

NO. 81201-2

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**SUPREME COURT OF THE STATE OF WASHINGTON**

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In re the Detention of:

PAUL MOORE,

Petitioner,

v.

STATE OF WASHINGTON,

Respondent.

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**SUPPLEMENTAL BRIEF**

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**TABLE OF CONTENTS**

I. ISSUES PRESENTED FOR REVIEW ..... 1

    A. Does Due Process Require An Advisement And Waiver Of Rights Before A Person Subject To Civil Commitment Is Permitted To Stipulate To Certain Facts And Exhibits During The Commitment Trial? ..... 1

    B. Where There Was No Evidence That Moore Was Unable To Understand The Proceedings Or Assist Counsel, Did Trial Counsel’s Stipulation To Certain Exhibits Constitute Ineffective Assistance Of Counsel? ..... 1

    C. Where The SVP Statute Imposes No Requirement That Future Dangerousness Occur Within A Specific Time Period, Was The State Required To Limit The Assessment Of Future Dangerousness To The Foreseeable Future? ..... 1

II. STATEMENT OF THE CASE ..... 1

    A. Moore’s Extensive History Of Predatory Sexual Offending ..... 1

    B. Competency Finding In SVP Action ..... 5

    C. SVP Trial ..... 7

    D. Court Of Appeals Affirms Moore’s Commitment ..... 9

III. ARGUMENT ..... 10

    A. The Trial Court Did Not Violate Moore’s Right To Due Process By Accepting His Stipulation To Facts And Exhibits 10

    B. Moore Received Effective Assistance Of Counsel ..... 14

    C. The State’s Failure To Specify A Time Period Within The Foreseeable Further When Predicting Future Dangerousness Did Not Violate Moore’s Rights To Due Process ..... 19

IV. CONCLUSION ..... 20

## TABLE OF AUTHORITIES

### Cases

<i>Boykin v. Alabama</i> , 395 U.S. 238, 89 S.Ct. 1709 (1969) .....	13
<i>In re Detention of Stout</i> , 159 Wn.2d 357, 150 P.3d 86 (2007) .....	15, 17
<i>In re Detention of Strand</i> , 139 Wn.App. 904, 162 P.3d 1195 (2007) .....	16
<i>In re Detention of Wright</i> , 138 Wn.App. 582, 155 P.3d 945 (2007).....	19, 20
<i>In re Personal Restraint of Davis</i> , 152 Wn.2d 647, 101 P.3d 1 (2004).....	15
<i>In re the Dependency of G.A.R.</i> , 137 Wn. App. 1, 150 P.3d 643 (2007) .....	16
<i>In re the Detention of Moore</i> , noted at 141 Wn. App. 1026, 2007 WL 3347797 .....	9
<i>In re the Welfare of J.M.</i> , 130 Wn. App. 912, 125 P.3d 245 (2005) .....	16
<i>In re Young</i> , 122 Wn.2d 1, 857 P.2d 989 (1993) .....	17, 19, 20
<i>State v. Gossett</i> , 120 Ariz. 44, 583 P.2d 1364 (1978) .....	14
<i>State v. Johnson</i> , 104 Wn.2d 338, 705 P.2d 773 (1985) .....	13, 14
<i>State v. McFarland</i> , 127 Wn.2d 322, 899 P.2d 1251 (1995) .....	15
<i>State v. McNeal</i> , 145 Wn.2d 352, 37 P.3d 280 (2002) .....	16

<i>State v. Modica</i> , 136 Wn. App. 434, 149 P.3d 446 (2006) .....	11
<i>State v. Saylor</i> , 70 Wn.2d 7, 422 P.2d 477 (1966).....	13
<i>State v. Wiley</i> , 26 Wn. App. 422, 613 P.2d 549 (1980).....	9
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S. Ct. 2052 (1984) .....	16

**Statutes**

RCW 71.05 .....	9
RCW 71.09.020(9).....	9
RCW 71.09.020(15) .....	2

## I. ISSUES PRESENTED FOR REVIEW

- A. Does Due Process Require An Advisement And Waiver Of Rights Before A Person Subject To Civil Commitment Is Permitted To Stipulate To Certain Facts And Exhibits During The Commitment Trial?
- B. Where There Was No Evidence That Moore Was Unable To Understand The Proceedings Or Assist Counsel, Did Trial Counsel's Stipulation To Certain Exhibits Constitute Ineffective Assistance Of Counsel?
- C. Where The SVP Statute Imposes No Requirement That Future Dangerousness Occur Within A Specific Time Period, Was The State Required To Limit The Assessment Of Future Dangerousness To The Foreseeable Future?

