not physically strong, and "was very weak as far as being able to protect himself." RP F at 169-70.

When Appellant was confronted about this behavior, he said that he could not help himself, and that his behavior was a result of his "adult attention disorder." RP F at 170. The institution responded to this behavior by removing him from the unit and placing Appellant on administrative segregation. RP F at 173.

While in segregation, Appellant made numerous threats against other inmates and their families. John Blasdel, a former inmate who had been in the segregation unit at the same time Appellant was confined there, testified that he had overheard an argument between Appellant and another inmate, Steve Dempsey. RP F at 123. The argument apparently began when Appellant was laughing about his history of sexual crimes, and others on the unit became angry. RP F at 125. Appellant threatened to get out, find Dempsey's family, and have contact with his children. RP F at 123. Blasdel, characterizing the exchange, said: "It was more in terms of, "[t]his is what I did. This is what I can do to your family."

RP F at 133. Disturbed by this exchange and Appellant's comments, Blasdel wrote a statement reporting the exchange, and turned it over to one of the prison counselors. RP F at 128.

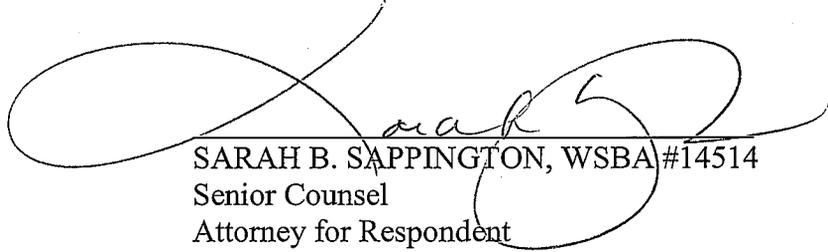
Another inmate at Walla Walla, Henry Morton, also testified regarding Appellant's threats to others and their families while in prison. Mr. Morton testified that, at first, Appellant seemed like a "nice guy" and "an intelligent young man." RP F at 138, 151. After someone else on the unit revealed that Appellant had a history of sex offenses against children, however, Mr. Morton testified that "he went from bein' this—my neighbor to bein' a monster." RP F at 143. Appellant talked about what he would do to children if he were released. RP F at 143. Appellant threatened Mr. Morton's family directly, saying that, if he got out, he would "screw" Mr. Morton's children. RP F at 145. Appellant also talked about "how he would hurt Red [Steve Dempsey]'s kids." RP F at 146. Mr. Morton, like Mr. Blasdel, reported these conversations to prison officials, acknowledging that to do so could be extremely dangerous. RP F at 149.

These threats, made shortly before his scheduled release from prison, reveal clearly that Appellant posed a threat, not only to children in his immediate and extended family, but to strangers in the community. The jury had sufficient evidence to conclude that Appellant was likely to commit predatory acts of sexual violence.

IV. CONCLUSION

For the foregoing reasons, Respondent State of Washington respectfully requests that the Order of Commitment of the trial court be affirmed.

Respectfully submitted this 8th day of February, 2006.



SARAH B. SAPPINGTON, WSBA #14514
Senior Counsel
Attorney for Respondent

EXHIBIT 1

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FILED

MAR 16 2005

Lynne Leseman
Columbia County Clerk
And Clerk of the Superior Court
By _____ Deputy

**STATE OF WASHINGTON
COLUMBIA COUNTY SUPERIOR COURT**

In re the Detention of:

NO. 03-2-00041-7

DAVID JAMES LEWIS,

MOTION FOR ORDER FOR
RESPONDENT'S COUNSEL TO
CEASE AND DESIST AND TO
MAKE FULL DISCLOSURE OF
COMMUNICATIONS WITH
PROSPECTIVE JURORS

Respondent.

A. IDENTITY OF PARTY AND RELIEF REQUESTED

Petitioner State of Washington, by Rob McKenna, Attorney General, and Sarah Sappington, Senior Counsel, moves the court to order that Mr. Charles H. Thronson, counsel for respondent, immediately cease and desist all efforts to communicate with prospective jurors in this or any other county, and that he fully disclose: (1) the method by which he chose his target audience; (2) a full and complete list of the names and addresses of all persons to whom he mailed or delivered the exhibit attached hereto; and (3) copies of each and every response he received, to include identification of the person who completed the response.

