

Supreme Court No. 81644-1
(COA No. 35805-1-II)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IN RE: DETENTION OF DAVID MCCUISTION

STATE OF WASHINGTON,

Respondent,

v.

DAVID MCCUISTION,

Petitioner.

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

MOTION FOR DISCRETIONARY REVIEW

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A. IDENTITY OF PETITIONER

David McCuiston, petitioner here and below, asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition pursuant to RAP 13.3(d); RAP 13.4(b); and RAP 13.5(a).

B. COURT OF APPEALS DECISION

Mr. McCuiston seeks review of the Court of Appeals' decision dated April 26, 2007, denying his motion to modify the Commissioner's ruling denying discretionary review. The Commissioner's ruling is attached as Appendix A and the Court of Appeals ruling is attached as Appendix B.

C. ISSUES PRESENTED FOR REVIEW

1. It is unconstitutional to civilly confine a person where the person is not presently mentally ill and dangerous based on that mental illness. Do the 2005 amendments to RCW 71.09.090, restricting a confined individual's right to release even if he or she no longer meets the criteria for commitment violate the right to due process of law under the state and federal constitutions?

2. This Court has been presented with issues involving constitutional inadequacies of 2005 amendments to RCW 71.09.090 in several recent cases but has reversed those cases on

other grounds. Where the constitutional question is squarely presented in the case at bar, is there substantial public interest in accepting review to resolve ongoing disputes as to the constitutionality of efforts to narrow an SVP petitioner's right to obtain a re-commitment hearing based on evidence he no longer meets the criteria for commitment.

3. The legislature violates the separation of powers by dictating that a person limiting a person's right to seek redress in violation of the constitution. Do the 2005 amendments to RCW 71.09.090 violate the doctrine of separation of powers?

4. Did the trial court probably err in deny Mr. McCuiston a new hearing when it impermissibly weighed the evidence rather than determine probable cause and when Mr. McCuiston presented competent evidence that he no longer met the criteria for indefinite civil commitment?

5. Is remand required under Elmore when Mr. McCuiston's right to a hearing arose prior to the statutory amendments to RCW 71.09.090 and under the version of the statute in effect at the time his right to a hearing arose, he established probable cause for a new commitment trial.

D. STATEMENT OF THE CASE

The State confined David McCuiston at the Special Commitment Center in October 1998, and after a number of delays related to litigation, he was ordered to serve an indefinite confinement under the SVP statute. CP 584 (Order on Show Cause Hearing). In 2006, the court held an annual review hearing for the consolidated periods of 2004-2006. CP 585.

The State submitted psychologists' evaluations in support of Mr. McCuiston's continued total confinement. CP 5-30 (Report by Carole DeMarco); CP 48-80 (Report by Carla van Dam); CP 491-538; 11/27/06RP 15.¹ The State's psychologists stated that Mr. McCuiston continued to meet the criteria for commitment, on the grounds that the conditions still existed to find he had a mental disorder, risk assessment tests would show he presented a likelihood of reoffending, and his criminal history alone would make reoffending likely. 11/27/06RP 4; CP 18-25; CP 66-71.

Mr. McCuiston offered an evaluation by psychiatrist Lee Coleman, a professionally qualified psychiatrist familiar with the statutory requirements of SVP commitment in Washington. CP 585, 616-17. Dr. Coleman disputed the diagnosis of Mr.

¹ The verbatim report of proceedings ("RP") consists of one volume of transcripts that will be referred to herein by the date of the proceeding followed by the page number.

McCuistion rendered by the State's psychologists and contended those evaluations involved flawed applications of the standard diagnostic manual. CP 617-24. Dr. Coleman stated that Mr. McCuistion's criminal history did not establish a diagnosable mental disorder and found no evidence that Mr. McCuistion lacked control over his behavior due to a cognitive or acquired condition. CP 618-24.