## II. STATEMENT OF THE CASE

Paul Moore was civilly committed as a sexually violent predator (SVP) on March 9, 2006, following a bench trial. CP at 5-16. The evidence adduced at trial illustrates Moore's extensive history of sexually assaulting and raping women.

### A. Moore's Extensive History Of Predatory Sexual Offending

Moore committed his first known sexual offense in Seattle on September 14, 1985, when he entered a beauty salon armed with an 8-inch knife and ordered a hairdresser, Petra S., and her customer to the back of the salon. CP at 6, 35. There, Moore forced Petra to disrobe and perform oral sex on him. CP at 6, 36. When she began to choke and gag, Moore attempted to anally rape her and, when he was unsuccessful, he vaginally raped her. *Id.* Before leaving, Moore told the two women not to come out of the room or he

would “burn the place down.” *Id.* When he was later arrested, the police discovered that Moore was carrying a green bottle filled with gasoline. *Id.*

Moore was sent to Western State Hospital (WSH) for a competency evaluation. CP at 36. After approximately 13 months of observation, he was determined competent to stand trial, and ultimately pled guilty to Rape in the First Degree with a Deadly Weapon. *Id.*; Ex. 1; CP at 12.<sup>1</sup> He was sentenced to 75 months confinement. CP at 6, 36.

While he was serving this sentence, Moore committed his second sexually violent offense. CP at 7, 37. On the morning of February 23, 1990, Moore sexually assaulted his prison counselor, Linda P., by forcing her into an isolated corner of her office, bending her over while holding a homemade shank to her ribcage, and simulating intercourse by rubbing his erect penis against her buttocks. *Id.* During a subsequent prison infraction hearing regarding the incident, Moore acknowledged that he intended to have sex with the counselor when he assaulted her. *Id.*

Moore was charged with Attempted Rape in the Second Degree. Ex. 2. His competency was again challenged and Moore was evaluated by Dr. Greg Gagliardi at WSH. Dr. Gagliardi indicated that Moore’s behaviors “appear volitional and oppositional,” that Moore had the capacity to fake symptoms of mental illness,<sup>2</sup> and that he was extremely dangerous and violent. CP at 238-

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<sup>1</sup> This is a sexually violent offense as defined in RCW 71.09.020(15).

<sup>2</sup> The official diagnosis was “Malingering, by history.”

39. He was found competent to stand trial and pled guilty to Attempted Rape in the Second Degree by Forcible Compulsion. CP at 27, 37; Ex. 2.<sup>3</sup> He was sentenced to 50 ½ months confinement. CP at 7, 37.

Moore committed his third sex offense on June 4, 1991, when he assaulted another female prison staffer, Elaine Ann L. CP at 8, 38. While Elaine Ann was assisting Moore with cleaning his cell, he struck her on the head with a broom handle, lunged at her, and shoved her into his cell. *Id.* She sprayed Moore with the disinfectant she was carrying and ran out of the cell. *Id.* When questioned about this offense by a psychological evaluator, Moore admitted that he attacked the officer in an effort to “try to do something sexual to her.” *Id.* Moore was again sent to WSH, and was again determined competent by WSH staff. CP at 38, 230. The case was, however, ultimately dismissed upon motion of the State “in the interests of justice,” apparently due to a combination of factors, including the trial court’s concerns about Moore’s competency and the fact that he was already in prison. Ex. 3.<sup>4</sup>

On February 19, 1995, while still incarcerated for the 1990 attempted rape of Linda P., Moore assaulted Cheryl S., a corrections officer at the Washington Corrections Center in Shelton, Washington. CP at 28, 38. As the inmates were returning to their cells after breakfast, he ran up to Cheryl, grabbed her from behind, held her around the chest, and pinned her arms in

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<sup>3</sup> This is a sexually violent offense as defined in RCW 71.09.020(15). CP 12, 38.

