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NO. 58087-6-1

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

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IN RE THE DETENTION OF PAUL MOORE

STATE OF WASHINGTON,

Respondent,

v.

PAUL MOORE,

Appellant.

FILED  
COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON  
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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

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APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT.

In light of Paul Moore's serious mental illness and marginal competency, the trial court failed to protect his right to due process of law at his civil commitment trial by permitting his attorney to stipulate to the majority of the case against him without inquiring into whether Mr. Moore understood he was essentially agreeing to the accuracy and veracity of the prosecution's case. Furthermore, Mr. Moore was denied effective assistance of counsel based on his attorney's fundamental lapse in advocacy. Finally, by failing to require the prosecution prove Mr. Moore was likely to commit a sexually violent offense in a reasonably foreseeable time, the court deprived him of his liberty based on unacceptably vague predictions of future dangerousness, in violation of his right to due process of law.

B. ASSIGNMENTS OF ERROR.

1. The court denied Mr. Moore due process of law by failing to ensure he understood that he was waiving his right to confront and cross-examine the majority of the State's evidence against him, in violation of the Fourteenth Amendment and the Washington Constitution, Article 1, section 3.

2. Mr. Moore was denied effective assistance of counsel by his attorney's failure to act as an effective advocate, contrary to the Fourteenth Amendment and Article 1, section 3 of the Washington Constitution.

3. By refusing to require the prosecution prove Mr. Moore would commit a sexually violent offense within the reasonably foreseeable future, the court denied Mr. Moore due process of law as protected by the state and federal constitution.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Principles of due process are flexible and require a proceeding is fundamentally fair based on the particular facts of the case. As a matter of due process of law, an accused person in a sexually violent predator (SVP) proceeding is guaranteed the right to cross-examine witnesses and test the accusations against him. In the case at bar, even though Mr. Moore had a long history of marginal competence and a documented difficulty understanding complex concepts, the court accepted without inquiry a wide-ranging stipulation to the bulk of the evidence in the State's case. Did the court deny Mr. Moore his right to due process of law by conducting no inquiry into Mr. Moore's awareness or understanding

of his attorney's waiver of his right to test or cross-examine the majority of the evidence used against him?

2. An SVP detainee has the right to effective assistance of counsel. Mr. Moore's attorney stipulated to the majority of the evidence in the State's case even when the evidence was inadmissible under the rules of evidence, Mr. Moore had expressed doubt as to the accuracy of some allegations against him, and Mr. Moore was not consulted as to whether he knowingly waived cross-examination. Did Mr. Moore receive ineffective assistance of counsel due to his attorney's failure to act as an effective advocate?

3. An SVP commitment is a massive deprivation of liberty that may not occur absent proof that the accused person is likely to be dangerous in the future. In the case at bar, the State did not demonstrate Mr. Moore was likely to commit a sexually violent offense in the reasonably foreseeable future. Does the failure to require the prosecution to prove the likelihood of future dangerousness within a reasonably foreseeable time undermine the right to due process of law in light of the substantial intrusion into Mr. Moore's liberty and the imprecise nature of the requirement of future dangerousness?

D. STATEMENT OF THE CASE.

Paul Moore has suffered from mental health problems throughout his adult life. In 1985, he committed first degree rape while armed with a knife. CP 26 (Findings of Fact, attached as Appendix A). His competency to stand trial was questioned and he was ultimately found competent. CP 35 (Stipulated Facts, attached as Appendix B). He later explained that he committed the crime because he was homeless and desperate and thought he should go to jail. Ex. 6, p. 39-41. Mr. Moore has not been released from prison since this 1985 incident.

While in prison, Mr. Moore was been accused of attempting to assault, either physically or sexually, several prison employees or therapists. CP 35-38 (Stipulated Facts). He was found incompetent to stand trial for allegations of custodial assault with sexual motivation in 1994. CP 37. In 2005, he was found not guilty of indecent liberties by forcible compulsion for allegedly grabbing his DOC therapist. 12/21/05RP 2,<sup>1</sup> Exs. 7-10.

The State filed an SVP petition in 2002 and the court held a competency hearing. 9/20/02RP 2; CP 218-53. Dr. Lee Gustafson

evaluated Mr. Moore at the court's request and concluded he was marginally competent. 6/21/02RP 4, 7; 9/20/02RP 9-10. Dr. Gustafson warned that Mr. Moore's competence ebbed and flowed over time. 9/20/02RP 9-10; 15. The court found Mr. Moore competent to stand trial but noted it may not "always be the case" that he remains competent. *Id.* at 15.

Judge George Bowden presided at Mr. Moore's non-jury SVP commitment trial. Defense counsel stipulated to the prosecution's fact witnesses and psychological evidence. CP 34-42. The State called a single witness, Dr. Richard Packard. Mr. Moore did not call any witnesses but offered a written evaluation by a psychologist who concluded Mr. Moore was both mentally ill and likely to commit sexually violent offenses in the future. Ex. 14. The defense expert argued Mr. Moore was better suited for civil commitment under chapter RCW 71.05, the mental health commitment proceedings, than an SVP commitment. *Id.*

The trial court found Mr. Moore met the criteria for SVP commitment and ordered him committed indefinitely. CP 32-33. Mr. Moore timely appeals. CP 3-14.

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<sup>1</sup> The verbatim report of proceedings ("RP") consists of seven volumes of transcripts and will be referred to herein by the date of proceeding followed by the

**E. ARGUMENT.**

1. BY RELYING UPON STIPULATED EVIDENCE WITHOUT DETERMINING WHETHER MR. MOORE WAIVED HIS RIGHT TO CROSS-EXAMINE THE STATE'S WITNESSES OR TESTIFY ON HIS OWN BEHALF, THE COURT VIOLATED MR. MOORE'S RIGHT TO DUE PROCESS OF LAW

a. The court must ensure the accused person is accorded fundamentally fair trial proceedings. The Sixth Amendment to the federal constitution and Article I, section 22 of the Washington Constitution guarantee criminal defendants the rights to counsel, trial by jury, and confrontation of adverse witnesses. State v. Smith, 148 Wn.2d 122, 131, 59 P.3d 74 (2002). Although the sexually violent predator statute is considered civil in nature, it inherently implicates an individual's fundamental interest in liberty and thus requires many of the procedural protections afforded criminal defendants. See In re Detention of Young, 122 Wn.2d 1, 48, 857 P.2d 396 (1993) (due process protections of criminal cases apply where SVP statute indicates similar standards); see also In re Detention of Halgren, 156 Wn.2d 795, 809, 132 P.2d 714 (2006) (holding that same "constitutionally

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prescribed unanimity requirement" as required in criminal cases applies to SVP proceedings); RCW 71.09.050 (granting accused in SVP proceeding rights to attorney, expert witnesses, and 12-person jury); RCW 71.09.060 (requiring State to prove SVP allegations beyond a reasonable doubt and "unanimous jury").

The right to due process of law condemns the deprivation of individual liberty without adequate procedural protections.

"Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action." Foucha v. Louisiana, 504 U.S. 71, 80, 112 S. Ct. 1780, 1785, 118 L. Ed. 2d 434 (1992); U.S. Const. amend. 14. Physical confinement in a mental institution entails a "massive curtailment of liberty." Vitek v. Jones, 445 U.S. 480, 491-92, 100 S. Ct. 1254, 1262-63, 63 L. Ed. 2d 552 (1980). An individual's liberty interest is fundamental in nature and due process protections apply. See United States v. Salerno, 481 U.S. 739, 750, 107 S. Ct. 2095, 2103, 95 L. Ed. 2d 697 (1987); In re Detention of Thorell, 149 Wn.2d 724, 72 P.3d 708 (2003); U.S. Const. amend. 14; Wash. Const, Art, I, section 3.

The constitutional right to procedural due process therefore requires, at a minimum, the right to counsel, to cross-examine

witnesses, and to present witnesses at a civil commitment trial. Specht v. Patterson, 386 U.S. 605, 609-10, 87 S.Ct. 1209, 18 L.Ed.2d 326 (1967); see In re Detention of Stout, \_\_\_ Wn.2d \_\_\_, 150 P.3d 86, 2007 Wash. LEXIS 1, \*18-20 (2007) (“ample opportunity to cross-examine” witness at pretrial deposition satisfies due process in SVP proceeding). Additionally, Mr. Moore has a due process right to the same procedural protections afforded to involuntary mental committees. Baxstrom v. Herold, 383 U.S. 107, 110-11, 86 S.Ct. 760, 15 L.Ed.2d 620(1966); RCW 71.05.200(1)(d); RCW 71.05.250(2); RCW 71.05.310 (right to cross-examine witnesses at commitment hearings).

