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NO. 81201-2

BY RONALD R. OTHES
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IN RE: DETENTION OF PAUL MOORE

STATE OF WASHINGTON,

Respondent,

v.

PAUL MOORE,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

PETITIONER'S SUPPLEMENTAL BRIEF

NANCY P. COLLINS
Attorney for Petitioner

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, WA 98101
(206) 587-2711

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A. ISSUES FOR WHICH REVIEW WAS GRANTED

1. Due process prohibits an individual's indefinite confinement for a mental disorder unless the individual is currently dangerous, and the procedure under which the State massively curtails the individual's liberty must be narrowly drawn.

Washington's sexually violent predator (SVP) commitment scheme asks for proof a person is likely to commit sexually violent acts any time in the future, but not proof that a dangerous act is likely in the reasonably foreseeable future. Does the SVP statute violate the right to due process of law by allowing indefinite commitment based on the possibility of dangerous acts at any time in the future?

2. When a person facing indefinite civil commitment has a documented history of being incompetent to stand trial, and has been found only marginally competent by a court-appointed expert, does the court deny the individual his right to due process of law by accepting a stipulation to essential evidence without verifying he understands and knowingly waives his right to contest the majority of the State's case against him?

3. Does a trial attorney provide ineffective assistance of counsel when the attorney stipulates to the evidence against a

person facing indefinite civil commitment as a sexually violent predator, including otherwise inadmissible evidence, and does not meaningfully advocate on the client's behalf?

B. STATEMENT OF THE CASE.

When the State filed an SVP petition for Paul Moore in 2002, the court held a competency hearing due to Mr. Moore's unstable behavior. 9/20/02RP 2; CP 218-53. Dr. Lee Gustafson concluded Mr. Moore was marginally competent but warned his competence ebbed and flowed. 6/21/02RP 4, 7; 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.

Mr. Moore was shackled, with one hand free, at his nonjury SVP trial. 3/7/06RP 2-4. During pretrial motions, Mr. Moore expressed his discomfort due to the chains he wore. Id. at 25. He complained of needing to sleep during trial testimony. Id. at 66. Shortly thereafter, defense counsel stipulated to the prosecution's fact witnesses and psychological reports. CP 34-42. The court accepted the stipulation without inquiring whether Mr. Moore understood and agreed. 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 the mental health provisions than the SVP commitment. Id. The trial court found Mr. Moore met the criteria for SVP commitment and ordered him committed indefinitely. CP 32-33.

The facts are further set forth in the Court of Appeals opinion, pages 2-6, Appellant's Opening Brief, pages 4-5, and throughout the pertinent argument sections.

C. ARGUMENT.

1. INDEFINITE CIVIL COMMITMENT MUST BE
PREDICATED ON A FINDING OF
DANGEROUSNESS IN THE NEAR FUTURE

a. Indefinite civil commitment is an unconstitutional deprivation of liberty unless based on proof of dangerousness. Freedom from bodily restraint is a fundamental and core liberty interest protected by the due process clause of the Fourteenth Amendment to the United States Constitution. In re Detention of Thorell, 149 Wn.2d 724, 732, 72 P.3d 708 (2003); U.S. Const. amend. 14; Wash. Const, Art, I, § 3. Commitment for any reason constitutes a significant deprivation of liberty triggering due process protection. Foucha v. Louisiana, 504 U.S. 71, 80, 112 S. Ct. 1780, 1785, 118 L. Ed. 2d 434 (1992). SVP commitment is intended only

for people with “very long-term” commitment needs. In re: Detention of Ambers, 160 Wn.2d 543, 550, 158 P.3d 1144 (2007).

Due process requires that state laws impinging on fundamental rights such as liberty must advance compelling state interests and be “narrowly drawn to serve those interests.” In re Detention of Young, 122 Wn.2d 1, 26, 857 P.2d 396 (1993). The degree of dangerousness required for indefinite civil commitment in an SVP context is proof, beyond a reasonable doubt, that the individual against whom a petition is brought has a serious lack of control over their behavior. Thorell, 149 Wn.2d at 735, citing Kansas v. Crane, 534 U.S. 407, 413, 122 S.Ct. 867, 151 L.Ed.2d 586 (2002).