<sup>4</sup> This information comes from the State’s Motion to Dismiss. The Order of Dismissal makes no finding regarding Moore’s competence to stand trial.

front of her. *Id.* He then twisted her around and thrust his pelvis into her buttocks. *Id.* Another officer witnessed the assault and assisted Cheryl in gaining control of Moore. *Id.* Cheryl suffered physical injury as a result of this assault and could not work for approximately eight months. *Id.*

Moore was charged with Indecent Liberties by Forcible Compulsion for his offenses against Cheryl S. CP at 29, 39. On February 3, 1997, after another evaluation at WSH, he pled guilty to Custodial Assault with Sexual Motivation in Mason County Superior Court and was sentenced to 60 months confinement. *Id.*

On April 22, 2003, while detained at the Special Commitment Center (SCC) pending his civil commitment trial, Moore grabbed Dr. Carole D., his forensic therapist, from behind. CP at 29; Exs. 7-10. He pressed his body against hers and thrust his hips against her buttocks in a manner indicative of sexual intercourse. *Id.* Other SCC staff were present, observed this assault, and gained control of Moore. CP at 188; Exs. 7-10. He was charged with Indecent Liberties by Forcible Compulsion in Pierce County Superior Court. *Id.* After having what appear to have been two different competency evaluations,<sup>5</sup> Moore was tried before the bench and was acquitted of this offense. *Id.*; RP 5/25/05 at

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<sup>5</sup> On 12/3/03, the parties convened to update the trial court on the status of criminal charges relating to charge of Indecent Liberties with Forcible Compulsion against Dr. D. RP 12/3/03 at 2; RP 12/21/05 at 2. At that hearing, the AAG indicated that "there is still a competency issue in that trial. Mr. Moore was evaluated by Western State so they do have one opinion, but the defense in that case has asked for a second competency evaluation" and that the court had granted that request. RP 12/3/03 at 2.

5. He was, however, convicted of two additional, unspecified offenses. RP 12/21/05 at 2.

On October 22, 2003, while at the SCC, Mr. Moore assaulted Cynthia W., a female staff member. CP at 29, 39. As he walked past the staff desk, he turned and charged at staff members, attempting to hit them. *Id.* When Cynthia moved under the counter to protect herself, Moore repeatedly kicked her in the leg. *Id.* Moore was charged with Assault in the Fourth Degree for this offense CP at 29, 39. He pled guilty to this charge on April 26, 2005. *Id.*; Ex. 5.

**B. Competency Finding In SVP Action**

Shortly before he was due to be released from prison in May 2002, the State petitioned for Moore's commitment as an SVP. CP at 35. Prior to trial, Moore's counsel moved for a hearing to determine Moore's competency and to consider whether the court should appoint a Guardian ad Litem (GAL) on his behalf. CP 217.

At the competency hearing, the defense submitted a report by Dr. Lee Gustafson, who also testified to Moore's competency. 9/20/02 RP at 2-20. Dr. Gustafson had been retained by Moore's defense counsel to conduct competency evaluations of Moore on approximately four previous occasions. *Id.* at 4-5. Dr. Gustafson testified that on "one or two" of those occasions, he had found Moore incompetent. *Id.* On those occasions, Dr. Gustafson testified, Moore had not been on anti-psychotic medication. *Id.*

Dr. Gustafson had attempted to interview Moore at the SCC, where persons detained as potential SVPs are housed, but Moore had refused to speak to him. *Id.* He had, however, reviewed a report from Moore's therapist at the SCC, who indicated that, although there were times that Moore had refused to talk, at other times he "communicated clearly what he wanted and seemed to clearly understand what was said to him." *Id.* at 6.

Dr. Gustafson testified that he had personally observed Moore immediately before the SVP competency hearing, and that Moore had appeared cooperative and was talking to his attorney. *Id.* He stated that Moore "clearly understood what his attorney was saying, and he responded appropriately and cooperatively in his conversations with her." *Id.* Asked whether a GAL would be in Moore's best interests, Dr. Gustafson stated that, when Moore was cooperating and talking with his attorney, a GAL would not be necessary. *Id.* at 8.