The right to confront and cross-examine witnesses is a “bedrock procedural guarantee” of a fair trial. Crawford v. Washington, 541 U.S. 36, 42, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). According to Crawford, the opportunity to cross-examine an adverse witness is necessary to determining the reliability of testimony, implicates the fundamental fairness of the trial, and may significantly affect the integrity of the fact-finding process. Id. at 42, 51, 54. While the Sixth Amendment right to confrontation does not govern an SVP civil commitment trial, the underlying principles of that constitutional provision shape the due process rights that must

be afforded to a person facing indefinite and life-long custodial confinement. Stout, 2007 Wash. LEXIS at \*16-17.

Due process is a flexible concept, and what is fair depends on the particular context. Morrissey v. Brewer, 408 U.S. 471, 481, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972); Stout, 2007 Wash. LEXIS at \*18; Young, 122 Wn.2d at 46. Determining the appropriate level of procedural protection requires balancing the interests of the individual and the government. The court must consider the following factors: (1) the private interests affected, (2) the risk of erroneous deprivation of that interest through the procedures used, (3) the probable value, if any, of substitute procedural safeguards, and (4) the government's objectives and interest, including the burdens entailed by additional or different procedural requirements. Mathews v. Eldridge, 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976); Young, 122 Wn.2d at 43-44.

b. Mr. Moore has a significant interest in receiving heightened procedural protections in an SVP commitment trial.

There can be no dispute that Mr. Moore has a significant liberty interest at stake in an SVP commitment trial. Stout, 2007 Wash. LEXIS at \*18. Accordingly, the first Mathews factor "weighs heavily" in Mr. Moore's favor. Id.

In Stout, the Court rejected the claim that conducting an SVP commitment trial without actual physical confrontation of a prosecution witness violates due process. Id. at \*22. However, the Stout Court expressly limited its ruling to the due process required when the SVP detainee's attorney has already "achieved" cross-examination of the witness. Id. at \*15 n.9. In Stout, defense counsel cross-examined the absent witness in two recorded depositions, one of which was videotaped. Id. at \*14. The witness refused to travel from Michigan to the Washington trial and her deposition testimony was admitted in her absence. Since Stout had full and effective cross-examination, as well as the opportunity to review the recorded testimony with counsel and discuss inconsistencies, the court ruled that the procedural protections in place were adequate to ensure a fair proceeding. Id. at \*19-20.

In the case at bar, defense counsel and the prosecutor presented the court with Stipulated Facts and Exhibits. CP 35-42; CP 258-62 (Exhibit list). Mr. Moore did not sign the stipulation or otherwise indicate he understood the stipulation.<sup>2</sup>

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<sup>2</sup> Some months before trial, defense counsel filed a motion withdrawing Mr. Moore's previously asserted request for a jury trial after consulting with Mr. Moore. CP 207-08.

While a trial predicated upon stipulated facts is a perfectly permissible procedure, by stipulating, the accused person forgoes the opportunity to confront and cross-examine the witnesses whose testimony is stipulated. The party cannot challenge the witness's veracity, document inconsistencies, or judge the witness's demeanor. Stout, 2007 Wash. LEXIS at \*20 (noting that confrontation is valuable procedure, as it exposes inconsistencies, explores witness's veracity, and grants fact-finder opportunity to observe demeanor).

In the case at bar, before accepting the stipulated facts, the court did not explain to Mr. Moore that he was waiving his right to cross-examine the numerous witnesses by stipulating to their description of his behavior on prior occasions. The court also did not conduct any inquiry as to Mr. Moore's knowing, intelligent, and voluntary waiver of his right to cross-examine the witnesses or to testify on his own behalf. While there is no strict rule mandating such formal permission, the court must insure an SVP detainee receives due process of law based on the particular facts of the case. Accepting the wide-ranging stipulation absent any assurance that Mr. Moore understood this stipulation results in a substantial

risk that Mr. Moore unknowingly waived this bedrock procedural protection.

c. Due to Mr. Moore's documented mental health issues, the court improperly accepted the stipulated facts without any inquiry of Mr. Moore. The risk of erroneous deprivation of Mr. Moore's right to a fair trial is far greater than in Stout. Not only did Stout's attorney cross-examine the one witness whose testimony was presented by videotaped deposition on two occasions, Stout did not have a long-term history of marginal competency to stand trial that ebbed and flowed on a weekly basis or a significant inability to understand and perceive events.

In the case at bar, the court conducted a competency hearing at Mr. Moore's attorney's request. CP 214-16. Mr. Moore had been previously found incompetent to stand trial and had his competency questioned and evaluated on numerous occasions. CP 35-38 (Stipulated Facts).

At the competency hearing, psychologist Dr. Lee Gustafson explained to the court that Mr. Moore's competency "varies substantially week-to-week," and his condition today does not mean it will remain the case. 9/20/02RP 9-10; Supp CP \_\_, sub. no. 34 (Psychological Evaluation), p. 4 ("Over time it has become

clear to those familiar with Mr. Moore that he does indeed have a psychotic illness that renders him legally incompetent at times.”). Dr. Gustafson had evaluated Mr. Moore on several prior occasions and at times had found him incompetent to stand trial. 9/20/02RP 5.

In a written evaluation filed with the court, Dr. Gustafson explained that Mr. Moore was “marginally competent.” Supp CP \_\_, sub. no. 34 (Psychological Evaluation), p. 5. His competency was affected not only by his mental illness, but also by his isolation during years of solitary confinement. *Id.* at 4. His cognitive problems caused him trouble in relating to people and dealing with new situations, including difficulty being in a courtroom setting. *Id.*

At trial, Dr. Packard testified that Mr. Moore suffered from grossly disorganized thought, occasionally catatonic behavior, disturbed interpersonal relations, and regressed behavior. 3/7/06RP 89-90, 93. His psychotic behavior fluctuated, but contained characteristics of schizophrenia, mood disorder, and schizo-affective disorder. 3/7/06RP 90.

Dr. Packard’s trial testimony and the stipulated exhibits offer examples of Mr. Moore’s inability to understand basic concepts. For example, as part of an intelligence assessment, Dr. Packard

asked Mr. Moore to explain what he thinks the saying, "all that glitters is not gold" means. Mr. Moore replied, "I don't know, something about Led Zeppelin buying a stairway to heaven, I don't know." Ex. 6, p. 52.

Mr. Moore's answer does not appear to be an effort at humor. When asked to name things he was afraid of, Mr. Moore said, "cold weather, pain . . . hideous looking robots, yeah, I guess that's all." *Id.* (ellipses in original).

When asked about possible sexual activity within his family, Mr. Moore described having sex with his mother, yet when pressed for details, he revealed that when he shook his mother's hand and she made an "ahh" sound, he thought the experience was sexual to her. *Id.* at 37-38.

When a person is not competent to stand trial for criminal charges, the Legislature requires heightened procedural protections before those criminal allegations may be used as the basis of an SVP commitment. RCW 71.09.060(2) directs a trial court to conduct rigorous testing of accusations underlying an SVP

petition when the detainee has been found incompetent to stand trial for the underlying criminal charges.<sup>3</sup>

In light of the well-documented history of Mr. Moore's difficulty understanding legal proceedings or assisting his attorney, and his difficulty understanding concepts that require any degree of complex thought or worldliness, the court should have taken measures to insure Mr. Moore understood the nature of the rights he was waiving. Instead, Mr. Moore essentially stipulated to the case against him.

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<sup>3</sup> RCW 71.09.060(2) provides that when the State files an SVP petition for a person who has been found incompetent to stand trial and is about to be released from confinement,

the court shall first hear evidence and determine whether the person did commit the act or acts charged if the court did not enter a finding prior to dismissal under RCW 10.77.090(4) that the person committed the act or acts charged. The hearing on this issue must comply with all the procedures specified in this section. In addition, the rules of evidence applicable in criminal cases shall apply, and all constitutional rights available to defendants at criminal trials, other than the right not to be tried while incompetent, shall apply. After hearing evidence on this issue, the court shall make specific findings on whether the person did commit the act or acts charged, the extent to which the person's incompetence or developmental disability affected the outcome of the hearing, including its effect on the person's ability to consult with and assist counsel and to testify on his or her own behalf, the extent to which the evidence could be reconstructed without the assistance of the person, and the strength of the prosecution's case. If, after the conclusion of the hearing on this issue, the court finds, beyond a reasonable doubt, that the person did commit the act or acts charged, it shall enter a final order, appealable by the person, on that issue, and may proceed to consider whether the person should be committed pursuant to this section.

While the prosecution's single witness, Dr. Packard, was cross-examined, his two written evaluations were admitted as stipulated exhibits, and thus were substantive evidence. Exs. 11, 12. Stipulated Exhibit 6 included a cover sheet, admitted as substantive evidence, documenting the prosecutor's belief that Mr. Moore met all criteria for commitment. Ex. 6. Additionally, the stipulated facts included detailed descriptions of allegations from witnesses in other criminal cases, even where Mr. Moore had not been convicted. CP 34-38.