An SVP commitment requires present dangerousness as a matter of due process. In re Detention of Marshall, 156 Wn.2d 150, 157, 125 P.3d 113 (2005). “Current dangerousness is a bedrock principle underlying the SVP commitment statute.” In re: Detention of Paschke, 121 Wn.App. 614, 622, 90 P.3d 74 (2008), citing In re Detention of Albrecht, 147 Wn.2d 1, 7, 51 P.3d 73 (2002).

By statute, SVP commitment requires the State to establish a mental 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(7).¹ The State must show this likelihood of future dangerousness “more probably than not” if the individual is unconditionally released. *Id.* The SVP statute does not expressly require the jury find that the likelihood of future sexually violent and predatory acts will occur within the foreseeable future.

b. Predicting an individual’s dangerousness is a tenuous proposition and a difficult task. Past acts alone cannot justify indefinite civil confinement. *Foucha*, 504 U.S. at 81. In *Young*, this Court acknowledged fallacies in predicting future dangerousness, and these predictions remained marred by uncertainty today. 122 Wn.2d at 32 n.8 (“predictions of future dangerousness are certainly less than perfect . . .”).

Mental health professionals “vigorously” question the scientific ability to predict future dangerousness. *See* M. Browne & R. Harrison-Spoerl, *Putting Expert Testimony in its Epistemological Place: What Predictions of Dangerousness In Court Can Teach Us*, 91 Marq. L.Rev. 1119, 1121 & n.11 (2008) (cataloging sources of criticism); A. Scherr, *Daubert & Danger: The “Fit” of Expert*

¹ Pertinent text of RCW 71.09.020 is attached in Appendix A.

Predictions in Civil Commitments, 55 *Hastings L.J.* 1, 30 (2003)
("Psychiatric predictions of future dangerousness *are not accurate*;
[they are] wrong two times out of three" quoting Barefoot v. Estelle, 463 U.S. 880, 928, 103 S.Ct. 3383, 77 L.Ed.2d 1090
(1983) (Blackmun, J. dissenting, emphasis in original)).

Clinical judgments are fraught with unreliability. E. Beecher-Monas & E. Garcia-Rill, *The Impact of Behavioral Genetics on the Criminal Law: Genetic Predictions of Future Dangerousness: Is there a Blueprint for Violence?*, 69 *Law & Contemp. Prob.* 301, 317 (2006) ("Future dangerousness testimony based on clinical judgment alone has been overwhelmingly castigated by the profession and so fails peer review, publication, and the general acceptance prongs of Daubert.").

Actuarial analysis has methodological limitations and questionable application to an individual. *Id.* at 320-21. Although more accurate than clinical predictions, actuarial predictions "are still tenuous" and "at best," they "correlate only moderately with violence and sexual recidivism." *Id.* at 321.

A mixed clinical-actuarial approach is inherently premised on the clinician's judgment and lacks demonstrated scientific reliability. There is "little evidence" supporting enhanced accuracy of "hybrid"

approaches using clinical assessment together with actuarial results. Browne, 91 Marq. L.Rev. at 1199 n. 373; see also Scherr, 55 Hastings L.J. at 24 (“no consensus” about merits or appropriate combinations in mixing clinical and actuarial approach).

Inaccuracy of predictions persists in short-term and long-term predictions. R. Simon, *The Future of the “Duty to Protect”: Scientific and Legal Perspective on Tarasoff’s Anniversary: the Myth of “Imminent” Violence in Psychiatry and the Law*, 75 U. Cin. L.Rev. 631, 631 (2006). “No evidence-based research supports the proposition that clinicians can accurately predict when, or even if, an individual will commit an act of violence toward oneself or others.” *Id.* at 2. One study found, after systematically reviewing the literature, short term clinical predictions of one to seven days were no more accurate than long-term predictions of dangerousness, of one year or longer in the future. *Id.* n.2, citing D. Mossman, *Assessing Prediction of Violence*, 62 J. Consulting & Clinical Psychol., 783 (1994).