At the conclusion of the hearing, the trial court found Moore competent. *Id.* at 15. The trial court appointed a "standby" GAL, ruling that, if a situation arose where defense counsel or the GAL felt that Moore was not able to make his own decision, there would be another hearing to reevaluate his status. *Id.* at 14-15. Beyond the initial appointment, there is no further mention of the standby GAL, and he does not appear to have ever been asked to participate or intervene.

At the December 3, 2003 pre-trial hearing, in the course of reporting regarding the progress of the ongoing criminal prosecution related to the assault on Dr. D. (*see supra* at 4), Moore's attorney stated that "Moore would like [the trial court] to know that he would like to stipulate; I think that's what he wanted to tell you." RP 12/3/03 at 3. Moore then volunteered: "Well, I just want to say that if I get released, I would do another sexual offense. . . . So can I go back to the SCC?" *Id.*

### **C. SVP Trial**

A bench trial began on March 7, 2006 after Moore withdrew his jury demand. CP at 207; RP 3/7/06 at 51. Moore was present during the first day of trial. RP 3/7/06 at 2-3. The parties began by arguing the numerous evidentiary issues raised by Moore's trial counsel in her numerous pre-trial motions. CP at 165-183; RP 3/7/06 at 2-51.

The State called as its only live witness Dr. Richard Packard, a psychologist and certified sex offender treatment provider who conducted the SVP evaluation for the State. RP 3/7/06 at 53-54. Following the first portion of Dr. Packard's direct examination, the parties broke briefly to discuss entry of a stipulation. With Moore present, Krista Bush, Assistant Attorney General, described the contents of a document entitled "Stipulated Facts and Exhibits." RP 3/7/06 at 71-75; CP at 35-42. Pursuant to that document, the parties stipulated to certain facts surrounding Moore's prior convictions, including a

brief description of each offense and the subsequent court disposition of each crime. CP at 35-39. In addition, the parties stipulated to the admissibility of 15 exhibits, including various court documents relating to Moore's prior convictions (Exs. 1, 2, 4, 5), dismissal of the charges relating to the assault against Elaine Ann (Ex. 3), a transcript of Moore's interview with Dr. Packard (Ex. 6), trial testimony (both direct and cross) of witnesses to the assault against Dr. D. at the SCC of which Moore had been acquitted (Exs. 7-10), and the evaluations of Moore conducted by the parties' experts (Exs. 11, 12, 14), along with their respective CVs (Exs. 13, 15).

Defense counsel orally affirmed on the record that both she and Moore agreed with the stipulation, but wanted the record to reflect her continuing objections to certain portions of the evidence identified in Moore's motions in limine. RP 3/7/06 at 72-73. The court acknowledged the continuing objection. RP 3/7/06 at 73. Moore, who had apparently previously told counsel that he might want to return to the SCC for the remainder of the proceedings, then indicated that he in fact wished to stay for the rest of the day. *Id.* at 75. At the end of the day, at his own request, he was excused from attending the remainder of the trial. RP 3/7/06 at 143-44. The bench trial proceeded through the cross-examination of Dr. Packard by Moore's counsel, as well as the parties' closing arguments. RP 3/8/06 at 20-42; RP 3/9/06 at 28-34.

In her closing, Moore's counsel argued the State had not met its burden

of proof because Dr. Packard's diagnoses were internally inconsistent and because Moore's expert, Dr. Donaldson, concluded Moore was more appropriate for commitment pursuant to RCW 71.05. RP 3/9/07 at 28-34. She also argued that the State had not demonstrated a preference for non-consenting sex, and that his recent offense had not been "predatory"<sup>6</sup> in that his relationships with prison counselors are "significant personal relationships for Paul Moore." *Id.* at 33. After considering the evidence, the trial court committed Moore as an SVP. *Id.* at 51-51; CP at 5-14.