In his conversation with Dr. Packard, Mr. Moore stated, "I feel I didn't fully do most of the sexual offenses that are on my record." Ex. 6, p. 59. Indeed, Mr. Moore had been found incompetent to stand trial in a prior case but the substance of the allegations against him in that case were admitted without any additional inquiries by the court as would be required under RCW 71.09.060(2) if those criminal charges were the source of the SVP petition.

Mr. Moore suffered from serious mental illness that at times rendered him incompetent to understand the nature of the proceedings or assist in his own defense. In light of Mr. Moore's documented history of suffering from severe mental illness that

varied in how debilitating it was, the court's failure to inquire into whether Mr. Moore understood the nature of the stipulation represents a significant diminishment in the procedural process required to protect Mr. Moore's significant liberty interest at stake in the trial.

The State's interest in speedy and low-cost commitment trials cannot trump the very important right to cross-examine witnesses or to contest the veracity of evidence given Mr. Moore's limited reasoning and analytic skills. In his interview with Dr. Packard, Mr. Moore complained that his actions had been misunderstood in his prior criminal cases. Ex. 6, p. 59. Mr. Moore complained that he had other, non-sexual motives, such as a desire to obtain shelter or gain access to materials to commit suicide. *Id.* at 4 (pleaded guilty to attempted rape because "I wanted to go to Shelton"), 6 (knew he would be stopped by nearby male officer when he assaulted C.S.), 39-41 (committed rape because living on street and thought "why not be in jail"); 59-60 (denied attacking counselor sexually). His admissions to "sexual activity" are of dubious value, given his explanation that sexual activity may consist of a handshake and his low-level ability to understand concepts that entail any sophistication.

Finally, the value of further procedural safeguards is plain. By taking steps to guarantee Mr. Moore understood that he was giving up the right to confront and cross-examine witnesses, and was agreeing to the admission of otherwise inadmissible psychological evaluations, the court could simply and readily document Mr. Moore's comprehension of the fundamental procedures that he was afforded when he faced a life-long deprivation of liberty.

Because Mr. Moore contested the validity of his prior convictions and the underlying accusations and since he had limited ability to understand the proceedings, the court should not have merely stood by while counsel stipulated to the case. Moreover, Mr. Moore had been acquitted of a recent and serious allegation of indecent liberties with forcible compulsion but the testimony of four witnesses from that trial was admitted by stipulation. Exs. 7-10. Mr. Moore had been found incompetent to stand trial for the 1990 custodial assault allegations and yet the court admitted by stipulation not only the underlying allegations but also statements Mr. Moore purportedly made regarding those allegations, without accounting for his diminished mental state at the time of that offense.

In sum, further procedural protections were necessary and not unduly burdensome to provide Mr. Moore with the fundamental fairness required in the case at bar. The court's failure to conduct any colloquy before accepting and relying upon the stipulated facts and exhibits denied Mr. Moore his right to due process of law.

2. BY FAILING TO CHALLENGE THE STATE'S EVIDENCE, MR. MOORE WAS DEPRIVED OF EFFECTIVE ASSISTANCE OF COUNSEL

a. Mr. Moore had a right to effective assistance of counsel. A person facing commitment under the sexually violent predator laws maintains the same right to effective assistance of counsel as held by a defendant in a criminal case. Stout, 2007 Wash. LEXIS at \*30; RCW 71.09.050(1).

The appellate court reviewing a claim of ineffective assistance of counsel must ask (1) was the attorney's performance below objective standards of reasonable representation, and if so, (2) did counsel's deficient performance prejudice the respondent. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Stout, 2007 Wash. LEXIS at \*30. An attorney renders constitutionally inadequate representation when he or she engages in conduct for which there is no legitimate strategic or tactical reason. State v. McFarland, 127 Wn.2d 322, 335-36, 899

P.2d 1251 (1998). A decision is not tactical or strategic if it is not reasonable. Roe v. Flores-Ortega, 528 U.S. 470, 481, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000); see also Wiggins v. Smith, 539 U.S. 510, 123 S.Ct. 2527, 2535, 156 L.Ed.2d 471 (2003) (“[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms,” quoting Strickland, 466 U.S. at 688).

While courts generally presume counsel was effective, in some cases, prejudicially deficient performance is presumed.

United States v. Cronin, 466 U.S. 648, 654, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984); In re Pers. Restraint of Davis, 152 Wn.2d 647, 673, 101 P.3d 1 (2004); In re G.A.R., \_\_ Wn.App. \_\_, 2007 Wash.App. LEXIS 102 (Jan. 22, 2007).

b. Mr. Moore's constitutional right to counsel was violated because his attorney did not act as an advocate as required by due process. The adversarial process requires both sides be represented by attorneys who perform as advocates. Cronin, 446 U.S. at 656; Strickland, 466 U.S. at 685; see Plumlee v. Del Papa, 465 F.3d 910, 919 (9<sup>th</sup> Cir. 2006) (right to counsel includes right to “effective advocate”). When counsel does not perform his or her function, it is the equivalent of the complete

denial of counsel and the respondent need not show prejudice to prevail. Cronic, 466 U.S. at 659; Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed.2d 158 (1932).

G.A.R., 2007 Wash.App. LEXIS 102, is an example of the deprivation of counsel due to the failure to act as an effective advocate. The attorney in this parental termination case appeared in court on his client's behalf and argued that the mother's rights should not be terminated, but did little else. 2007 Wash.App. LEXIS 102, \*2-6. The attorney did not object to any of the State's exhibits, including written reports from experts. The State called a single witness, a social worker with experience as a mental health therapist, who repeated what he learned from others about the parents' parental deficiencies. Id. at \*2-3. Defense counsel asked no questions of the State's witness and made little argument on the client's behalf. Id. at \*5-6.

This Court was highly critical of the attorney's failure to test the evidence relied on by the State. Id. at \*9-10. It rejected the State's claim that challenging the State's evidence may only have elicited more damaging information, as it is the attorney's job to test "the authenticity and truth of the matters asserted in the reports and the witness's testimony." Id. at \*10.

[The] attorney's job was to test the authenticity of the reports and the accounts (much of it hearsay) related by the State's witness. Without having these reports or accounts put to the test, "[w]e can only speculate as to what weaknesses in the State's case or strengths in [the mother's] case might have been revealed by competent counsel."

Id. citing In re Dependency of J.M., 130 Wn.App. 912, 125 P.3d 245 (2005). The court reversed the termination order based on counsel's failure to challenge the evidence presented by the State.

In J.M., the court confronted a similar lack of effective advocacy in a parental termination proceeding. 130 Wn.App. at 925. The attorney stipulated to the State's exhibits, called no witnesses, and made little challenge to the prosecution's case. Id.

A similar lack of advocacy as in G.A.R. and J.M., occurred in the case at bar. Counsel stipulated to testimony by critical witnesses who established Mr. Moore's prior acts of sexual violence. CP 34-42. Counsel waived Mr. Moore's right to cross-examine these witnesses, and thus test their veracity or challenge their version of events. Counsel stipulated to the admission of two written psychological evaluations by Dr. Packard, as well as a letter from the prosecutor documenting the State's opinion that all of the statutory criteria for commitment has been met. Exs. 6, 11, 12.

Counsel did not call any witnesses on Mr. Moore's behalf, but offered a written evaluation by a defense expert who agreed Mr. Moore was mentally ill and likely to reoffend, but argued he should be civilly committed under RCW 71.05 rather than RCW 71.09, as such mental health commitments would better serve his treatment needs. Ex. 14.

While such a far-ranging stipulation might not necessarily amount to deficient performance in all cases, Mr. Moore was in the unusual position of having been severely mentally ill at the time the prior events occurred. In one case, the charges were dismissed after he was found incompetent to stand trial. Competency questions arose during almost all of the prior proceedings. CP 35-38. Rather than challenge the conclusion that Mr. Moore committed a sexually violent act on that prior occasion, counsel stipulated to the admission of testimony from the trial for that offense, including testimony from the complaining witness as well as other witnesses. CP 37; see e.g., RCW 71.09.060(2) (setting heightened procedural protections for person found incompetent to stand trial). Counsel did not make an opening statement, despite claiming she would, and made a closing argument that was seven

pages long in the transcript, as opposed to the 30 pages the State's attorney argued. 3/7/06RP 53; 3/9/06RP 2-38.

Counsel entered into this stipulation without insuring that Mr. Moore understood its consequences. While counsel had filed detailed motions in limine trying to exclude evidence such as the offenses for which Mr. Moore was not convicted, when the court ruled the underlying acts and charges admissible, counsel ceased mounting any challenge to these allegations. 3/7/06RP 9-49.