B. FACTS

On March 15, 2005, the Clerk of the Court faxed to the undersigned a copy of a letter and questionnaire ("the mailing"), apparently sent by Mr. Thronson to a citizen of Columbia County. See attached Exhibit A. The mailing was sent by a recipient to the Court, which disclosed it as an

MOTION FOR ORDER FOR
RESPONDENT'S COUNSEL TO CEASE
AND DESIST AND TO MAKE FULL
DISCLOSURE OF COMMUNICATIONS
WITH PROSPECTIVE JURORS

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ATTORNEY GENERAL'S OFFICE
Criminal Justice Division
900 Fourth Avenue, Suite 2000
Seattle, WA 98164
(206) 464-6430

1 ex parte communication. Mr. Thronson appears to have sent the mailing to persons who "might
2 be called upon . . . as a juror." Exhibit at 2. The target audience is evidently large, since
3 Mr. Thronson notes his "hope" that there will be a "sizable pool of responses[.]" *Id.*

4 The mailing invites the recipient to "imagine you are a juror" at an "imagined trial," and to
5 complete and return an enclosed questionnaire. *Id.* The questionnaire then sets out actual,
6 incomplete facts of the instant case, two hypothetical jury instructions, and asks potential jurors a
7 series of confusing questions. Exhibit A at 3-4.

8 C. ISSUE

9 Whether the Court should order Mr. Thronson to immediately cease and desist
10 from sending out his letter and questionnaire to prospective jurors in this or any
11 other county, and order that he fully disclose: (1) the method by which he chose
12 his target audience; (2) a full and complete list of the names and addresses of all
13 persons to whom he sent the attached exhibit; and (3) copies of each and every
14 response he received, to include the identity of the person completing each
15 response.

14 D. ARGUMENT

15 Mr. Thronson's communications with prospective jurors are grossly improper and can
16 only result in prejudice to the State.¹ On its face, the mailing is highly prejudicial to the
17 petitioner. For example, at the outset Mr. Thronson suggests to prospective jurors that it is an
18 open question as to whether RCW 71.09 "can be followed or needs more work." Exhibit A at
19 2. Then, under the heading "Evidence," he raises the specter of double jeopardy and
20 misrepresents the purpose of the proceedings, by writing: "*Despite his having done his time,*
21 *the State is now suing to keep him in jail indefinitely pursuant to RCW 71.09 (1990).*" *Id.* at 3

22 ¹ Mr. Thronson's actions may well implicate several Rules of Professional Conduct (RPC). Pursuant to
23 RPC 3.6, for example, it is improper to disseminate extrajudicial statements where the lawyer "knows or
24 reasonably should know" that those statements will have "a substantial likelihood of materially prejudicing an
25 adjudicative proceeding." RPC 3.5 prohibits any ex parte communication with prospective jurors. In addition, in
26 the event that any of the persons to whom communications were sent had already been drawn or summoned to
appear as prospective jurors in this case, such contact may be prohibited under the criminal law, which forbids
any attempt to communicate, directly or indirectly, with a person "already drawn or summoned to appear as a
prospective juror," where that communication is done with intent to "influence a juror's vote, opinion, decision or
other official action in the case." RCW 9A.72.140, .010(5).

1 (emphasis added). The mailing fails to identify the commitment trial as a mental health
2 proceeding that requires evidence beyond a reasonable doubt of a mental disorder causing a
3 person to have serious difficulty controlling sexually violent behavior. The questions
4 Mr. Thronson asks are confusing and skewed to elicit answers beneficial to the respondent's
5 Motion to Dismiss. *Id.* at 3-4. The mailing therefore provides a narrow, incomplete and
6 distorted picture of the law and proceedings that must prejudice prospective jurors. To ensure
7 the broadest dissemination of this misinformation, Mr. Thronson informs the reader that they
8 are "welcome to ponder it and talk it over with others (as, indeed, you would in the jury
9 room)." *Id.* at 2.

10 E. CONCLUSION

11 Mr. Thronson's mailing is improper and potentially highly prejudicial to the petitioner
12 because it can only serve to create bias and confusion in prospective jurors. The Court should
13 order Mr. Thronson to immediately cease and desist in his communications with prospective
14 jurors and to provide the full disclosure the petitioner requests. In order to avoid raising issues
15 related to work-product, such disclosure can be made to the Court rather than to Petitioner if
16 the Court deems this proper. Petitioner reserves the right, upon Mr. Thronson's full disclosure,
17 to request additional measures to contain and/or mitigate the damage done, and to request
18 appropriate sanctions or other remedies.

