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STATE OF WASHINGTON

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BY RONALD R. CARPENTER
IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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IN RE: THE DETENTION OF
DAVID MCCUISTION

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

PETITIONER'S ANSWER TO AMICUS FILED BY
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A. ARGUMENT.

1. THE CONSTITUTIONAL FLOOR
PERMITTING INDEFINITE CIVIL
COMMITMENT REMAINS PRESENT,
CONTINUING DANGEROUSNESS DUE TO
MENTAL ILLNESS

a. Indefinite civil commitment of a person is not akin to labeling a chemical as "dangerous." The Washington Association of Prosecuting Attorneys (WAPA) posits that civil commitment should be viewed like affixing a label of dangerousness on a chemical or other "item" and this label ought not be removed absent the most extreme caution and deference to the entity that first deems the item dangerous. WAPA, at 3. This painting of Mr. McCuiston's rights dovetails with its view that Mr. McCuiston has no fundamental interest in being at liberty and therefore, only rational basis review should occur. WAPA, at 5-6, 9, 12-14.

Unlike an "item" or a "virulent virus," Mr. McCuiston is a person who has due process rights. Holding a show cause hearing on annual review is not the equivalent of removing the label of hazardousness on a chemical. It is one small step in the process of securing a trial to decide the person's eligibility for continued commitment. Prevailing at the show cause stage merely enables a

person to have a trial, and before that trial, the State may independently evaluate the person with an expert of its choosing, depose the detainee by videotape, search the records of the individual's daily interactions at the SCC, and present all cumulated evidence it has at its disposal. See In re Det. of Young, 163 Wn.2d 684, 693, 185 P.3d 1180 (2008) (detainee awaiting new commitment trial must submit to state's evaluation and deposition or face contempt sanctions); RCW 71.09.090(3). The jury will learn of the individual's long-term civil commitment and will have to decide whether the person is safe to be at large. RCW 71.09.090(3). Even if released, a single threat of reoffense may cause a new commitment proceeding. See In re Detention of Post, 170 Wn.2d 302, 316, 241 P.3d 1234 (2010) ("a respondent in an SVP proceeding who is subsequently released could be subject to another SVP proceeding if he commits a recent overt act"). There are significant procedural hurdles to a committed person's ability to secure his liberty that are untouched by this Court's decision in In re Detention of McCuiston, 169 Wn.2d 633, 641-42, 283 P.3d 1147 (2010).

This Court has ruled on numerous occasions that due process requires the State to bear the burden at the review

hearing. In re Det. of Turay, 139 Wn.2d 379, 424, 986 P.2d 790 (1999) (“due process requires that the burden of proof remain upon the State in the show cause hearing.”); In re Det. of Petersen, 145 Wn.2d 789, 795-96, 42 P.3d 952 (2002) (“Both this Court’s opinions and those of the United States Supreme Court heavily favor placing the burden of proof on the State in former RCW 71.09.090(2) show cause hearings”); In re Det. of Young, 122 Wn.2d 1, 38, 857 P.2d 396 (1993) (“the Washington Statute makes proof of a *current* mental disorder a condition of commitment” and the statutory scheme thereby assures “incapacitation is more closely tailored to . . . the acquittee’s continuing dangerousness.” (emphasis in original)). The commitment scheme becomes unconstitutionally punitive if its conditions or duration do not bear reasonable relationship to the purpose for which the individual is committed. Selig v. Young, 530 U.S. 250, 265-67, 121 S.Ct. 727, (2001). Consequently, periodic review resting on the individual’s current mental state and continuing dangerousness is essential to the constitutionality of the continued confinement. See Petitioner’s Brief on Reconsideration, p. 3-4.