Counsel's stipulation included admissions of guilt Mr. Moore allegedly made to others even though Mr. Moore was either incompetent or of questionable competence at the time of these earlier incidents. CP 35-38. Moreover, there was no particular benefit to Mr. Moore in stipulating to disputed facts or agreeing to the testimony of the witnesses against him. He could not be rewarded by a more lenient sentence in exchange for sparing the various complaining witnesses from testifying. The fact that witnesses did not testify would not make it harder for the prosecution to prove any elements of commitment since the stipulation included numerous admissions of sexually violent conduct. Reducing the potential emotional impact of the victims' testimony would not redound to his benefit, as the court's only

options were to order commitment or reject commitment. By making it easier for the prosecution to prove its case, Mr. Moore received no benefit other than shortening the trial. An attorney's role is not to make it easier for the prosecution to prove its case. By failing to advocate on Mr. Moore's behalf in a meaningful fashion, Mr. Moore was denied the assistance of counsel.

c. Alternatively, Mr. Moore's attorney's performance was deficient because she did not object to several exhibits or insure Mr. Moore understood and waived his right to cross-examine witnesses. The prosecution presented much of its case through stipulated facts and exhibits. Some of the exhibits were admissible as they were certified copies of court orders. Exs. 1-5; ER 902(d). But Mr. Moore's attorney did not object to the admission of Dr. Packard's written psychological evaluations or the letter from the prosecutor outlining the prosecutor's opinion that Mr. Moore met the criteria for commitment and encouraging him to stipulate to a commitment order. Exs. 6, 11, 12. Counsel agreed to the admission of trial transcripts from a Pierce County criminal case in which Mr. Moore was acquitted of indecent liberties. Exs. 7-10; 12/21/05RP 2. Counsel agreed to the factual allegations underlying five prior offenses, even a dismissed charge for

custodial assault. CP 34-38. Counsel did not request that any fact witnesses testify and submitted her own expert's testimony solely by a written evaluation, without any in-court testimony from the evaluating psychologist in which the psychologist could explain his credentials or persuade the court as to the accuracy of his diagnosis and risk assessment.

In G.A.R. and J.M., the attorneys did not object to written reports from experts. 2007 Wash.App. LEXIS 102, \*8-9; 130 Wn.App. at 916, 925. Both courts found that counsel's failure to object to otherwise inadmissible evidence demonstrated counsels' failure of advocacy. J.M., 130 Wn.App. at 919, 923-25. A psychological evaluation is not admissible as a business record. RCW 5.45; ER 703; ER 705. A psychological evaluation is not a routine notation of the occurrence of objective facts. J.M., 130 Wn.App. at 924. Thus, the State's psychological evaluation was not admissible as documentary evidence.

Similarly, the prosecutor's letter regarding her interest in entering a stipulated order of commitment was not admissible evidence. Ex. 6. The letter gave the court further reason to believe that the SVP criteria were undisputed.

As detailed above, these numerous concessions were unnecessary and offered no reasonable benefit to Mr. Moore. Since there is no plausible tactical reason for agreeing to the testimony of all of the State's witnesses, counsel did not act as an advocate on Mr. Moore's behalf by making a few short arguments to the court asking it not to order Mr. Moore's commitment. G.A.R., 2007 Wash.App. LEXIS \*10.

d. Counsel's deficient performance requires reversal.

Mr. Moore was prejudiced by his counsel's deficient performance. He was unable to mount any defense to the State's allegations once his attorney agreed to the prosecution's evidence and submitted an expert's evaluation that offered such little assistance to Mr. Moore that counsel did not even ask the psychologist to testify. Counsel's failure to act as an effective advocate rendered the proceedings fundamentally unfair and deprived Mr. Moore of his right to counsel.

3. THE COURT'S REFUSAL TO LIMIT THE PREDICTION OF FUTURE DANGEROUSNESS TO A REASONABLY FORESEEABLE TIME PERIOD VIOLATED MR. MOORE'S RIGHT TO DUE PROCESS OF LAW

a. RCW 71.09 infringes on a fundamental right and must pass strict scrutiny analysis. As discussed above, involuntary civil commitment is a "massive curtailment of liberty," which must be protected by substantive and procedural due process guarantees. In re Harris, 98 Wn.2d 276, 279, 654 P.2d 109 (1982); see also Vitek v. Jones, 445 U.S. at 492; Foucha, 504 U.S. at 79-80. State action that infringes on fundamental rights is constitutional only if it is narrowly drawn to further compelling state interests. Young, 122 Wn.2d at 26; In re Schuoler, 106 Wn.2d 500, 508, 723 P.2d 1103 (1986); Reno v. Flores, 507 U.S. 1992, 123 L.Ed.2d 1, 113 S.Ct. 1439 (1993).

The State undoubtedly has a compelling interest in protecting the public from sex predators. Young, 122 Wn.2d at 27. However, RCW 71.09 does not require any determination that the respondent is likely to commit a sexually violent offense within a certain amount of time; nor does it allow for any intervening events that might decrease or obviate the respondent's recidivism risk.

The statute allows the State to make its showing through blanket assertions of the respondent's likelihood of re-offending at any point in his lifetime. As to an individual who is incarcerated when the petition for commitment is filed, it requires no showing of current dangerousness beyond the act that gave rise to the current incarceration.

b. To pass strict scrutiny, the statute must require the State to prove that a respondent is both mentally ill and currently dangerous. Substantive due process requires the state to prove that an individual is both mentally ill *and* dangerous in order to be committed. Young, 122 Wn.2d at 27 (citing Addington v. Texas, 441 U.S. 418, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979)); Foucha, 504 U.S. 71; O'Connor v. Donaldson, 422 U.S. 563, 575, 95 S.Ct. 2486, 45 L.Ed.2d 396 (1975). Indefinite commitment based on incompetency or mental illness alone, without dangerousness, violates due process. Jackson v. Indiana, 406 U.S. 715, 732-33, 92 S.Ct. 1845, L.Ed.2d 435 (1972) (citing Greenwood v. United States, 350 U.S. 366, 76 S.Ct. 410, 100 L.Ed. 412 (1956)); see also Foucha, 504 U.S. at 72 (involuntary commitment statute held unconstitutional, in part because it was "not carefully limited").

Furthermore, the dangerousness must be current. In re Albrecht, 147 Wn.2d 1, 7, 51 P.3d 73 (2002).

Without a showing of current dangerousness, a commitment under the SVP statute amounts to an unconstitutional indefinite detention. The statute is also overbroad, by including in its grasp individuals who are not actually dangerous or not currently dangerous, although they may have been in the past.

RCW 71.09.020 purports to incorporate a dangerousness element by requiring that the individual is "likely to engage in predatory acts of sexual violence if not confined in a secure facility," which means that

The person more probably than not will engage in such acts if released unconditionally from detention on the sexually violent predator petition.

RCW 71.09.020(7). The Supreme Court in Young recognized that this language alone was insufficient to prove actual dangerousness and imposed the additional requirement that, for respondents not incarcerated when the commitment is filed, the State must prove that the respondent committed a recent overt act. Young, 122 Wn.2d at 40-41. The Young Court held that "proof of a recent overt act is necessary to satisfy due process concerns when an

individual has been released into the community.” Id. at 41 (relying on Harris, 98 Wn.2d at 284 (establishing the “recent overt act” requirement for the non-emergency involuntary commitment of mentally ill persons)). The Legislature responded by amending the statute to conform to Young’s interpretation and clarify that the “recent overt act”<sup>4</sup> requirement applies only to a respondent who has been released from total confinement prior to the filing of the commitment petition. RCW 71.09.030(5). Subsequent cases have affirmed, “the recent overt act requirement directly and specifically speaks to a person’s dangerousness and thus satisfies the dangerousness element required by due process.” Albrecht, 147 Wash.2d at 11; see also In re Detention of Henrickson, 140 Wn.2d 686, 2 P.3d 473 (2000); In re Detention of Broten, 115 Wn.App. 252, 62 P.3d 514 (2003).

However, for a respondent who is incarcerated on the date of filing, there is no equivalent requirement to show that individual’s current dangerousness. As to these individuals, due process is not

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<sup>4</sup> “Recent overt act” is defined in the statute as,

any act or threat that has either caused harm of a sexually violent nature or creates a reasonable apprehension of such harm in the mind of an objective person who knows of the history and mental condition of the person engaging in the act.

satisfied. The rationale for the distinction between the two classes is that requiring the State to show a recent overt act by an incarcerated person "would create a standard which would be impossible to meet." Young, 122 Wn.2d at 41. However, the State may not evade the strictures of due process simply because it is too hard to meet them. While it is true that "due process does not require that the absurd be done before a compelling state interest can be vindicated," there are other ways to ensure due process. Id. (quoting People v. Martin, 107 Cal.App.3d 714, 725, 165 Cal.Rptr. 773 (1980)).