19 DATED this 14 day of March, 2005.

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21 ROB MCKENNA
22 Attorney General

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25 SARAH B. SAPPINGTON, WSBA #14514
26 Senior Counsel
Attorneys for Petitioner

**OFFICE OF COLUMBIA COUNTY CLERK
AND CLERK OF SUPERIOR COURT
LYNNE LESEMAN, CLERK
COURTHOUSE
341 E. MAIN
DAYTON, WASHINGTON 99328
TELEPHONE: 509-382-4321
FAX: 509-382-4830**

March 15, 2005

Sarah B. Sappington, Senior Counsel
Attorney General's Office
Criminal Justice Division
900 Fourth Avenue, Suite 2000
Seattle, WA 98164

Re: In Re the Detention of: David Lewis
Columbia County Cause No. 03-2-00041-7

Dear Ms. Sappington:

Enclosed please find a copy of a letter received ex parte by a local citizen from Columbia County.

Judge Acey has asked that this be sent to you by fax and hard copy.

If you have any questions please contact our office.

Sincerely,



Lynne Leseman
Columbia County Clerk

Enclosure

EXHIBIT A

THRONSON LAW OFFICE

Business Address
531 N. TOUCHET RD.
DAYTON, WA 99228

Phone: 509-382-2834
Fax: 509-382-4274

March 9, 2005

[REDACTED]
[REDACTED]
Dear [REDACTED]

I am writing you about an important constitutional matter. I need your help in determining whether or not a law on the books of the State of Washington makes sense to you as a citizen who might be called upon to apply it as a juror. The question is whether it can be followed as written or needs more work.

In the attached questionnaire I am presenting the law to you in the context of an imagined trial, and I am asking you to imagine you are a juror at that trial. I am presenting the scenario briefly and following it with a few questions. I am not asking you for a verdict, just to tell me whether you think the law is clear and provides you with the guidance you would need to come to a verdict.

I sincerely hope you will engage with me for a few minutes on this exercise in citizenship. My hope is that the tabulated results of a sizable pool of responses will give me a sense of whether my proposed challenge to the law is viable.

Please fill out the enclosed questionnaire and return it to me in the enclosed envelope. It should only take a few minutes of your time, although you are welcome to ponder it and talk it over with others (as, indeed, you would in the jury room).

This is not a confidential matter; although I have made the questionnaire anonymous so that your name can never be disclosed in connection with your response. I thank you very much in advance for your help.

Sincerely,

Charles H. Thronson

Charles H. Thronson
Attorney at Law

CHT:mwp

Questionnaire

Would you describe yourself as a person of at least ordinary intelligence?

Yes _____ No _____

Please assume that you are a juror in a case where you hear the following:

EVIDENCE

As a juvenile and by age 19, the respondent committed one or more sex offenses—rape, indecent liberties, etc. He was convicted of it/them, and now, at age 30-35, has been in jail ever since. He is nearing the end of his sentence and is about to be released.

Despite his having done his time, the State is now suing to keep him in jail indefinitely pursuant to RCW 71.09 (1990). The State's evidence is that he is like a group of sex offenders of whom, according to statistics, 25 percent will reoffend within the first five years of their release. Within ten years of their release, 39 percent of this group will reoffend, and within 15 years, 52 percent will reoffend.

The defense presents recent statistics showing that not only are these percentages too high but also that the longer an individual ex-convict goes without reoffending, the greater the chance that he will not reoffend ever.

LAW

The judge instructs you as follows:

1. If you find that the respondent is likely to engage in predatory acts of sexual violence if not confined, then you must vote to commit him.
2. "Likely to engage in predatory acts of sexual violence if not confined" means that the person more probably than not will engage in such acts if released unconditionally from detention.

QUESTIONS

In the jury room you begin to deliberate. You have heard the State's evidence about what can be expected to happen over different periods of time in the group's future. You have heard the defense's evidence about what can be expected to happen over time in the individual's future. You have heard the judge's instruction about the law.

1. Does the law tell you how to consider the evidence about time?

YES _____ NO _____

2. Do you find it possible to determine the probability of the respondent reoffending without considering time?

YES _____ NO _____

3 What period of time would you use in determining the respondent's probability of reoffending? (Circle one.)

- A. 2 years
- B. 5 years
- C. 10 years
- D. 15 years

- E. Defendant's lifetime
- F. A reasonable length of time
- G. Other (explain)

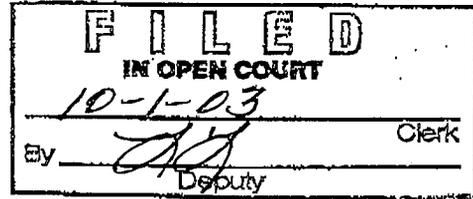
4. Is the law as the judge explained it to you clear and easy to understand and apply?

YES _____ NO _____

5. Use this space to comment if you like. Thank you.

4

EXHIBIT 2



STATE OF WASHINGTON
COLUMBIA COUNTY SUPERIOR COURT

In re the Detention of:

NO. 03-2-00041-7

ROY DALE EAKER,

STATE'S RESPONSE IN
OPPOSITION TO MOTIONS TO
DISMISS /VACATE

Respondent.