#### **D. Court Of Appeals Affirms Moore's Commitment**

Moore appealed the commitment order. In an unpublished decision, the court affirmed Moore's commitment. *In re the Detention of Moore*, noted at 141 Wn. App. 1026, 2007 WL 3347797. The court rejected Moore's argument that due process required the trial court to ensure that Moore understood the rights he was waiving by entering into the stipulation to facts and exhibits. *Id.* Slip. Op. at 6. A stipulation, the court noted, "is typically only an admission 'that if the State's witnesses were called, they would testify in accordance with the summary presented by the prosecutor.'" *Id.*, citing *State v. Wiley*, 26 Wn. App. 422, 425, 613 P.2d 549 (1980). The court then cited to a long line of analogous criminal cases holding that due process does not require that a

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<sup>6</sup> RCW 71.09.020(9) defines "predatory" as "acts directed towards: (a) strangers; (b) individuals with whom a relationship has been established or promoted for the primary purpose of victimization; or (c) persons of casual acquaintance with whom no substantial personal relationship exists."

defendant understand the rights waived by entering a factual stipulation, so long as the stipulation is not "tantamount to a guilty plea." *Id.* The court observed that the stipulation to facts and exhibits entered by Moore "in no way conceded that the State had met its burden of proof," and that Moore's counsel "vigorously contested the sexually violent predator petition" by drafting and arguing numerous pretrial motions, presenting evidence at trial, cross-examining the State's expert, and contesting the sufficiency of the State's evidence in closing argument. *Id.* at 7. The court also rejected Moore's ineffective assistance of counsel claim and his claim that assessments of dangerousness must be limited to the near future. *Id.* at 9-12.

### III. ARGUMENT

#### A. **The Trial Court Did Not Violate Moore's Right To Due Process By Accepting His Stipulation To Facts And Exhibits**

Without any citation to applicable authority, Moore argues that his due process rights were violated when the trial court accepted Moore's stipulation to facts and exhibits during his trial without providing an advisement of rights to ensure his waiver of those rights was knowing, intelligent, and voluntary. Pet. for Review at 7-13 (henceforth "Petition"). The Court of Appeals, however, correctly held that the stipulation to the trial court's consideration of certain agreed-upon exhibits constituted only a stipulation that the state's witnesses, if called, would testify "in accordance with the summary provided by the prosecutor." Slip Op. at 6. Because it was not "tantamount to a stipulation

to commitment,” the trial court was not required to provide an advisement and obtain a waiver from Moore. *Id.*

First, the record does not support Moore’s characterizations of his own mental condition. Moore refers to his “long term history of marginal competency to stand trial that ebbed and flowed on a weekly basis,” a previous finding of incompetence to stand trial (*Id.*), and testimony by Dr. Packard regarding Moore’s “grossly disorganized thought,” and “occasionally catatonic behavior.” Pet. at 9. As previously noted, however, Moore, although evaluated for competency on numerous occasions, has always ultimately been determined by the professional psychologists and psychiatrists at WSH staff to be competent, and he fails to cite to a single instance in which he was found, by the court, to be incompetent.<sup>7</sup>

Moreover, as correctly noted by the Court of Appeals, the relevant inquiry is into Moore’s state at the time of trial. Slip. Op. at 8, citing *State v. Modica*, 136 Wn. App. 434, 445, 149 P.3d 446 (2006). The SVP trial judge had made careful inquiry into Moore’s mental condition at the time of his competency hearing in September of 2002, at which he had appointed a standby GAL. RP 9/20/02. Dr. Packard interviewed Moore roughly six months later and testified at trial that Moore “seemed to understand and relate very well to the

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<sup>7</sup> Moore appears to refer to the 1991 proceeding based on the attack on Elaine Ann. While the State’s Motion to Dismiss the proceeding “in the interests of justice,” cited, *inter alia*, the trial court’s belief that Moore was not competent, this is not tantamount to a judicial finding of incompetence.

various tasks and questions that were asked of him.” RP 3/7/06 at 83. His “verbal skills, his ability to recognize and understand vocabulary, essentially, they’re actually pretty darn good. Within the average range.” *Id.* at 82. Nor did his assigned attorneys ever indicate in any way, after initially having brought their concerns regarding Moore’s competence to the attention of the trial court, that Moore was not competent to assist in his own defense. While it is clear that Moore has a history of mental illness, there is simply no evidence to support the inference that Moore was not competent at the time of trial, or in the years leading up to trial. Nor does Moore cite to any authority that, because of this history of mental illness, an entirely novel due process analysis and procedure should be created to ensure protection of his rights in this proceeding.