Mr. McCuistion also presented evidence supporting a long history of good behavior while at SCC. CP 638-49 (attachments C-F). He supplied the court with evidence that a number of SVP detainees engage in inappropriate behavior while confined, in an effort to dispute the State's claim that Mr. McCuistion had no opportunity to misbehave while in confinement that his recent good behavior was irrelevant. CP 585, 595-96. Four long-time supervisors at SCC filed affidavits on Mr. McCuistion's behalf, stating that they were familiar with Mr. McCuistion personally and with his SCC file and knew of no violent, assaultive, or sexual misbehavior that he had committed. CP 638-4. They further attested to his responsible behavior throughout the years they knew him at SCC. CP 638-49.

After considering the written motions and attachments presented, the trial court denied Mr. McCuistion's request for a

hearing on his continued confinement. CP 585-86. The court reasoned that Mr. McCuiston had not proven that Dr. Coleman's opinion was the correct one and had not sufficiently rebutted the State's evidence. CP 585-86.

The Commissioner rejected Mr. McCuiston's appeal without addressing his constitutional and statutory challenges to his continued confinement without a further commitment proceeding. The Court of Appeals denied the motion to modify without comment.

The pertinent facts are discussed in further detail throughout Petitioner's Opening Brief and Reply, and are set forth in the Commissioner's Ruling, p. 1-4. The facts as stated in these pleadings are incorporated herein by this reference.

E. ARGUMENT

1. THIS CASE RAISED SIGNIFANT QUESTIONS OF THE CONSTITUTIONALITY OF THE CHANGES TO THE SHOW CAUSE HEARING RULES THAT THIS COURT HAS NOTED BUT NOT REACHED IN *FOX*, *ELMORE*, AND *AMBROSE*

a. Review should be granted based on the issues of substantial public importance. This Court was presented with cases challenging the constitutionality of changes to RCW 71.09.090, the procedural requirements for gaining a recommitment trial following indefinite confined as an SVP. In re:

Detention of Elmore, 162 Wn.2d 27, 168 P.3d 1285 (2007); In re Detention of Ambers, 160 Wn.2d 543, 553 n.4, 158 P.3d 1144 (2007). But this Court did not need to reach the constitutional questions in those cases because they were decided, and reversed, on other grounds. This case presents an appropriate vehicle for addressing and resolving the important and unanswered question as to whether the legislative changes to RCW 71.09.090 comport with due process as required by the Fourteenth Amendment and Article I, section 3.

The ruling below relied entirely on a Court of Appeals decision in In re Detention of Fox, 138 Wn.App. 374, 158 P.3d 69 (2007), rev. granted and remanded, 162 P.3d 1019 (2008)² even though the court knew that the consolidated cases in Fox had been remanded by this Court for further consideration. Ruling, at 6; Motion to Modify, p. 4-5. Not only does Fox lack precedential value, Fox was decided without the benefit of this Court's more recent decisions in Elmore, and Ambrose.

² On February 5, 2008, this Court issued the following ruling for the consolidated cases in Fox, in pertinent part:

The Petitions for Review filed in Jones and Fox are granted and remanded to the Court of Appeals for consideration in light of In re Detention of Elmore, 162 Wn.2d 27 (2007). The State's motion to withdraw its Petition for Review in the Jacka case is granted. The State's motions in the Jones and Fox cases to grant review and immediately remand directly to the trial court for evidentiary hearings are denied. The State's motion for a stay in the Jones' case is denied as moot. available at: http://www.courts.wa.gov/appellate_trial_courts/supreme/.

In Ambers, this Court indicated it would be unconstitutional to impose more stringent standard for release at annual review hearing than for original confinement. 160 Wn.2d at 553 n.4. The ruling noted that under any statutory scheme, “once the original basis for the detainee’s commitment no longer existed, continuing confinement would be unconstitutional.” Id., citing O’Connor v. Donaldson, 422 U.S. 563, 574-75, 95 S.Ct 2486, 45 L.Ed.2d 396 (1975.). The Ambers Court did not need to resolve whether it would be unconstitutional to strictly limit the type of evidence a person could use to convince the court that he or she did not meet the criteria for commitment. However, the Court emphasized that a person must merely show that he or she no longer meets the definition of an SVP in order to obtain further review of the commitment order. Id. The Ambers Court’s interpretation of the evidentiary requirements in a show cause hearing under the 2005 amendments to RCW 71.09.090 is directly contrary to Fox and thus undermines the validity of the reasoning by the two-judge majority in Fox.