The State of Washington submits this memorandum in opposition to Respondent's motions to dismiss 1) for violation of due process; 2) for lack of jurisdiction; and 2) because there is insufficient evidence to believe that Mr. Eaker is a Sexually Violent Predator. Mr. Eaker has filed three separate motions. The State responds to all arguments included therein in this Response in Opposition.

The Petitioner, State of Washington, filed a petition seeking the commitment of the Respondent, ROY DALE EAKER, as a sexually violent predator ("SVP") pursuant to RCW 71.09 on July 1, 2003.

I. ARGUMENT

1. DUE PROCESS

Mr. Eaker alleges that Mr. Lewis he has been confined since August, 1999, "without being convicted of any crime and without a judicial determination that he suffers from a mental abnormality that makes him a danger to the community." Respondent's Motion-Due Process, at 7. In support of his argument, Mr. Eaker provides a history of his various cases dating back

1 to April 15, 1996, and alleges, based on that chronology, that his rights to due process have
2 been violated.

3 The State filed its petition in this case on July 1, 2003. The question currently pending
4 before this Court, to be addressed at the hearing on October 1, 2003, is whether there is
5 probable cause to believe that Mr. Eaker is a sexually violent predator. Specifically, the Court
6 must decide whether there is probable cause to believe that Mr. Eaker has been convicted of a
7 sexually violent offense, and suffers from a mental abnormality or personality disorder which
8 makes him likely to engage in predatory acts of sexual violence if not confined in a secure
9 facility. RCW 71.09.020 (16). The Court has already made an ex parte determination that
10 there is probable cause to hold Mr. Eaker for evaluation.

11 At his upcoming probable cause hearing, Mr. Eaker will now have an opportunity to
12 contest probable cause. The scope of the hearing, however, is limited by the terms of the
13 Statute. The purpose of the adversarial probable cause hearing is not to determine whether, at
14 some time in the past, Mr. Eaker's rights have been violated by acts or omissions on the part of
15 various State agents. Thus, whether or not Mr. Eaker's rights to due process were violated
16 between the period April 15, 1996 and June 30, 2003 (the day before the filing of the sex
17 predator petition) is not a question that is properly before this Court as part of the sexually
18 violent predator inquiry. Should Mr. Eaker wish to pursue this claim, he is free to do so as part
19 of a personal restraint petition pursuant to RAP 16.1 *et seq.*¹

20 A. LACK OF JURISDICTION

21 Respondent argues that, because he was awaiting re-trial on the charges that he
22 molested his step-brother when the State filed its case, he was not "about to be released," and,
23 as such, the State had no jurisdiction to file against him.

24
25 ¹ By making this observation, the State takes no position as to whether such a claim would be viable or
26 timely as part of a PRP.

1 Respondent was convicted of First Degree Rape of a Child on November 1, 2000 in
2 Walla Walla County. His case was ultimately overturned on appeal, and the case was
3 remanded to the trial court. The prosecuting attorney, James Nagle, noted the case for trial, and
4 trial was set for mid July, 2003. During the period, the Office of the Attorney General
5 received notification that Mr. Eaker's case had been reversed. Initially, the Office had was not
6 informed as to whether the case would be re-tried and, if so, on what charges. The office later
7 learned that the Prosecuting Attorney for Walla Walla County planned to proceed on the
8 original charges of First Degree Rape of a Child. The Walla Walla county prosecutor,
9 James Nagle, contacted the office of the attorney general, to determine whether this office
10 planned to re-file an SVP petition against Mr. Eaker. The Attorney General's office made
11 arrangements to retrieve their archived files, and asked for all current files and records
12 addressing Mr. Eaker's most recent period of incarceration and current functioning. Such
13 materials are generally relied upon in making a determination as to whether an SVP petition
14 will be filed. In the course of conversations between Mr. Nagle and Ms. Sappington, Mr. Nagle
15 indicated that, were Mr. Eaker to be re-tried and re-sentenced, he would in all likelihood
16 receive no additional prison time, and would be determined to have served his complete
17 sentence. Based on this information, the Attorney General's Office determined that, as a
18 practical matter, Mr. Eaker was "about to be released," and immediate filing was appropriate.