If it is impossible for the State to prove, through a recent overt act, that an incarcerated individual is currently dangerous, then it must be forced to refine its prediction of dangerousness to the foreseeable future. This approach has been adopted in other jurisdictions; for example, the New Jersey Supreme Court held:

Commitment requires that there be a substantial risk of dangerous conduct within the reasonably foreseeable future. . . . It is not sufficient that the state establish a possibility that defendant might commit some dangerous acts at some time in the indefinite future. The risk of danger, a product of the likelihood of such conduct and the degree of harm,

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RCW 71.09.020(1).

which may ensue, must be substantial within the reasonably foreseeable future.

State v. Krol, 68 N.J. 236, 344 A.2d 289, 302 (N.J. 1975). The West Virginia Supreme Court quoted and endorsed the Krol "reasonably foreseeable future" standard in Hatcher v. Wachtel, 165 W.Va. 489, 269 S.E.2d 849, 852 (W. Va. 1980) (cited in Harris, 98 Wn.2d at 283).

In Washington, the Supreme Court requires "a high probability of serious physical harm within the near future" in order to meet due process standards for commitment under the "gravely disabled" standard. In re LaBelle, 107 Wn.2d 196, 204, 728 P.2d 138 (1986).

The definition of "near future" or "foreseeable future" may be broader in "predator" cases than in traditional civil commitments. But the court must establish some limit, such as the Krol "reasonably foreseeable future" standard, in order to pass strict scrutiny.

c. The statute is not narrowly drawn to serve a compelling state interest. Involuntary civil commitment under RCW 71.09 deprives Mr. Moore of his fundamental right to liberty and therefore must be narrowly drawn to serve the State's interests.

Young, 122 Wn.2d at 26; Schuoler, 106 Wn.2d at 508. Where the “recent overt act” requirement does not apply, RCW 71.09 allows commitment based only on a showing of mental abnormality and vague predictions of recidivism at any point in the indefinite future; this scheme is too broad to satisfy substantive due process.

In Young, the petitioner argued broadly that RCW 71.09 was constitutionally defective because it allowed for a showing of dangerousness at any point in an indefinite time period. Young, 122 Wn.2d at 59. Without discussing this argument, the Young Court instituted the “recent overt act” requirement, which the Legislature subsequently codified in the amended statute. Young, 122 Wn.2d at 41; RCW 71.09.030(5). Therefore the Young Court had no opportunity to consider the argument now raised by Mr. Moore: that the statute is constitutionally deficient because there is no equivalent to the “recent overt act” requirement for a respondent who is incarcerated at the time of filing.

In order to satisfy strict scrutiny, this Court must establish some limit on the prediction of future dangerousness, such as the “reasonably foreseeable future” standard adopted by New Jersey and West Virginia. Krol, 344 A.2d at 302; Hatcher, 269 S.E.2d at 852. The definition of “reasonably foreseeable” will likely differ in

the sexually violent predator context as opposed to the traditional civil commitment, but there is no reason to characterize that standard as "narrow." Mr. Moore does not argue that the trier of fact must be required to "pinpoint the time at which future injury is likely to occur" or that the respondent would "inflict harm immediately upon release." Hubbart v. Superior Court, 19 Cal.4<sup>th</sup> 1138, 1161, 969 P.2d 584, 599-600 (Cal App. 2001). However, there must be some level of immediacy to the likelihood of reoffending, in order to satisfy due process when indefinitely confining an individual.

Actuarial instruments used by the State do not take into account the principles of survival analysis, an important statistical tool. For example, assume an individual is deemed 33% likely to reoffend within five years, according to an actuarial prediction tool. Even if the recidivism continues within the group at the same rate, the individual members become less likely to reoffend with the passage of every year. If the rate of reoffense is constant, the individual must be presumed to be 6.5% likely to reoffend every year, or 1/5th of 33%. That means he is 93.5% unlikely to reoffend in his first year of freedom. The first year, once gone, can no longer figure in the risk analysis. In other words, he is likely to

survive the first year, and after surviving it, would be only 26.5% likely to reoffend in the remaining four years of a five-year analysis. Claims of a high likelihood of recidivism over a period of many years are therefore illusory. The longer the period considered for possible reoffense, the less reliable the prediction. As a practical matter, then, prediction over a long period of years is so unreliable as to violate the "narrow tailoring" requirement.

A narrowly tailored statute prevents a "massive curtailment of liberty" without due process protections. Harris, 98 Wn.2d at 279. The current scheme fails to provide such protections for a respondent, like Mr. Moore, who is confined on the date the commitment petition is filed. For a respondent who is incarcerated when the commitment petition is filed, the statute does not require proof of *current* dangerousness; instead it allows for a prediction of dangerousness at any point in the indefinite future. RCW 71.09.030 (requiring proof of a recent overt act for the commitment of a respondent who was *not* incarcerated at the time of filing, but requiring no equivalent for one who was confined); see also Albrecht, 147 Wn.2d at 11 (holding that the "recent overt act requirement... satisfies the dangerousness element required by due process," again, only for one not confined on the date of filing).

In order to satisfy the constitutional requirement of current dangerousness, the State must be required to prove a future risk within a limited period of time.

d. The State failed to prove Mr. Moore's current dangerous or to limit its prediction of future dangerousness. Mr. Moore asked the court to require the State to limit its prediction of future dangerousness to a certain time period. The court refused.

The danger to fundamental liberty posed by this constitutional defect is shown by the State's strategy in this case. Since Mr. Moore was incarcerated on the date of filing, the State was not required to prove a recent overt act. The State did not prove Mr. Moore's current dangerousness or likelihood of re-offense within the foreseeable future, but instead only offered evidence of his past acts and vague, indefinite predictions about his future.

Dr. Packard testified as to Mr. Moore's risk of reoffending in the future in terms of percentages in 15 years, 10 years, or 6 years depending upon the predictive tool used and each tool had certain limitations. 3/7/06RP 138-141; 3/8/06RP 3-4. Dr. Packard admitted that the percentages should not be taken "too literally" as they were not seen as scientifically precise. 3/8/06RP 5. The

State made no effort to limit its prediction to the reasonably foreseeable future.

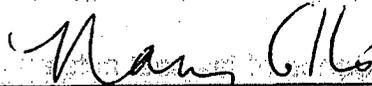
In sum, proof of current dangerousness is a critical component of a civil commitment and the procedures used in the case at bar contain no requirement of such proof. Accordingly, Mr. Moore's commitment violates his right to due process of law.

F. CONCLUSION:

For the foregoing reasons, Mr. Moore respectfully requests this Court reverse the commitment order and remand the case for further proceedings consistent with this Court's ruling.

DATED this 20<sup>th</sup> day of February 2007.

Respectfully submitted,



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Washington Appellate Project (91052)  
Attorneys for Appellant

## APPENDIX A

Filed in Open Court

3-21-2006

PAM L. DANIELS  
COUNTY CLERK

By *[Signature]*  
Deputy Clerk



STATE OF WASHINGTON  
SNOHOMISH COUNTY SUPERIOR COURT

In re the Detention of:

NO. 02-2-06693-1

PAUL MOORE,

FINDINGS OF FACT,  
CONCLUSIONS OF LAW,  
AND ORDER OF COMMITMENT

Respondent.

A trial was held in this matter pursuant to chapter 71.09 RCW, on March 7, 8, and 9, 2006, to determine whether Respondent, PAUL MOORE, is a sexually violent predator. Respondent waived his right to a jury trial and elected to have the case tried to the Court. Petitioner, State of Washington, was represented by counsel, KRISTA K. BUSH. Respondent was represented by counsel, JENNIFER H. MCINTYRE. Respondent was present for the majority of the first day of trial, then waived his presence and returned to the Special Commitment Center. The Court, having heard the evidence presented by the parties and the argument of counsel, hereby determines that Respondent is a sexually violent predator as that term is defined in chapter 71.09 RCW.

I. FINDINGS OF FACT

1. Respondent, Paul Moore, was born on July 25, 1967, and is the same Paul Moore referenced in the Petition and Certification of Probable Cause filed in this matter.

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1           2.       Petitioner filed a petition alleging Respondent is a sexually violent predator  
2 pursuant to chapter 71.09 RCW, on May 1, 2002.

3           3.       Respondent has been convicted of two sexually violent offenses, as that term is  
4 defined in RCW 71.09.020 – Rape in the First Degree (1987) and Attempted Rape in the  
5 Second Degree by Forcible Compulsion (1990).