b. Statements by a prosecutor or legislative "findings" criticizing appellate decisions do not trump judicial review of constitutional questions. "[T]he testimony of an interested party in support of a bill is not suggestive of the legislature's intent in enacting the statute." State v. Tobin, 145 Wn.App. 607, 617, 187 P.3d 780 (2008), aff'd on other grounds, 169 Wn.2d 396, 239 P.3d 544 (2010); see Wilmot v. Kaiser Alum. & Chem. Corp., 118 Wn.2d 46, 64, 821 P.2d 13 (1991) ("testimony before a legislative committee is given little weight"). WAPA insists that testimony presented in favor of the 2005 amendments to RCW 71.09.090 proves that the legislature enacted the changes to stop "paid defense experts" from subverting the system of annual review. WAPA, at 7-8. This testimony occurred at a committee hearing. Id. at 7 n.4 & n.5.¹ Testimony at a committee hearing does not establish the intent of the Legislature. Tobin, 145 Wn.App. at 617.

¹ The people who testified at the committee hearings are essentially the parties to this case: a representative from the SCC, which submitted an amicus motion; assistant attorney general Todd Bowers, who represents the State in this case; prosecutor David Hackett, who authored WAPA's amicus brief and King County's amicus motion; and a two trial attorneys from the public defender agencies who filed an amicus brief in this case. See Bill Reports, SB 5582, available at: <http://search.leg.wa.gov/advanced/3.0/main.asp> (last viewed May 3, 2011).

WAPA's claim that this Court must defer to committee testimony turns judicial review on its head. It makes the Court's assessment of the statute subservient to the opinions of the lawyers arguing this case.

WAPA cites Turner Broadcasting System v. F.C.C., 520 U.S. 180, 196, 117 S.Ct 1174, 137 L.Ed.2d 369 (1997), for the proposition that the Court is required to defer to legislative findings. But the findings to which Turner referred were Congress's ability to amass and sort vast data. Id. at 195. Congress had "three years of preenactment hearings" and after a prior remand, the trial court "oversaw another 18 months of factual development" on remand, "yielding a record of tens of thousands of pages of evidence," pertaining to the regulations on cable television at issue in that case. Id. at 195.

The power of the legislature does not extend to altering the constitutional rights of an individual even if the legislature finds it is more expedient to reduce a person's due process rights. See State ex. rel. Peninsula Neighborhood Ass'n v. Washington State Dep't of Transp., 142 Wn.2d 328, 335, 12 P.3d 134 (2000) ("ultimately, the judiciary decides whether a given statute is within the Legislature's power to enact or whether it violates a constitutional mandate."); see also United States v. Morrison, 529 U.S. 598, 607, 120 S.Ct. 1740, 146 L.Ed.2d 658 (2000) ("The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written,"

quoting Marbury v. Madison, 1 Cranch. 137, 176, 2 L.Ed. 60 (1803)). Even though this Court presumes the legislature intends to enact constitutional statutes, the legislature's pronouncements do not substitute for judicial review.

The "findings" of the legislature to which WAPA wants deference are not the legislature's assessment of data based on detailed research, as in Turner. The "findings" are a statement of opinion that the Court of Appeals was wrong when it construed the prior version of the statute. Laws 2005, ch. 344 §1. The "findings" are nothing more than a legal disagreement with the appellate courts.² The "findings" also explain that the legislature wants to restrict the type of information a court may consider without regard to the scientific validity of the information. These are certainly not the type of findings that bind the Court when determining the constitutionality of the statute.

As explained in Mr. McCuiston's supplemental brief, the separation of powers doctrine bars the legislature from making or changing judicial determinations. Tacoma v. O'Brien, 85 Wn.2d 266, 272-73, 534 P.2d 114 (1975) (courts "carefully preserve[]

² In re Det. of Young, 120 Wn.App. 753, 755, 86 P.3d 810, rev. denied, 153 Wn.2d 1035 (2004); and In re Det. Of Ward, 125 Wn.App. 381, 383, 104 P.3d 747 (2005).