19 **B. FAILURE TO FOLLOW PRE-PETITION PROCEDURE REQUIRED BY**
20 **RCW 71.09**

21 Respondent makes two arguments as to the alleged failure of the State to follow the
22 pre-petition procedure required by RCW 71.09. First, Respondent argues that the Petition must
23 be released because the State did not receive a referral from the agency with jurisdiction over
24 Respondent, presumably DOC. Respondent's argument has been addressed and rejected by
25 the court of Appeals in *In re Aqui*, 84 Wn. App 88. (1996). There, Joseph Aqui argued,
26 because he was under the jurisdiction of the ISRB at the time of the petition's filing, that only

1 a referral by the ISRB could trigger a petition under RCW 71.09. Id. at 95-96. The court
2 rejected this argument, stating:

3 RCW 71.09.025 requires that the agency with jurisdiction over a person
4 potentially classifiable as a sexually violent predator notify the prosecutor if
5 release from total confinement is contemplated. Aqui argue that this statute
6 precludes a prosecutor from filing a petition if the agency does not notify the
7 prosecutor. Aqui misreads the statutory scheme. Rather than limiting the
8 prosecutor's power to file a petition, RCW 71.09.025 is designed only to
9 provide notice to the prosecutor. Another section, RCW 71.09.030,
10 demonstrates this point. RCW 71.09.030 allows the prosecutor to file a petition
11 if an individual is about to be released from total confinement and if it appears
12 that the person may be a sexually violent predator. In RCW 71.09.030, the
13 Legislature did not make the exercise of the prosecutor's discretion contingent
14 on notification from an agency.

15 *Id.*, at 96.

16 Respondent next argues that the Attorney General's Office, in the absence of a specific
17 request by the prosecuting attorney, has no authority to file a sex predator petition.

18 Pursuant to RCW 71.09.030, where it appears that a person may be a sexually violent
19 predator, "the prosecuting attorney of the county where the person was convicted or charged or
20 the attorney general if requested by the prosecuting attorney may file a petition..." In this case,
21 the Attorney General's Office was acting on behalf of the Columbia County Prosecuting
22 Attorney, who, like all other prosecutors in the State of Washington with the exception of
23 King County, had previously indicated her desire to have the Attorney General's Office handle
24 all sex predator cases for her office. There is no requirement in the statute that the "request of
25 the prosecutor" take any particular form or that it be in writing (cf. RCW 43.10.232 (2),
26 providing that the Attorney General's Office may exercise criminal jurisdiction only upon
written authorization by the prosecuting authority). The Office of the Attorney General filed
this case with the approval of the Columbia County Prosecutor, whose request that this Office
assume responsibility for the case is ongoing. Respondent's argument must be rejected.

////

1 **C. PROBABLE CAUSE: SUFFICIENCY OF THE EVIDENCE**

2 Respondent urges that the State has not shown that there is probable cause to believe
3 that Respondent is an SVP (Respondent's Motions to Vacate Arrest Warrant and Dismiss
4 Petition). Respondent concedes that he has been convicted of a crime of sexually violence, to
5 wit, Child Molestation in the First Degree in Columbia County.

6 Respondent concedes that, while Respondent has, in the past, been diagnosed with a
7 condition that would qualify as a "mental abnormality" under the Statute, the State has made
8 no showing that he currently suffers from such condition. Respondent notes that no current
9 mental evaluation was filed at the time of the probable cause certification, "suggest[ing] that
10 there was no such opinion prior to the probable cause statement. If so, it is pure speculation
11 whether Mr. Lewis currently suffers from a mental abnormality." Motion to Vacate at 9.

12 Pursuant to RCW 71.09.030, filing of an SVP petition is authorized "when it appears
13 that a person...may be a sexually violent predator." Upon filing, an ex parte hearing is held
14 and, if the court finds probable cause based on the State's pleadings, the individual is taken
15 into custody. RCW 71.09.040(1). The person is then entitled to a probable cause hearing
16 within 72 hours to contest probable cause. RCW 71.09.040(2). If the probable cause
17 determination is made, the judge "shall direct that the person be transferred to an appropriate
18 facility for an evaluation as to whether the person is a sexually violent predator."
19 RCW 71.09.040(4). Within 45 days after completion of the probable cause hearing, the court
20 shall conduct a trial to determine whether the person is a sexually violent predator.
21 RCW 71.09.050(1). There is nothing in the statutory scheme that requires a current mental
22 evaluation before a case can be filed; rather, the filing of the petition is authorized "when it
23 appears that the person may be" an SVP. The Certification for Determination of Probable
24 Cause provides sufficient information beyond "pure speculation" as to whether Mr. Eaker is an
25 SVP. The Declaration, which describes his history of sexual offending, discusses past
26 diagnoses (two psychologists, Dr. David Johnson, M.D. and Dr. Ronald Page, Ph.D., have

1 assigned Eaker diagnoses of Pedophilia), and his threats to re-offend as recently as 1998, are a
 2 sufficient basis upon which to find probable cause to believe that Eaker "may" be an SVP.
 3 Moreover, as Respondent is well aware, Dr. Amy Phenix, Ph.D, has, since the petition's filing,
 4 completed a current evaluation of Respondent. This evaluation supports the State's position
 5 that Respondent meets the criteria of an SVP.