6           a.       Rape in the First Degree, with a Deadly Weapon (Sep. 14, 1985)

7           (1)       On September 14, 1985, Respondent entered a beauty salon in Seattle,  
8 Washington, brandishing an 8-inch steak knife and carrying a brown paper bag. He told Petra S.,  
9 who was working at the salon, and her customer, "Shut up and do as I say," or words to that  
10 effect. After locking the door to the salon, Respondent ordered the two women into a back room  
11 and instructed the customer to, "Sit down and shut up," or words to that effect. Respondent  
12 ordered Petra to take off her pants and her shirt and to perform oral sex on him. Petra began  
13 choking and gagging. Respondent again told Petra to take off her pants and he attempted to anally  
14 rape her with his penis. When Respondent was unable to anally penetrate Petra, he vaginally  
15 raped her with his penis. After Respondent assaulted Petra, he told the two women not to come  
16 out of the tanning room or he would "burn the place down." After Respondent left, Petra  
17 immediately tried to call the police, but discovered that the phone cord had been cut. She ran out  
18 of the salon, screaming that she had been raped.

19           (2)       When Respondent was arrested, he was carrying a green "7-Up" bottle,  
20 filled with gasoline, inside a paper bag.

21           (3)       When Respondent committed this offense against Petra S., he was on  
22 parole pertaining to a juvenile adjudication for Intimidation with a Weapon.

23           (4)       Respondent pled guilty to Rape in the First Degree with a Deadly Weapon  
24 in King County Superior Court on October 13, 1987, and was sentenced to 75 months  
25 confinement.  
26

1           b.     Attempted Rape in the Second Degree by Forcible Compulsion  
2                     (Feb. 23, 1990)

3           (1)     On February 23, 1990, Respondent was incarcerated at the Special  
4 Offender Center in Monroe, Washington, serving his sentence for the 1985 rape of Petra S. At  
5 that time, Linda P. was Respondent's counselor:

6           (2)     On the morning of February 23, 1990, Respondent rushed into Linda's  
7 office without her permission. As he approached her, Linda started to scream. Respondent told  
8 her to stop screaming and pushed her into the wall. While holding a weapon (made of two pencils  
9 that he had taped together) to her ribcage, Respondent grabbed Linda and forced her into the  
10 corner of her office that was the furthest from view of the outside hallway. Respondent pushed  
11 Linda's head to knee level and demanded that she "bend over." Continuing to hold the pencils to  
12 her ribcage, he pushed his crotch to her buttocks; Linda could feel that he had an erection.  
13 Respondent ordered Linda to the floor; she continued struggling against him. A nurse outside  
14 Linda's office heard a muffled scream and called a "code" situation. The first staff person to  
15 arrive was Joe G. When Joe entered Linda's office, he saw that Respondent had one arm around  
16 Linda's neck and the other was holding the pencils against her as a weapon. Joe heard  
17 Respondent say something that sounded like "shut up." Joe pulled Respondent away from Linda  
18 and restrained him.

19           (3)     The previous day, Joe overheard Respondent talking to another inmate  
20 about having sex with Linda. At an infraction hearing held on March 12, 1990, Respondent  
21 acknowledged that he intended to have sex with Linda P. when he assaulted her.

22           (4)     Respondent pled guilty to Attempted Rape in the Second Degree by  
23 Forcible Compulsion in the Snohomish County Superior Court and was sentenced to 50½ months  
24 confinement.

25     ///

26

1           4.       Respondent has been incarcerated in total confinement since he was convicted of  
2 the 1985 rape of Petra S.

3           5.       Custodial Assault in the First Degree (Jun. 4, 1991)

4           a.       On June 4, 1991, while still incarcerated for the 1990 attempted rape of  
5 Linda P., Respondent assaulted Elaine Ann L., a corrections officer at the Special Offender Center  
6 in Monroe, Washington. While Elaine Ann L. was assisting Respondent with cleaning his cell, he  
7 struck her on the head with a broom handle, lunged at her, and shoved her into his cell.  
8 Elaine Ann L. sprayed Respondent with the disinfectant she was carrying and ran out of the cell.

9           b.       Respondent was charged with Custodial Assault in the First Degree in  
10 Snohomish County Superior Court. This charge was later dismissed after concerns arose about  
11 Respondent's competence to stand trial.

12           c.       When questioned about this offense by Dr. Richard Packard on March 19,  
13 2003, Respondent admitted that he lunged toward Elaine Ann L. to "try to do something sexual to  
14 her."

15           6.       Custodial Assault with Sexual Motivation (Feb. 19, 1995)

16           a.       On February 19, 1995, while still incarcerated for the 1990 attempted rape  
17 of Linda P., Respondent assaulted Cheryl S., a corrections officer at the Washington Corrections  
18 Center in Shelton, Washington. As the inmates were returning to their cells after breakfast,  
19 Respondent ran up to Cheryl, grabbed her from behind, held her around the chest, and pinned her  
20 arms in front of her. Respondent then twisted Cheryl and thrust his pelvis into her buttocks.  
21 Another officer witnessed the assault and assisted Cheryl in gaining control of Respondent.  
22 Cheryl suffered physical injury as a result of this assault and could not work for approximately  
23 eight months.

24           b.       When asked about this incident by Dr. Richard Packard on March 19,  
25 2003, Respondent acknowledged that he "mashed up against her backside."  
26

1 c. Respondent was charged with Indecent Liberties by Forcible Compulsion.  
2 He pled guilty to an amended charge of Custodial Assault with Sexual Motivation in Mason  
3 County Superior Court and was sentenced to 60 months confinement.

4 7. Assault in the Fourth Degree (Oct. 22, 2003)

5 a. On October 22, 2003, while at the Special Commitment Center, on McNeil  
6 Island, Washington, Respondent assaulted Cynthia W., a female staff member at the Special  
7 Commitment Center. As Respondent walked past the staff desk, he turned and charged at staff  
8 members, attempting to hit them. When Cynthia W. moved under the counter to protect herself,  
9 Respondent kicked her in the leg repeatedly.

10 b. Respondent was charged, in Pierce County Superior Court, with Assault in  
11 the Fourth Degree for his offense against Cynthia W. He pled guilty to this charge on April 26,  
12 2005.

13 8. Since arriving at the Special Commitment Center, Respondent has not  
14 participated in sex offender treatment.

15 9. On April 22, 2003, while detained at the Special Commitment Center,  
16 Respondent grabbed Dr. Carole D. from behind, in a "bear hug" embrace, pinning her arms in  
17 front of her. She screamed. Respondent thrust his pelvic area against her buttocks in a sexual  
18 manner several times before other staff members intervened.

19 10. Dr. Richard Packard

20 a. At the request of Petitioner, State of Washington, Dr. Richard Packard  
21 evaluated Respondent to determine whether he meets the psychological criteria for  
22 determination as a sexually violent predator. Dr. Packard is a licensed psychologist in the  
23 State of Washington, has performed numerous evaluations of individuals to determine whether  
24 they meet the statutory definition of a sexually violent predator, and has testified as an expert

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1 in Washington Superior Court. The Court finds that Dr. Packard is a qualified expert in the  
2 areas of sex offender evaluation, diagnosis, and risk assessment.

3 b. Dr. Packard reviewed approximately 9,000 pages of information  
4 concerning Respondent, including charging and conviction documents for crimes alleged or for  
5 which Respondent was convicted; arrest reports and police reports; psychological records and  
6 reports; Department of Corrections records, including psychological evaluations, discipline  
7 history, and medical records; Department of Social and Health Services records; Special  
8 Commitment Center records; and records from juvenile departments.

9 c. The documents Dr. Packard reviewed in conducting his evaluation of  
10 Respondent are all of the type that he routinely reviews and relies upon for evaluation,  
11 diagnosis, treatment, or risk assessment of sex offenders; they are also of the type that other  
12 psychologists routinely review and rely upon for evaluation, diagnosis, treatment, or risk  
13 assessment of sex offenders.

14 d. In conducting his evaluation of Respondent, Dr. Packard interviewed  
15 Respondent for several hours on March 19, 2003.

16 e. Dr. Packard concluded that Respondent suffers from a mental  
17 abnormality which is made up of several disorders, including: Psychotic Disorder, Not  
18 Otherwise Specified (NOS); Paraphilia, NOS, involving non-consenting sex with adult  
19 females; and Personality Disorder, NOS, with Antisocial and Passive-Aggressive Features.  
20 Dr. Packard indicated that the Paraphilia was the driving impetus behind Respondent's  
21 continued sexual offending, but that it was also impacted by the other two disorders as they  
22 affect his perception of reality and his willingness to violate the rights of others.

23 f. Dr. Packard concluded that Respondent's mental abnormality and/or  
24 personality disorder cause(s) him serious difficulty controlling his behavior.