The Legislature intends SVP commitments to exist for the “very long term,” and the court in Young recognized that constitutionality of the commitment hinges on the strict procedural protections that must equalize the risk of erroneous deprivation of

liberty. Ambers, 160 Wn.2d at 550; Young, 122 Wn.2d at 38.

Substantive criteria are required so the fact-finder is not left with unguided discretion as the basis for civil commitment. In re Detention of Schuoler, 106 Wn.2d 500, 511, 723 P.2d 1103 (1986).

Accordingly, the SVP statute must guarantee an individual is not indefinitely confined based on ambiguous concerns of acts that could occur in the distant future.

c. In Washington, SVP commitment for a confined person requires evidence of current dangerousness. If a person is not confined at the time the petition is filed, due process requires proof of a recent act causing or threatening harm of a sexually violent nature. Young, 122 Wn.2d at 41.² Absent proof of a recent overt act, there is insufficient evidence that the individual poses an imminent threat of dangerous as required to indefinitely detain the person under the due process clauses of the state and federal constitutions. Id.

But the Young Court waived the recent overt act requirement for person incarcerated when the SVP petition was filed, because due process “does not require that the absurd be done.” Id. Proof

of a recent overt act would be “absurd,” the Young Court reasoned, when a person has been in continued custody and thus would not have had the opportunity to commit such an act.

Young read the “recent overt act” requirement into the statute largely from a similar construction placed on a mental health detention statute in In re Matter of Harris, 98 Wn.2d 276, 654 P.2d 109 (1982). Harris involved a summons used for a person not confined at the time commitment is sought. The pertinent statute allowed detention only with proof the individual presented a “likelihood of serious harm,” which was defined by statute as “a substantial risk” of physical harm to self or others if not confined. Id. at 279. The Harris Court found that as a matter of due process, the State must also show the likelihood of danger by a recent act. Id. at 281-84.

The court reasoned that a person’s “substantial risk of danger” is not “meaningful” unless it is recent. Id. at 284. As echoed in Young, Harris found it would be impractical to require imminent danger in all circumstances, because hospitalization may reduce the imminence of danger without alleviating the individual’s

² After Young, the legislature enacted a statutory requirement of a recent overt act for individuals not confined at the time the petition is filed. RCW

dangerousness if unconfined. Id. Harris addressed this concern by rejecting an “imminent harm” requirement, and substituting a recent act requirement to guarantee adequate present dangerousness for involuntary commitment to pass constitutional muster.

But Harris did not reject the importance of imminent dangerousness. It acknowledged that requiring imminent danger “reflects a valid constitutional concern for establishing a high standard of danger where the potential deprivation of liberty is great” Id. at 283, citing Suzuki v. Yuen, 617 F.2d 173 (9th Cir. 1980).

The commitment at issue in Harris did not involve someone who had been in prison his entire adult life, as Mr. Moore has, before facing SVP commitment. CP 195-88. Neither Young nor Harris addressed the due process concerns of an open-ended prediction of dangerousness in the vague and nebulous future, a prediction that is inherently tenuous in its scientific basis, and whether it is sufficiently narrowly curtailed to deny a person’s liberty for the rest of his or her life. Young, 122 Wn.2d at 26; Schuoler,

71.09.020(1).

106 Wn.2d at 508; Reno v. Flores, 507 U.S. 1992, 123 L.Ed.2d 1, 113 S.Ct. 1439 (1993).

d. The possibility of dangerous acts in the distant future is an insufficient basis for a civil commitment as a matter of due process. In the case at bar, the trial court refused Mr. Moore's request that the State limit its prediction of future dangerousness to a certain time period. 3/7/06RP 45-46. The court reasoned that the Legislature did not require any time limit to a prediction for dangerousness. The court further surmised that at some point in time, perhaps at 100 years old, a person might become too infirm to reoffend and this outer time limit may be reflected in an expert's prediction. 3/7/06RP 46-48. The court explained that it would be changing the law if it engrafted any time limit to the prediction of dangerousness. Id.