6 **D. SERIOUS DIFFICULTY CONTROLLING BEHAVIOR**

7 Respondent asserts that the *In re Thorell*, 149 Wn. 2d 724 (2003) stands for the
 8 proposition that "proof of serious difficulty controlling sexually predatory behavior is [an]
 9 element to be proved by the state." Motion to Vacate at 11. Respondent misapprehends
 10 Thorell. Indeed, Thorell stands for precisely the contrary proposition: "We hold that although
 11 *Crane* did not establish a new element in SVP commitments, *Crane* did require SVP
 12 commitments to be supported by proof beyond a reasonable doubt of serious difficulty
 13 controlling behavior.: 149 Wn. 2d at 745. Elsewhere, the court expands on this position:

14 We conclude that *Crane* requires a determination that a potential SVP has
 15 serious difficulty controlling dangerous, sexually predatory behavior, but does
 16 not require a *separate* finding to that effect. **The United States Supreme Court**
 17 **did not impose a new element in SVP commitment proceedings when**
 18 **explaining its case specific *736 approach.** Although *Crane* held that "there
 19 must be proof of serious difficulty in controlling behavior," the Court made this
 20 holding in response to whether a fact finder must find a *total* lack of control, not
 21 whether the proof requires a specific finding. *Crane*, 534 U.S. at 413, 122 S.Ct. 867.

22 149 Wn. 2d at 735-736. The *Thorell* court went on to explain that the concept of "serious
 23 difficulty controlling behavior" may be contained within a finding of a mental abnormality:

24 We therefore read *Crane* as consistent with *Hendricks*, which held that a
 25 lack of control determination may be included in the finding of mental
 26 abnormality. *Crane*, 534 U.S. at 421, 122 S.Ct. 867 (Scalia, J., dissenting).
 What is critical to both *Hendricks* and *Crane* is the existence of "some proof"
 that the diagnosed mental abnormality has an impact on offenders' ability to
 control their behavior. *Crane* requires linking an SVP's serious difficulty in
 controlling behavior to a mental abnormality, which together with a history of
 sexually predatory behavior, gives rise to a finding of future dangerousness,
 justifies civil commitment, and sufficiently distinguishes the SVP from the
 dangerous but typical criminal recidivist. **It is the finding of this link, rather**

1 than an independent determination, that establishes the serious lack of
 2 control and thus meets the constitutional requirements for SVP
 commitment under Hendricks and Crane.

3 *Id.*

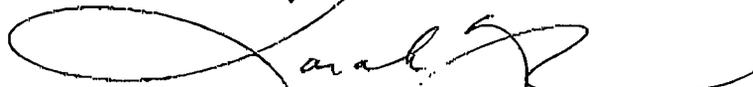
4 Moreover, even if a separate determination were required to be made, there is clearly
 5 probable cause to determine that Mr. Eaker has "serious difficulty" controlling his behavior. IN
 6 198, he during an SOPT program unit team meeting, he stated that "I am a sexual predator."
 7 See Certification at 8. DOC records indicate that, on August 4, 1999, Eaker was bragging to
 8 another inmate that, upon release no matter when they sent him, he would offend again. *Id.*
 9 When asked what he thought his chances of re-offending were, he stated "50-50." *Id.* at 9. He
 10 later clarified that one of the reasons for the 50-50 estimate was that he still "had the urges."
 11 *Id.* Thus even under Respondent's erroneous "element" argument, the State has presented
 12 sufficient evidence to show, for purposes of the probable cause determination, that Eaker has
 13 "serious difficulty" controlling his sexually violent behavior.

14 **II. CONCLUSION**

15 For the foregoing reasons, the State respectfully requests that this Court deny
 16 Respondent's motions to dismiss and vacate and enter an Order Affirming Probable Cause.

17
 18 DATED this 29 day of September, 2003.

19 CHRISTINE O. GREGOIRE
 20 Attorney General



21 SARAH B. SAPPINGTON, WSBA #14514
 22 Senior Counsel
 23 Attorneys for Petitioner

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In the Office of the Clerk of Court
Washington Court of Appeals, Division Three
By _____

NO. 24168-8-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

In re the Detention of:

DAVID LEWIS,

Appellant,

v.

STATE OF WASHINGTON,

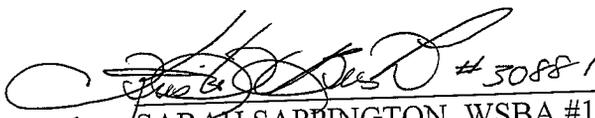
Respondent.