judicial functions from legislative encroachment”). The “effect of a judicial interpretation of the constitution may not be modified or impaired in any way by the legislature.” Seattle Sch. Dist. No. 1 v. State, 90 Wn.2d 476, 496, 585 P.2d 71 (1978). The legislature amended the annual review statute to restrict the type of evidence a court may consider in finding a detainee entitled to a review trial, in a transparent effort to circumvent the constitutional standards outlined in Young and Ward. Laws 2005, ch. 344 §1. This legislation did not merely clarify statutory definitions. Instead, it barred the court from considering otherwise reliable, admissible, scientifically valid evidence casting doubt on the legality of continued commitment. Because RCW 71.09.090(4)(b) (2005) prohibited a court from ordering a new trial even when the petitioner did not meet the criteria for confinement, the legislation contradicts the judiciary’s interpretation of the constitutional requirements for a detainee to petition for release, violates the separation of powers, and denies the detained individual his right to be free from confinement when he no longer meets the criteria for confinement.

c. The statute is strictly construed. WAPA criticizes the McCuistion decision for confusing the principles of statutory

construction. WAPA, at 19 n.13. However, “statutes that involve the deprivation of liberty must be strictly construed.” In re Det. of Hawkins, 169 Wn.2d 796, 801, 238 P.3d 1175 (2010).

Strict construction requires that, “given a choice between a narrow, restrictive construction and a broad, more liberal interpretation, we must choose the first option.” As civil commitment is a “massive curtailment of liberty,” we must narrowly construe the present statute [RCW 71.09.040(3)].

Id. (internal citations omitted); see Post, 170 Wn.2d at 312 (“our duty to strictly construe statutes involving deprivations of liberty.”).

As part of WAPA’s desperate efforts to convince the Court to defer to the legislature, it discourages the Court from strictly construing the statute, claiming principles of lenity do not apply. WAPA, at 19 n.13. The statute must be narrowly construed as well as narrowly tailored. Young, 122 Wn.2d at 38.

2. THE RIGHT TO PERIODIC REVIEW IS NOT AN INSIGNIFICANT PART OF THE STATUTE THAT NEED NOT BE NARROWLY TAILORED TO THE CONSTITUTIONALITY OF CONTINUED CONFINEMENT

Making liberal use of hyperbole, WAPA asserts that this Court’s review of the statutory scheme is limited by Young, and the McCuiston decision errs by parsing the “constituent parts” of the statute to demand narrow tailoring at every turn.

Under a strict scrutiny analysis, the statute in dispute has to both serve a compelling state interest and be narrowly drawn. Young, 122 Wn.2d at 26. WAPA reads Young with one eye closed. It contends that Young holds that strict scrutiny “applies only ‘to the statute as a whole,’ not to its constituent parts.” WAPA, at 15, 16 (citing Young, 122 Wn.2d at 26). But the quoted portion of Young is an introduction, rather than a holding, where the court says, “Applying the strict scrutiny test to the Statute as a whole,” 122 Wn.2d at 26. The Young Court continued by explaining that given the State’s compelling interest embodied in the civil commitment scheme, “[a]ny criticism of the Statute, then, would have to be based on the requirement that it be narrowly drawn.” Id.

The issue in Young was the “propriety of the statutory scheme,” at a time when the statute was newly enacted and the issue was “a matter of first impression.” Id. at 25. The court’s attention was focused on the scheme as a whole because that was the issue in the case, not because a lesser type of review would be required when assessing the constitutionality of an aspect of the statute, as opposed to the statute as a whole. Young did not eradicate the requirement that the State must effectuate its interest in protecting the public from presently dangerous and mentally ill

offenders by narrowly tailored procedures. On the contrary, Young held that the statute must be narrowly drawn. Id. at 26. WAPA's reading of Young is illusory.

WAPA also outlandishly claims that McCuiestion renders it impossible to draft a workable statute by insisting that "every decision-point" mandates "perfection of the least infringement on individual liberty." WAPA, at 17. Unsurprisingly, WAPA offers no citation to what portion of McCuiestion constitutes this remarkable encroachment. WAPA, at 15-19. The lack of citation to the actual McCuiestion decision illustrates the hyperbole at the root of WAPA's criticism of the ruling in McCuiestion.