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1 g. Dr. Packard also opined that Respondent's mental abnormality and/or  
2 personality disorder make(s) him likely to commit predatory acts of sexual violence if not  
3 confined in a secure facility. In reaching this opinion, Dr. Packard conducted a wide-ranging  
4 risk assessment, during which he applied clinical judgment, guided clinical assessment, and  
5 actuarial assessment; all three methods indicated that Respondent was at high risk to commit a  
6 new sex offense.

7 11. Dr. Theodore Donaldson

8 a. Dr. Donaldson is a forensic psychologist who specializes in the  
9 evaluation and diagnosis of sex offenders. Dr. Donaldson is licensed in the state of California.  
10 The Court finds that Dr. Donaldson is a qualified expert in the areas of sex offender evaluation,  
11 diagnosis, and risk assessment.

12 b. In conducting his evaluation of Respondent, Dr. Donaldson reviewed  
13 discovery documents and the transcript of the interview Dr. Packard conducted of Respondent  
14 in March 2003. Dr. Donaldson indicated that he found Dr. Packard's interview of Respondent  
15 to be thorough and that he did not think he could obtain information from Respondent more  
16 relevant than that obtained by Dr. Packard.

17 c. In Dr. Donaldson's opinion, Respondent is seriously mentally ill, but  
18 does not suffer from what he characterizes a "paraphilic rape disorder" or a "paraphilic  
19 coercive disorder." Dr. Donaldson provides no diagnosis of Respondent, but indicates that  
20 Respondent suffers some major mental illness and that remission does not appear likely.

21 d. In Dr. Donaldson's opinion, Respondent appears likely to commit a sex  
22 offense in the future and he indicates that, "given Respondent's history and his current mental  
23 status, it seems impossible to reach any other conclusion." Dr. Donaldson also opines that  
24 Respondent's future behavior will probably be very much like his past behavior.

25 ///



1 4. Respondent's mental condition, which is made up of the disorders Psychotic  
2 Disorder NOS, Paraphilia NOS, and Personality Disorder NOS with Antisocial and Passive-  
3 Aggressive Features, is a mental abnormality as that term is used in RCW 71.09.020(8) and  
4 (16).

5 5. Personality Disorder, NOS, with Antisocial and Passive-Aggressive Features,  
6 from which Respondent suffers, is a personality disorder, as that term is used in  
7 RCW 71.09.020(16).

8 6. Respondent's mental abnormality and/or personality disorder cause(s) him  
9 serious difficulty controlling his behavior.

10 7. Respondent's mental abnormality and/or personality disorder make(s) him  
11 likely to engage in predatory acts of sexual violence if not confined in a secure facility.

12 8. The evidence presented at Respondent's trial proved beyond a reasonable doubt  
13 that Respondent is a sexually violent predator as that term is used in chapter RCW 71.09.

14 Based upon the foregoing Findings of Fact and Conclusions of Law, the Court hereby  
15 enters the following:

16 ORDER

17 IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Respondent,  
18 PAUL MOORE, is a sexually violent predator as defined in RCW 71.09.020. Having so

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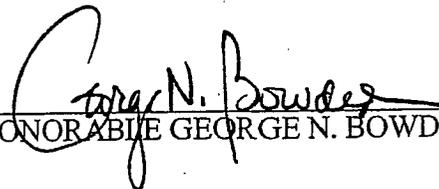
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1 found, the Court; therefore, ORDERS that Respondent be committed to the custody of the  
2 Department of Social & Health Services for placement in a secure facility for control, care, and  
3 treatment.

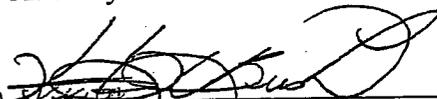
4 DATED this 21<sup>st</sup> day of MARCH, 2006.

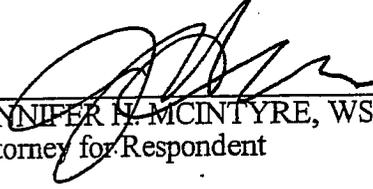
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6   
7 THE HONORABLE GEORGE N. BOWDEN

8 Presented by:

9 ROB MCKENNA  
10 Attorney General

Copy received, Approved as to Form,  
Notice of Presentation Waived:

11   
12 KRISTA K. BUSH, WSBA # 30881  
13 Assistant Attorney General  
14 Attorneys for Petitioner

15   
16 JENNIFER N. MCINTYRE, WSBA # 25981  
17 Attorney for Respondent

## APPENDIX B

37 2004

PAM L. DANIELS  
COUNTY CLERK

By [Signature]  
Deputy Clerk



STATE OF WASHINGTON  
SNOHOMISH COUNTY SUPERIOR COURT

In re the Detention of:

NO. 02-2-06693-1

PAUL MOORE,

STIPULATED FACTS AND  
EXHIBITS

Respondent.

COME NOW Petitioner, State of Washington, by and through its attorney, KRISTA K. BUSH, Assistant Attorney General, and Respondent, PAUL MOORE, by and through his attorney, JENNIFER H. MCINTYRE, and hereby agree to the submission of the following stipulated facts and exhibits for the Court in determining whether PAUL MOORE is a sexually violent predator.

I. STIPULATED FACTS

1. Respondent, Paul Moore, was born on July 25, 1967, and is the same Paul Moore referenced in the Petition and Certification of Probable Cause filed in this matter.

2. Petitioner filed a petition alleging Respondent is a sexually violent predator pursuant to chapter 71.09 RCW, on May 1, 2002.

3. Rape in the First Degree, with a Deadly Weapon (Sep. 14, 1985)

a. On September 14, 1985, Respondent entered a beauty salon in Seattle, Washington, brandishing an 8-inch steak knife and carrying a brown paper bag. He told Petra S., who was working at the salon, and her customer, "Shut up and do as I say," or words to that effect. After locking the door to the salon, Respondent ordered the two women into a back room

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1 and instructed the customer to, "Sit down and shut up," or words to that effect. Respondent  
2 ordered Petra to take off her pants and her shirt and to perform oral sex on him. Petra began  
3 choking and gagging. Respondent again told Petra to take off her pants and he attempted to anally  
4 rape her with his penis. When Respondent was unable to anally penetrate Petra, he vaginally  
5 raped her with his penis. After Respondent assaulted Petra, he told the two women not to come  
6 out of the tanning room or he would "burn the place down." After Respondent left, Petra  
7 immediately tried to call the police, but discovered that the phone cord had been cut. She ran out  
8 of the salon, screaming that she had been raped.

9 b. When Respondent was arrested, he was carrying a green "7-Up" bottle,  
10 filled with gasoline, inside a paper bag.

11 c. When Respondent committed this offense against Petra S., he was on  
12 parole pertaining to a juvenile adjudication for Intimidation with a Weapon.

13 d. Respondent was initially charged with Rape in the First Degree with a  
14 Deadly Weapon and Robbery in the First Degree. When issues concerning his competency to  
15 stand trial arose, Respondent was committed to Western State Hospital for evaluation. After  
16 being found competent to stand trial, Respondent pled guilty to Rape in the First Degree with a  
17 Deadly Weapon in King County Superior Court on October 13, 1987. He was sentenced to 75  
18 months confinement.

19 e. Copies of Respondent's charging and conviction documents pertaining to  
20 the offense against Petra S. are included in the Stipulated Exhibits (1(a) - 1(d)) and may be  
21 considered by the Court.

22 f. This is a conviction for a sexually violent offense, as that term is defined in  
23 RCW 71.09.020.

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1           4.     Attempted Rape in the Second Degree by Forcible Compulsion (Feb. 23, 1990)

2           a.     On February 23, 1990, Respondent was incarcerated at the Special  
3 Offender Center in Monroe, Washington, serving his sentence for the 1985 rape of Petra S. At  
4 that time, Linda P. was Respondent's counselor.

5           b.     On the morning of February 23, 1990, Respondent rushed into Linda's  
6 office without her permission. As he approached her, Linda started to scream. Respondent told  
7 her to stop screaming and pushed her into the wall. While holding a weapon (made of two pencils  
8 that he had taped together) to her ribcage, Respondent grabbed Linda and forced her into the  
9 corner of her office that was the furthest from view of the outside hallway. Respondent pushed  
10 Linda's head to knee level and demanded that she "bend over." Continuing to hold the pencils to  
11 her ribcage, he pushed his crotch to her buttocks; Linda could feel that he had an erection.  
12 Respondent ordered Linda to the floor; she continued struggling against him. A nurse outside  
13 Linda's office heard a muffled scream and called a "code" situation. The first staff person to  
14 arrive was Joe G. When Joe entered Linda's office, he saw that Respondent had one arm around  
15 Linda's neck and the other was holding the pencils against her as a weapon. Joe heard  
16 Respondent say something that sounded like "shut up." Joe pulled Respondent away from Linda  
17 and restrained him.