STATEMENT OF
ADDITIONAL
AUTHORITY

As permitted by RAP 10.8, the State of Washington, Respondent,
submits the following additional authority on the confidentiality issue:
In re the Detention of Sheldon Martin, __ P.3d __, 2006 WL 1641945,
Wn. App. Div 2, June 14, 2006.

RESPECTFULLY SUBMITTED this 29th day of June, 2006.

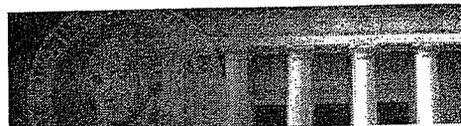
ROB MCKENNA
Attorney General

 #30881
SARAH SAPPINGTON, WSBA #14514
Senior Counsel
Attorneys for Respondent

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Court of Appeals Division I By _____
State of Washington

Opinion Information Sheet

Docket Number: 32972-7-II
Title of Case: In Re The Detention of: Sheldon Martin, Appellant
v. State of Washington, Respondent
File Date: 06/14/2006

SOURCE OF APPEAL

Appeal from Superior Court of Thurston County
Docket No: 03-2-00394-5
Judgment or order under review
Date filed: 02/22/2005
Judge signing: Hon.-Wm Thomas McPhee

JUDGES

Authored by David H. Armstrong
Concurring: Joel Penoyar
Elaine Houghton

COUNSEL OF RECORD

Counsel for Appellant(s)
Joseph Orry-Leroy Baker
Law Offices of David Gehrke
22030 7th Ave S Ste 202
Des Moines, WA 98198-6219

Counsel for Respondent(s)
Melanie Tratnik
Attorney Generals Office/CJ Division
Msc Tb-14
900 4th Ave Ste 2000
Seattle, WA 98164-1012

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

In re Detention of No. 32972-7-II

PUBLISHED OPINION

Sheldon Martin.

Appellant.

ARMSTRONG, J. -- Sheldon Martin moved to dismiss Thurston County's petition to civilly commit him as a sexually violent predator under RCW 71.09.020(16). He argued that the Thurston County Superior Court lacked jurisdiction because his sexually violent offense occurred in Oregon and his other criminal activity occurred in Clark County, Washington. The lower court denied his motion, and Martin appeals. Although venue may have been improper,¹ the remedy for improper venue is a change of venue, not dismissal of the action. Martin never moved for a change of venue. And because the Thurston County Superior Court had jurisdiction of the action, we affirm.

FACTS

In 1992, the State charged and convicted Sheldon Martin of second degree burglary with sexual motivation and indecent exposure in Clark County, Washington. Pending sentencing on those convictions, Martin fled to Oregon where he committed and was convicted of two sexually violent offenses: second degree kidnapping and attempted first degree sexual abuse. After Martin served the Oregon sentences, the authorities returned him to Clark County where he began serving a 30-month sentence for his Clark County crimes.

In March 2003, the attorney general's office petitioned in Thurston County Superior Court to commit Martin as a sexually violent predator (SVP) under RCW 71.09.020(16). Neither of Martin's Washington offenses, second degree burglary with sexual motivation and indecent exposure, is a sexually violent offense as that term is defined in RCW 71.09.020(15) and as used in RCW 71.09.030.

Martin moved to dismiss the State's petition for civil commitment, asserting that the Thurston County Superior Court was not the proper court to hear the State's petition since he had never been convicted of an offense there. The State countered that the definition of 'sexually violent offense' under RCW 71.09.020(15) allows the use of out-of-state convictions as predicate sexually violent offenses, and the established practice of the attorney general's office is to file those petitions in Thurston County. Clerk's Papers (CP) at 90.

The trial court denied Martin's motion to dismiss, ruling that both jurisdiction and venue were proper.

In his February 2005 bench trial, Martin stipulated to the facts sufficient to commit him as an SVP, reserving the right to appeal the trial court's denial of his motion to dismiss.

ANALYSIS

I. Civil Commitment for Sexually Violent Predators

In chapter 71.09 RCW, the Washington legislature enacted legislation that allows the State to indefinitely confine offenders 'likely to engage in sexually violent behavior.' RCW 71.09.010. Under this legislation, if the court or a jury determines that the person is a SVP beyond a reasonable doubt, the court may civilly commit the person. RCW 71.09.060. Under RCW 71.09.020(16), a 'sexually violent predator' is 'any person who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility.' RCW 71.09.020(15)(b) clarifies that a 'sexually violent offense' includes any out-of-state conviction for a felony offense that under the laws of Washington would be a sexually violent offense.