Secondly, Moore suggests that factual stipulation he entered into was the functional equivalent of a stipulation to commitment, and thereby triggered the due process requirement of an advisement and waiver of rights (“Moore essentially stipulated to the case against him.” Pet. at 11). The record, however, clearly demonstrates that a bench trial was held in this matter, that Moore was present for a significant portion of that trial, and that the stipulation amounted to no more than an agreement that certain evidence could be considered by the trial court. Moore’s counsel argued pre-trial motions, cross-examined the State’s expert witness, and presented closing argument in which she contended the evidence was not sufficient to find Moore met the criteria as an SVP. Most

importantly, the trial court retained the ultimate authority to determine whether the State had met its burden of proving beyond a reasonable doubt that Moore is an SVP.

This Court has made clear that a stipulated facts trial such as was held in this case is very different than a guilty plea, or its civil equivalent. Although there is no controlling appellate authority that directly addresses this issue in the context of civil commitment, analogous case law from the criminal arena demonstrates that Moore's due process claim is without merit. Moore correctly notes that, in criminal cases, procedural due process requires that, before accepting a guilty plea, a court must inform a defendant of certain constitutional rights that the defendant is waiving. *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709 (1969). This Court, however, has clearly held that, because a stipulated facts trial is "substantively different from a guilty plea proceeding" such advisement of rights is not constitutionally required in a trial on stipulated facts. *State v. Johnson*, 104 Wn.2d 338, 340, 705 P.2d 773 (1985). A guilty plea, the court noted, "is functionally and qualitatively different from a stipulation." A guilty plea, for example, "generally waives the right to appeal," (*Id.*, 104 Wn.2d at 341, citing *State v. Saylor*, 70 Wn.2d 7, 422 P.2d 477 (1966)) and, as noted by the Supreme Court, "is itself a conviction; nothing remains but to give judgment and determine punishment." *Boykin*, 395 U.S. at 242.

All of this, the *Johnson* Court noted, was very different than a stipulated

facts trial. Such a stipulation, the court wrote, “is only an admission that if the State’s witnesses were called, they would testify in accordance with the summary presented by the prosecutor. The trial court must make a determination of guilt or innocence.” *Johnson*, 104 Wn. 2d at 341 (citing *State v. Gossett*, 120 Ariz. 44, 583 P.2d 1364 (1978)). Finally, “a stipulation preserves legal issues for appeal and can operate to keep potentially prejudicial matters from the jury’s consideration.” *Id.*

As clearly illustrated by *Johnson*, the stipulated facts trial procedure used in this case was “functionally and qualitatively different from a stipulation.” 104 Wn. 2d at 341. The trial court retained the right to determine whether Moore met the criteria of an SVP. Moore’s attorney presented evidence on his behalf, cross-examined Dr. Packard, and argued in closing that the State had not met its burden because Dr. Packard’s diagnoses were inconsistent. Finally, Moore retained the right to appeal the trial court’s decision, which he has done. The procedure used was “functionally and qualitatively different from a stipulation,” and as such, due process did not require any advisements and waiver.

**B. Moore Received Effective Assistance Of Counsel.**

Moore argues that his counsel was ineffective because she did “not act as an advocate” by stipulating to certain facts and exhibits. Pet. at 13-19. This argument is without merit. Moore cannot show that his counsel’s performance

was unreasonable or that, had she acted otherwise, the result of the trial would have been different.

Moore claims that when the trial court rejected certain of his pre-trial motions relating to evidentiary matters, his counsel “ceased mounting any challenge to these allegations.” Pet. at 17. Again, this is simply untrue. Even after the trial court rejected Moore’s evidentiary motions, his counsel later reiterated to the court Moore’s continuing objection to the evidence at issue. RP 3/7/06 at 72-73. Counsel also argued vigorously for Moore’s theory of the case during her closing argument. RP 3/9/06 at 28-34.