3. COLLATERAL ESTOPPEL DOES NOT
FINALLY DETERMINE WHETHER A
PERSON'S TOTAL CONFINEMENT
REMAINS CONSTITUTIONAL

WAPA asserts that once committed, that commitment order constitutes a final judgment of a person's dangerousness due to a mental illness that must be treated as having preclusive effect, and therefore treatment completion or incapacitation should be the only way a detainee may proceed beyond a show cause hearing. But making continued treatment success or physical incapacity the only means to challenge the commitment order leaves no room for the

possibility of misdiagnosis or corrected diagnostics. It ignores the potential for changes in the scientific assessment of dangerousness, improvements in predictions of future behavior, advances in medications to treat disorders, or new understandings of neurological causes of prior behavior.

WAPA argues that the detainee may challenge his commitment only if he proves the "fact" that he successfully completed the State's treatment program, as opposed to offering an opinion from a qualified expert. WAPA, at 13 n.10. This insistence on "facts" is both misplaced and one-sided. An expert's opinion that a person is presently dangerous due to a mental illness is central to the determination that a person may be committed. McCouston, 169 Wn.2d at 643 n.4; In re Detention of Thorell, 149 Wn.2d 724, 758, 72 P.3d 708 (2003) ("expert predictions of future violence [are] 'central to the ultimate question here: whether petitioners suffer from a mental abnormality or personality disorder.'" (citing Young, 122 Wn.2d at 58)).

Additionally, if the State's expert opines a person no longer meets the criteria for commitment, the State may ask for a new commitment trial, according to the State's Supplemental Brief, at

13-14.³ But WAPA insists that a different standard applies to the committed individual if he wishes a trial on whether he continues to meet the criteria for commitment. It is not rational, fair, or consistent with the tremendous curtailment of liberty at stake to bar a person from obtaining full periodic review based on narrow evidentiary requirements that are unmoored from the constitutional limitations on civil commitment.

Civil commitment is a massive curtailment of the fundamental right to liberty protected by the right to due process of law. Thorell, 149 Wn.2d at 731 (“Freedom from bodily restraint has always been at the core of the liberty interest protected by the due process clause of the fourteenth amendment to the United States Constitution.”); see Youngberg v. Romeo, 457 U.S. 307, 316, 102 S.Ct. 2452, 73 L.Ed.2d 28 (1982) (a person’s protected liberty right “survives criminal conviction and incarceration. Similarly, it must also survive involuntary commitment.”).

Commitment for any reason constitutes a significant deprivation of liberty triggering due process protection. Foucha v.

³ As explained in McCulstion’s brief on reconsideration, pages 10-14, the State misreads the requirements imposed by RCW 71.09.090. The statute bars the court from holding any new commitment trial, at any party’s request, unless the change prompting the new trial arises from continued treatment success or physical incapacity. RCW 71.09.090(4)(b).

Louisiana, 504 U.S. 71, 80, 112 S. Ct. 1780, 1785, 118 L. Ed. 2d 434 (1992); Vitek v. Jones, 445 U.S. 480, 492, 100 S.Ct. 1254, 63 L.Ed.2d 552 (1980) (“The loss of liberty produced by an involuntary commitment is more than a loss of freedom from confinement.”).

Due process requires state laws impinging on the fundamental right to liberty must advance compelling state interests and be “narrowly drawn to serve those interests.” Young, 122 Wn.2d at 26; see Washington v. Glucksberg, 521 U.S. 702, 719-20, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997) (recognizing that, “[t]he Due Process Clause guarantees more than fair process, and the “liberty” it protects includes more than the absence of physical restraint. The Clause also provides heightened protection against government interference with certain fundamental rights and liberty interests.” (internal citations omitted)). WAPA’s efforts to minimize the rights at stake, overstate the importance of testimony before the legislature, and distort the holdings of this Court’s prior cases should be disregarded and this Court should adhere to the decision it previously entered.

B. CONCLUSION.

David McCuiston respectfully asks this Court to deny
WAPA's challenges to this Court's decision in McCuiston.

DATED this 4th day of May 2011.

Respectfully submitted,



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