RCW 71.09.030 describes the commitment procedure:

When it appears that: (1) A person who at any time previously has been convicted of a sexually violent offense is about to be released from total confinement . . . or (5) a person who at any time previously has been convicted of a sexually violent offense and has since been released from total confinement and has committed a recent overt act; and it appears that the person may be a sexually violent predator, the prosecuting attorney of

the county where the person was convicted or charged or the attorney general if requested by the prosecuting attorney may file a petition alleging that the person is a 'sexually violent predator' and stating sufficient facts to support such allegation.

II. Subject Matter Jurisdiction and Venue

Martin did not move for a change in venue; he moved to dismiss for lack of jurisdiction. In Washington, superior courts are courts of general jurisdiction and 'have the authority to hear and decide cases in equity, and all cases at law for which jurisdiction has not been vested by law exclusively in some other court.' Wash. Handbook on Civil Proc. sec. 9.3, at 124 (2006) (citing Wash. Const. art. IV, sec. 6); see also Wash. State Coal. for the Homeless v. Dep't of Soc. and Health Servs., 133 Wn.2d 894, 915, 949 P.2d 1291 (1997). In general, subject matter jurisdiction means 'the court's authority to hear and decide a particular kind of case.' Wash. Handbook sec. 9.1, at 123 (2006); see Bour v. Johnson, 80 Wn. App. 643, 910 P.2d 548 (1996). Martin does not dispute that all Washington State superior courts, including Thurston County, have subject matter jurisdiction to hear SVP civil commitment cases under RCW 71.09.020(15)(b).

While jurisdiction refers to the power of a particular court to hear and decide cases, venue concerns only the place where the suit may be brought within the state. Dougherty v. Dep't of Labor and Indus., 150 Wn.2d 310, 316, 76 P.3d 1183 (2003); Wash. Handbook sec. 13.1, at 142 (2006). The remedy for filing in the wrong county under the venue statutes is a change of venue--not dismissal for lack of subject matter jurisdiction. J.A. v. State, 120 Wn. App. 654, 659, 86 P.3d 202 (2004) (citing Sim v. Wash. State Parks & Recreation Comm'n, 90 Wn.2d 378, 383, 583 P.2d 1193 (1978)); cf. Shoop v. Kittitas County, 149 Wn.2d 29, 35, 65 P.3d 1194 (2003).

Martin moved only to dismiss, arguing that chapter 71.09 RCW makes clear that 'an SVP petition may only be filed in a county in which the Respondent has some type of criminal activity.' CP at 75. On appeal, Martin argues that because his 'sexually violent offense,' first degree attempted sexual abuse, is from Multnomah County, Oregon, 'there is absolutely no basis for filing an SVP petition against {him} in Thurston County, WA.' Br. of Appellant at 11. He emphasizes that under RCW 71.09.030, the prosecutor must file a SVP petition in a county where the respondent was convicted or charged and that because the petition against him was not filed in a county where he was convicted or charged, it must be dismissed.

Although RCW 71.09.030 does not state so directly, the legislature clearly intended the SVP civil commitment statute to provide for the civil commitment of a person who was convicted of a sexually violent crime in another state. Cf. RCW 71.09.020(15)(b) with RCW 71.09.030. But Martin is correct that the only venue language in the statute refers to filing in the 'county where the person was convicted or charged.' RCW 71.09.030. Nevertheless, Martin cannot avail himself of the apparent gap in the commitment procedure concerning venue for petitions of SVPs whose only sexually violent offenses are out-of-state.

Martin moved for dismissal based on lack of jurisdiction, a motion the court properly denied because it had jurisdiction. See, e.g., Dougherty, 150 Wn.2d at 316 (stating that '{s}tatutes which require actions to be brought in certain counties are generally regarded as specifying the proper venue and are ordinarily construed not to limit jurisdiction of the state courts to the courts of the counties thus designated.');

Shoop, 149 Wn.2d at 37 (holding that the filing requirements of RCW 36.01.050 relate to venue, not subject matter jurisdiction); Haywood v. Aranda, 143 Wn.2d 231, 237, 19 P.3d 406 (2001) (holding that 'the failure of a person to strictly observe the filing requirements set forth in the mandatory arbitration rules does not deprive the superior court of jurisdiction'). Martin did

not move for change of venue, a motion that would have required the court to decide proper venue in light of Martin's out-of-state predicate offense.

We affirm.

Armstrong, J.

We concur:

Houghton, P.J.

Penoyar, J.

1 Because Martin did not move to change venue, we need not decide where venue lies when the defendant's sexually violent offense occurs in another state.

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