In order to prevail on an ineffective assistance of counsel claim, the claimant must show that counsel's performance fell below an objective standard of reasonableness and that the deficient performance prejudiced the defendant, “i.e., that there is a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed.” *In re Detention of Stout*, 159 Wn.2d 357, 377, 150 P.3d 86 (2007). The proper measure of attorney performance is whether the actions by counsel were reasonable under prevailing professional norms. *In re Personal Restraint of Davis*, 152 Wn.2d 647, 714, 101 P.3d 1 (2004). The court will “strongly presume effective representation” and will not consider strategic or tactical decisions ineffective. *State v. McFarland*, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1995).

Moore argues that his counsel acted unreasonably because she did not

“act as an advocate.” Pet. at 14. As previously noted, this is not borne out by the undisputed factual record in the case; the decision to enter into a stipulated facts trial was a tactical decision by Moore’s counsel. “Exceptional deference” should be given to tactical decisions made by trial counsel in determining whether counsel’s assistance was unreasonable within the meaning of *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984); *State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002). The decisions of Moore’s counsel were sound and reasonable and, as a result, do not meet the first prong of the *Strickland* standard of ineffective assistance. *In re Detention of Strand*, 139 Wn.App. 904, 913, 162 P.3d 1195 (2007).<sup>8</sup>

Moore also fails to satisfy the second prong of the *Strickland* test: That, but for the alleged unreasonable conduct of counsel, he would not have been found to meet commitment criteria. The evidence against Moore was overwhelming and no reasonable argument can be made that Moore would not have been found to have met criteria had the parties not stipulated to the admission of certain exhibits. Moore argues that trial counsel should have cross-examined the various witnesses who established his prior acts of sexual violence to test their veracity or challenge their version of events, and by stipulating to the testimony, he was unable to cross-examine them. Pet. at 16.

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<sup>8</sup> Moore cites two cases in support of his ineffective assistance claim: *In re the Dependency of G.A.R.*, 137 Wn. App. 1, 150 P.3d 643 (2007) and *In re the Welfare of J.M.*, 130 Wn. App. 912, 125 P.3d 245 (2005). Pet. at 15-16. As noted in the State’s brief in the Court of Appeals, those cases are clearly distinguishable. Respondent’s Opening Brief at 24-27.

In light of the fact that Moore pled guilty to each of these offenses, and admitted to each of them in his interview with Dr. Packard, it is very difficult to see how this could possibly have made any difference in the outcome of the proceedings.<sup>9</sup> This is particularly true in view of the fact that, in SVP cases, the State is not required to prove the facts underlying a conviction of a sexually violent offense, rather, only the fact of a conviction. *In re Stout*, 159 Wn.2d at 367; *In re Young*, 122 Wn.2d 1, 54-55, 857 P.2d 989 (1993). Moore lost nothing by stipulating to the admissibility of the various legal documents establishing his convictions (Ex. 1, 2, 4, and 5); documents that would clearly have been admitted even over his objection. Likewise, Exhibit 6, a 61-page transcription of Dr. Packard's March 19, 2003 interview with Moore, would clearly have been admissible as Moore's own statements under ER 801(d)(2). Providing Dr. Packard as a live witness gave Moore's counsel ample opportunity to cross examine him on any concerns regarding that interview.

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<sup>9</sup> Moore admitted each of his previous offenses to Dr. Packard in his March 2003 interview. Regarding his 1985 rape of Petra S, Moore told Dr. Packard that he "wanted anal sex," but that, when he told her to bend over, my penis wouldn't go into her anus, [so] I put it in her vagina, instead." Ex. 6 at 6. Discussing his 1990 assault of Linda P, he stated that he "tried to force her to have sex" with him, "felt she owed [him] some sex," and that he had "pulled out two pencils that I earlier had taped together and then I told her to drop her pants and bend over, while I was holding the pencils." Ex. 6 at 7, 42. He told Dr. Packard that two guards had intervened and "stopped me from raping her." *Id.* See also 59. He told Dr. Packard that he had "tried to do something sexual to Elaine Ann in 1991, but that, rather than hitting her on the head with a broom as she had alleged, he had actually "plucked out some of her hair." *Id.* at 43. With regard to his 1995 assault on Cheryl S. at WCC, Moore told Dr. Packard that he wanted to have sex with Cheryl and that he had "mashed the front of myself against the back of her self," but indicated that "since she was wearing clothes, I feel it shouldn't be considered a sexual offense." *Id.* He also indicated that "a few times after and before the assault against Cheryl, "I did stuff like try to grab female staff members through food slots to try to force them to touch my, you know, private area." *Id.*