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) (text attached in App. A).

Young rested on the dubious contention that it would be “impossible” for a confined person to commit a recent, dangerous, act. 122 Wn.2d at 41. In fact, even a structured prison setting does not prevent a psychotic episode or violent behavior. State v. Huss, 666 N.W.2d 152, 162 (Iowa 2003), citing State v. Polly, 657 N.W.2d 462, 465 (Iowa 2003) (inmate sexually assaulted prison nurse); Greene v. State, 59 S.W.2d 500, 505 (Mo. 2001) (verbal assaults while confined show present dangerousness); In re Hayes, 564 S.E.2d 305, 309 (N.C. Ct. App. 2001) (assaultive behavior during confinement shows continued dangerousness). As one commentator said, most high security correctional facilities “are violent, threatening, antisocial milieus” that may exaggerate cognitive problems. R. Wittstein, *A Psychiatric Perspective on Washington’s Sexually Violent Predators Statute*, 15 U. Puget Sound L. Rev. 597, 617 (1992).

To comply with due process, the State can and must show current dangerousness for an incarcerated individual by refining 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 which may ensue, must be substantial within the reasonably foreseeable future.

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

Similarly, Washington 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 SVP 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.

The trier of fact need not “pinpoint” the precise time when future injury is likely to occur. Hubbart v. Superior Court, 969 P.2d 584, 599-600 (Cal. 2001). Yet there must be some level of immediacy to the likelihood of reoffending, in order to satisfy the

due process necessary for indefinite confinement and guarantee that civil commitment is not simply a warehousing of undesirable or mentally ill individuals who have committed serious offenses in the past.

Using past history to defeat a present diagnosis eliminates the requirement of current mental disorder and dangerousness. United States v. Bilyk, 29 F.3d 459, 461 (8th Cir. 1994); Levine v. Torvik, 986 F.2d 1506, 1514 (6th Cir. 1993). Dangerousness must be proven and found based on more than the statistical probability of relapse at an undefined point in time. See In re George L., 648 N.E.2d 475, 481 (N.Y. 1995) (construing requirement of “current risk”). While a clinician may offer an assessment and evaluation, it is unreasonable for a factfinder to parse the unreliable from the reliable and reach an accurate determination of an offender’s likelihood of reoffending without requiring that the prediction fall within the reasonably foreseeable future. C. Slobogin, *Dangerousness and Expertise*, 133 U. Pa. L. Rev. 97, 174 (1984). The open-ended and ambiguous determination that a person may reoffend at any time in the future is simply too vague to meet the heightened procedural protections necessary to satisfy the due process requirements of long-term and indefinite civil commitment.

The failure to require proof of dangerous acts in the reasonably foreseeable future is a failure to hold the State to the essential requirements of due process and reversal for a new commitment trial is necessary.

2. THE COURT'S FAILURE TO INSURE MR. MOORE KNOWINGLY STIPULATED TO THE EVIDENCE AGAINST HIM, WHEN HE HAD "MARGINAL" COMPETENCY, VIOLATED HIS RIGHT TO DUE PROCESS OF LAW

a. Due process requires the court to ensure a defendant understands he is waiving essential trial rights when the defendant is uncontestedly mentally ill. As discussed above, the right to due process of law bars the State from massively curtailing Mr. Moore's liberty without adequate procedural protections. Foucha, 504 U.S. at 80; Vitek v. Jones, 445 U.S. 480, 491-92, 100 S. Ct. 1254, 1262-63, 63 L. Ed. 2d 552 (1980); U.S. Const. amend. 14; Wash. Const, Art, I, § 3.

The right to procedural due process 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, 159 Wn.2d 357, 371, 150 P.3d 86 (2007) ("ample opportunity to cross-examine" witness at pretrial deposition

satisfies due process in SVP proceeding); Schuoler, 106 Wn.2d at 510 (rights to counsel, to present evidence, and to cross-examining witnesses inherent aspects of fair mental health hearing). Mr. Moore is entitled 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).