18           c.     The previous day, Joe overheard Respondent talking to another inmate  
19 about having sex with Linda. At an infraction hearing held on March 12, 1990, Respondent  
20 acknowledged that he intended to have sex with Linda P. when he assaulted her.

21           d.     In June 1990, Respondent was charged with Attempted Rape in the  
22 Second Degree by Forcible Compulsion. His competency against questioned, Respondent was  
23 returned to Western State Hospital for evaluation. After he was deemed competent to stand trial,  
24 he pled guilty to Attempted Rape in the Second Degree by Forcible Compulsion in the Snohomish  
25 County Superior Court. He was sentenced to 50½ months confinement.

26     ///

1 e. Copies of the relevant documents pertaining to the offense and conviction  
2 involving Linda P. are included in the Stipulated Exhibits (2(a) – 2(d)) and may be considered by  
3 the Court.

4 f. This is a conviction for a sexually violent offense, as that term is defined in  
5 RCW 71:09.020.

6 5. Custodial Assault in the First Degree (Jun. 4, 1991)

7 a. On June 4, 1991, while still incarcerated for the 1990 attempted rape of  
8 Linda P., Respondent assaulted Elaine Ann L., a corrections officer at the Special Offender Center  
9 in Monroe, Washington. While Elaine Ann L. was assisting Respondent with cleaning his cell, he  
10 struck her on the head with a broom handle, lunged at her, and shoved her into his cell.  
11 Elaine Ann L. sprayed Respondent with the disinfectant she was carrying and ran out of the cell.  
12 When questioned about this offense by Dr. Richard Packard on March 19, 2003, Respondent  
13 admitted that he lunged toward Elaine Ann L. to “try to do something sexual to her.”

14 b. Respondent was charged with Custodial Assault in the First Degree in  
15 Snohomish County Superior Court. This charge was later dismissed after concerns arose about  
16 Respondent’s competence to stand trial.

17 c. Copies of the relevant documents pertaining to the charge and dismissal of  
18 the offense involving Elaine Ann L. are included in the Stipulated Exhibits (3(a) – 3(e)) and may  
19 be considered by the Court.

20 6. Custodial Assault with Sexual Motivation (Feb. 19, 1995)

21 a. On February 19, 1995, while still incarcerated for the 1990 attempted rape  
22 of Linda P., Respondent assaulted Cheryl S., a corrections officer at the Washington Corrections  
23 Center in Shelton, Washington. As the inmates were returning to their cells after breakfast,  
24 Respondent ran up to Cheryl, grabbed her from behind, held her around the chest, and pinned her  
25 arms in front of her. Respondent then twisted Cheryl and thrust his pelvis into her buttocks.  
26 Another officer witnessed the assault and assisted Cheryl in gaining control of Respondent.

1 Cheryl suffered physical injury as a result of this assault and could not work for approximately  
2 eight months. When asked about this incident by Dr. Richard Packard on March 19, 2003,  
3 Respondent acknowledged that he "mashed up against her backside."

4 b. Respondent was charged with Indecent Liberties by forcible compulsion.  
5 After another evaluation at Western State Hospital, Respondent pled guilty on February 3, 1997,  
6 to Custodial Assault with Sexual Motivation in Mason County Superior Court. He was sentenced  
7 to 60 months confinement.

8 c. Copies of the relevant documents pertaining to the offense and conviction  
9 involving Cheryl S. are included in the Stipulated Exhibits (4(a) – 4(d)) and may be considered by  
10 the Court.

11 d. This is not a conviction for a sexually violent offense, as that term is  
12 defined in RCW 71.09.020.

13 7. Assault in the Fourth Degree (Oct. 22, 2003)

14 a. On October 22, 2003, while at the Special Commitment Center, on McNeil  
15 Island, Washington, Respondent assaulted Cynthia W., a female staff member at the Special  
16 Commitment Center. As Respondent walked past the staff desk, he turned and charged at staff  
17 members, attempting to hit them. When Cynthia W. moved under the counter to protect herself,  
18 Respondent kicked her in the leg repeatedly.

19 b. Respondent was charged, in Pierce County Superior Court, with Assault in  
20 the Fourth Degree for his offense against Cynthia W. He pled guilty to this charge on April 26,  
21 2005.

22 c. Copies of the relevant documents pertaining to the offense and conviction  
23 involving Cynthia W. are included in the Stipulated Exhibits (5(a) – 5(c)) and may be considered  
24 by the Court.

25 d. This is not a conviction for a sexually violent offense, as that term is  
26 defined in RCW 71.09.020.

1 8. Since arriving at the Special Commitment Center, Respondent has not  
2 participated in sex offender treatment.

3 9. At the request of Petitioner, State of Washington, Dr. Richard Packard evaluated  
4 Respondent to determine whether he meets the psychological criteria for determination as a  
5 sexually violent predator. Dr. Packard has performed numerous evaluations of individuals to  
6 determine whether they meet the statutory definition of a sexually violent predator and has  
7 testified as an expert in Washington Superior Court. Dr. Packard's reports and curriculum vitae  
8 are included in the Stipulated Exhibits (11 - 13) and may be considered by the Court.

9 10. At the request of Respondent, Dr. Theodore Donaldson evaluated Respondent to  
10 determine whether Respondent meets the psychological criteria for determination as a sexually  
11 violent predator. Dr. Donaldson has performed numerous evaluations of individuals to  
12 determine whether they meet the statutory definition of a sexually violent predator and has  
13 testified as an expert in Washington Superior Court. Dr. Donaldson's report and curriculum  
14 vitae are included in the Stipulated Exhibits (14 - 15) and may be considered by the Court.

15 11. Stipulated Exhibits. Petitioner and Respondent, after consultation with his  
16 counsel, have reviewed the following Exhibits and stipulate to their admissibility:

- 17 1. #85-1-03309-1 (Petra S.)  
18 (a) Information  
19 (b) Amended Information  
(c) Statement of Defendant on Plea of Guilty  
(d) Judgment & Sentence
- 20 2. #90-1-00731-1 (Linda P.)  
21 (a) Information  
22 (b) Statement of Defendant on Plea of Guilty  
(c) Judgment and Sentence
- 23 3. #91-1-01160-0 (Elaine Ann L.)  
24 (a) Information  
(b) Motion and Affidavit for Order of Dismissal  
(c) Order of Dismissal

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- 4. #95-1-00079-7 (Cheryl S.)
  - (a) Information
  - (b) Amended Information
  - (c) Statement of Defendant on Plea of Guilty
  - (d) Judgment & Sentence
  
- 5. #04-1-03654-4 (Cynthia W.)
  - (a) Amended Information
  - (b) Statement of Defendant on Plea of Guilty
  - (c) Judgment & Sentence
  
- 6. Transcript of Respondent's Interview with Dr. Richard Packard, March 19, 2003
  
- 7. Redacted Transcript of Testimony of Dr. Carole DeMarco, taken on April 6-7, 2005 (State v. Paul Moore, Pierce County Superior Court #03-1-03402-1)
  
- 8. Redacted Transcript of Testimony of Renee Alex, taken on April 7, 2005 (State v. Paul Moore, Pierce County Superior Court #03-1-03402-1)
  
- 9. Redacted Transcript of Testimony of Chris Yeatman, taken on April 7, 2005 (State v. Paul Moore, Pierce County Superior Court #03-1-03402-1).
  
- 10. Redacted Transcript of Testimony of James Dalrymple, taken on April 11, 2005. (State v. Paul Moore, Pierce County Superior Court #03-1-03402-1)
  
- 11. Psychological Evaluation Report by Dr. Richard Packard, dated February 9, 2002
  
- 12. Addendum to Psychological Evaluation Report of Dr. Richard Packard, dated May 19, 2003
  
- 13. C.V. of Dr. Richard Packard
  
- 14. Report of Dr. Theodore Donaldson, dated August 18, 2005.
  
- 15. C.V. of Dr. Theodore Donaldson

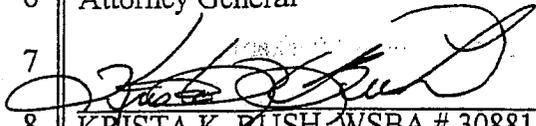
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1           12.    The parties have agreed to supplement this stipulation of facts and exhibits with  
2 the testimony of Dr. Richard Packard.

3                   DATED this 7<sup>th</sup> day of March, 2006.

4           Presented by:

5           ROB MCKENNA  
6           Attorney General

7   
8 KRISTA K. BUSH, WSBA # 30881  
9           Assistant Attorney General  
          Attorneys for Petitioner

10  
11   
12 JENNIFER H. MCINTYRE, WSBA # 25981  
13           Attorney for Respondent