While the transcripts of prior sworn testimony of Dr. D. and three witnesses to Moore's assault on her (Exs. 7-10) may not have been independently admissible, the transcripts included cross examination of each witness by Moore's criminal attorney. Given the fact that Moore was acquitted of the charge of Indecent Liberties with Forcible Compulsion following that trial, it is fair to assume that Moore's counsel at the criminal proceeding performed ably and that little more could have been accomplished by Moore's SVP attorney's cross-examining those witnesses at the civil commitment trial. Finally, the parties stipulated to the trial court's consideration of reports by both experts, and their respective CVs. Exs. 11-15. In view of the fact that Dr. Packard testified and was subjected to vigorous cross examination by Moore's counsel, it is unlikely that the trial's outcome would have been different had the trial court not, in addition, considered his written report.

The procedure adopted by the parties also offered Moore distinct advantages. Moore's stipulation to facts and exhibits allowed Moore to cross-examine Dr. Packard, who also testified at trial, while at the same time preventing the State from doing the same with Moore's expert, who did not.<sup>10</sup>

In addition, by presenting an abbreviated version of Moore's prior offenses,

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<sup>10</sup> Moore was probably well-advised to protect Dr. Donaldson from the possibility of cross-examination by the prosecutor, in light of various remarks in his report. Moore, Dr. Donaldson observed, "does not have the foggiest notion about sex, and does not understand the difference between rape and sex." Ex. 14 at 10. Moore could be seen as "basically 'crazy,'" and "likely to commit a sex offense in the future." *Id.* at 10-11. He went on to comment that, "[g]iven his history and his current mental status, it seems impossible to reach any other conclusion." *Id.* at 11. The question, he noted, "will be whether he commits a nonsexual crime for which he is convicted before the opportunity for a sex offense occurs." *Id.*

Moore's counsel prevented live, in-court testimony from the victims in those crimes, testimony that is typically emotional, compelling, and benefits only the State. *See e.g., In re Young*, 122 Wn.2d at 53.

The evidence that Moore was a sexually violent predator was overwhelming. Stipulating to consideration of evidence did nothing to affect the ultimate outcome of the trial.

**C. The State's Failure To Specify A Time Period Within The Foreseeable Future When Predicting Future Dangerousness Did Not Violate Moore's Rights To Due Process**

Moore argues that to satisfy due process when the individual is incarcerated, the State has to prove that sexual re-offense is likely within the reasonably foreseeable future. Pet. at 19-20. This argument has been considered and rejected by both this Court and the Court of Appeals. In *In re Detention of Wright*, 138 Wn.App. 582, 155 P.3d 945 (2007), the Court of Appeals rejected the identical argument and in doing so based their analysis on *Young*. *Young*, the court noted, had argued in his Personal Restraint Petition, consolidated with this direct appeal, that the State should have to prove he was likely to commit another offense within a set time frame. *Wright*, 138 Wn. App. at 585. The *Wright* court noted that *Young*, without directly addressing the argument, rejected this proposition, citing the following language: "Finally, we have given ample consideration to all of the remaining arguments raised in the personal restraint petitions and on appeal, as well as those advanced by

amici, and conclude that they lack merit." *Wright* at 585, *citing Young* at 59.

As such, his argument is without merit and should be rejected.

#### IV. CONCLUSION

The State respectfully asks that this Court affirm the decision of the courts below committing Paul Moore as a sexually violent predator.

RESPECTFULLY SUBMITTED this 18<sup>th</sup> day of November, 2008.

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