SVP commitment requires many of the procedural protections afforded criminal defendants because of the fundamental deprivation of liberty. See Young, 122 Wn.2d at 48 (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) (same “constitutionally prescribed unanimity requirement” as 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 to unanimous jury).

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, 159 Wn.2d at 369.

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).

b. The right to due process of law requires safeguards protecting the rights of an indefinitely detained person.

Mr. Moore has a significant liberty interest at stake in an SVP commitment trial. Stout, 159 Wn.2d at 369. Accordingly, the first Mathews factor "weighs heavily" in Mr. Moore's favor. Id.

The right to confront and cross-examine witnesses applies to SVP proceedings under the due process clause. Stout, 159 Wn.2d at 369; see Crawford v. Washington, 541 U.S. 36, 42, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004) (Sixth Amendment right to confront witnesses is "bedrock procedural guarantee" of a fair trial). While an individual is free to stipulate to the facts, he waives the ability to

challenge a witness's veracity, document inconsistencies, or judge the witness's demeanor. Stout, 159 Wn.2d at 370. Confrontation is valuable procedure, as it exposes inconsistencies, explores witness's veracity, and grants fact-finder opportunity to observe demeanor. Id. In a criminal trial, a court can no more dispense with a jury trial because a person is obviously guilty as it can infer that a person waived the right of confrontation absent an intentional relinquishment of that right. Giles v. California, __ U.S. __, 128 S.Ct. 2678, 2686, 171 L.Ed.2d 488 (2008).

An individual's competency must be a factor in assessing whether he or she may waive essential trial rights. Indiana v. Edwards, __ U.S. __, 128 S.Ct. 2379, 2386, 171 L.Ed.2d 375 (2008). In Edwards, the court concluded that even if an individual is competent to stand trial, he or she is not necessarily competent to make decisions needed to conduct a trial without the assistance of counsel. Id. at 2386. The court warned that individualized determinations are necessary to evaluate an accused person's ability to make trial decisions even if competent. Id.

Here, the court accepted a wide-ranging stipulation absent any assurance that Mr. Moore understood this stipulation, even though the court knew his competency was marginal and changed

over time. CP 35-42; CP 258-62 (Exhibit list). Mr. Moore did not sign the stipulation or otherwise indicate he understood. The court did not explain to Mr. Moore that he was waiving his right to cross-examine witnesses by stipulating to their description of his behavior on prior occasions, or his right to testify on his own behalf.

Mr. Moore had been previously found incompetent to stand trial. CP 35-38; CP 214-16. Dr. Gustafson concluded his competency "varies substantially week-to-week." 9/20/02RP 9-10. Dr. Gustafson found Mr. Moore "marginally competent," at the time of his evaluation. CP 293 (Psych. Eval., p. 5); 9/20/02RP 5.

At trial, Dr. Richard Packard said 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. 3/7/06RP 90. He was unable to understand basic concepts. When Dr. Packard asked Mr. Moore to name things he was afraid of, and Mr. Moore said, "cold weather . . . pain . . . hideous looking robots, yeah, I guess that's all." Ex. 6, p. 52 (ellipses in original). There is no indication these answers involved any attempt at humor.

When asked about sexual activity within his family, Mr. Moore said he had sex with his mother, but described this incident

as when he shook his mother's hand and she made an "ahh" sound, which he thought was sexual to her. Ex. 6, p. 37-38. His plan for remaining crime-free upon release included defecting to the former Soviet Union. 3/8/07RP 17-18.

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 the accusations underlying an SVP petition when the detainee has been found incompetent to stand trial for the underlying criminal charges.³

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 complex thought, the court should have taken measures to insure Mr. Moore understood the nature of the rights he was waiving. Instead, Mr. Moore's attorney essentially stipulated to the case against him. Dr. Packard's two written evaluations were admitted as stipulated evidence, as was a letter documenting the prosecutor's belief that

³ Pertinent text attached in Appendix B.

Mr. Moore met all criteria for commitment. Exs. 6, 11, 12. He stipulated to detailed allegations from criminal cases, even where Mr. Moore had not been convicted. CP 34-38.

The State's interest in speedy and low-cost commitment trials cannot trump the readily explored intelligent and knowingly waiver of basic trial rights, given Mr. Moore's limited reasoning and analytical skills. 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 agreeing to the admission of otherwise inadmissible psychological evaluations, the court could document Mr. Moore's comprehension of the fundamental procedures that he was afforded when he faced a life-long deprivation of liberty. Bare competence to stand trial is simply not enough to waive critical rights essential to a fair trial. Edwards, 128 S.Ct. at 2386-88.

3. 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, 159 Wn.2d at 377; 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, 159 Wn.2d at 377. 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).

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. Cronic, 446 U.S. at 656; Strickland, 466 U.S. at 685. 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).

In In re: Dependency of G.A.R., 137 Wn.App. 1, 150 P.3d 643 (2007), the attorney in a parental termination case did little other than appear in court on his client's behalf and assert the mother's rights should not be terminated. Id. at 7. 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.

On appeal, the court was highly critical of the attorney's failure to test the evidence relied on by the State. Id. at 7. 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.

[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.

A similar lack of advocacy occurred in the case at bar. Counsel stipulated to testimony of all the witnesses who sought to establish Mr. Moore committed 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, because mental health commitment would better serve his treatment needs. Ex. 14.

Mr. Moore was 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, and competency questions arose during almost all of the prior proceedings. CP 35-38. Counsel stipulated to the admission of testimony even when the charges were dismissed due to Mr. Moore's incompetency. CP 37; 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 of transcript, as opposed to the 30 pages the State presented. 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.

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. Mr. Moore was denied the assistance of counsel when his attorney ceased meaningful advocacy on his behalf.

c. Counsel's deficient performance requires reversal.

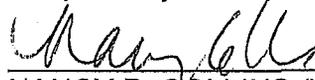
Mr. Moore could not and did not receive material benefit from waiving his right to contest the evidence against him when the immutable result of the trial is life-long, or "very long-term," involuntary confinement. Any defense was impossible once his attorney agreed to the prosecution's evidence and submitted an expert's evaluation that agreed Mr. Moore should be committed. Counsel's failure to act as an effective advocate rendered the proceedings fundamentally unfair and deprived Mr. Moore of his right to counsel.

D. CONCLUSION.

For the foregoing reasons, Mr. Moore respectfully requests this Court reverse the order of commitment of remand his case for a new trial.

DATED this 20th day of November 2008.

Respectfully submitted,



NANCY P. COLLINS (WSBA 28806)
Washington Appellate Project (91052)
Attorneys for Appellant

APPENDIX A

RCW 71.09.020. Definitions

Unless the context clearly requires otherwise, the definitions in this section apply throughout this chapter.

.....

(7) "Likely to engage in predatory acts of sexual violence if not confined in a secure facility" means that the person more probably than not will engage in such acts if released unconditionally from detention on the sexually violent predator petition. Such likelihood must be evidenced by a recent overt act if the person is not totally confined at the time the petition is filed under RCW 71.09.030.

(8) "Mental abnormality" means a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to the commission of criminal sexual acts in a degree constituting such person a menace to the health and safety of others.

(9) "Predatory" means 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.

(10) "Recent overt act" means 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.

.....

(16) "Sexually violent predator" means 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.

.....

APPENDIX B

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.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IN RE THE DETENTION OF)

PAUL MOORE,)

PETITIONER.)

NO. 81201-2

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, DECLARE THAT ON THE 21ST DAY OF NOVEMBER, 2008, I CAUSED THE ORIGINAL **SUPPLEMENTAL BRIEF OF PETITIONER** TO BE FILED IN THE **WASHINGTON STATE SUPREME COURT** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] SARAH SAPPINGTON
ATTORNEY AT LAW
OFFICE OF THE ATTORNEY GENERAL
800 FIFTH AVENUE, SUITE 2000
SEATTLE, WA 98104-3188

(X) U.S. MAIL
() HAND DELIVERY
() _____

SIGNED IN SEATTLE, WASHINGTON THIS 21ST DAY OF NOVEMBER, 2008.

X _____

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