The Elmore Court cast further doubt on the merits of relying on the decision in Fox. Again issuing a ruling contrary to Fox, the Supreme Court in Elmore found that the 2005 amendments to RCW 71.09.090 may not be imposed retroactively. Compare,

Elmore, 162 Wn.2d at 36 (“we hold that the 2005 amendment is neither curative nor remedial because it changed the construction of the law as set forth in Young and contained an emergency clause. We therefore do not apply the amendment retroactively.”); with Fox, 138 Wn.App. at 391, 393 (finding legislature intended “amendment would take effect immediately” and “Fox had no vested right to an SVP recommitment trial applying the pre-2005-amendment criteria.”). The Supreme Court in Elmore declined to address the constitutional challenges to the 2005 amendments because it ruled that those amendments did not apply to Elmore. 162 Wn.2d at 36 n.8.

In sum, since Fox was decided, the Supreme Court has called it into question and written a directly contrary decision. Yet the Court of Appeals relies on Fox as mandatory authority, summarily rejected Mr. McCuiston’s constitutional claims because “this court recently considered and rejected these arguments in In re Detention of Fox.” Ruling at 6 (citation omitted). The Commissioner’s ruling neither analyzes the constitutional claims nor acknowledges the dubious value of Fox as precedent.

Mr. McCuiston raised arguments similar to those raised in Fox, and endorsed by Judge Armstrong’s dissenting opinion. These issues should be revisited in light of the reversal and

remand order granted in Fox, and the Supreme Court's decisions in Ambers and Elmore.

b. The probable unconstitutionality of the statute creates a need for discretionary review. It violates due process to continue to confine a person who is mentally ill but not dangerous to himself or others. O'Connor, 422 U.S. at 574-75. Therefore, "even if [Mr. McCuistion's] confinement was initially permissible, it could not constitutionally continue after that basis no longer existed." Id.; see also Kansas v. Hendricks, 521 U.S. 346, 364, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997) (upholding sexual offender civil commitment because "Kansas does not intend an individual committed pursuant to the Act to remain confined any longer than he suffers from a mental abnormality rendering him unable to control his dangerousness."); Ambers, 160 Wn.2d at 553 n.4 (may be unconstitutional to impose more stringent standard for release at annual review hearing than for original confinement).

While the fact of the initial commitment may allow a court to infer basis of the commitment continues, "that inference does not last indefinitely." State v. Sommerville, 86 Wn.App. 700, 709, 937 P.2d 1317 (1997). Without evidence of a current mental illness, commitment simply may not continue. Id. at 710-11.

In 2005, the Washington Legislature amended the statute

providing the procedures for annual review given to all people committed under the SVP laws who request such review. RCW 71.09.090; 2005 Laws ch. 344 (Senate Bill 5882) (full text attached as Appendix A to Petitioner's Opening Brief); In re Detention of Petersen, 145 Wn.2d 789, 798-99, 42 P.3d 952 (2002).

However due process and RCW 71.09.070, require periodic assessments to determine whether the person currently meets the criteria for commitment, regardless of the reason for the current assessment. See In re Detention of Young, 120 Wn.App. 753, 763, 86 P.3d 810, rev. denied, 152 Wn.2d 1035 (2004) ("Because current risk assessment techniques suggest Young is not an SVP, denying him a hearing at this point raises due process concerns."); In re Detention of Ward, 125 Wn.App. 381, 386, 104 P.3d 747, rev. denied, 155 Wn.2d 1025 (2005) ("If a detainee provides new evidence establishing probable cause that he is not currently a sexually violent predator, due process requires a trial on the merits . . .").³ If the detainee can present *prima facie* evidence that scientific literature shows that he is not a sexually violent predator, then a trial on that issue must be ordered.

³ The Supreme Court in Ambers "declined" to address the constitutional issues underlying the necessary showing for obtaining an AVP release hearing, because it decided the case on other grounds. 160 Wn.2d 553 n.4, 555 n.7. However, the Court noted it may be unconstitutional to apply a more stringent standard in an annual review hearing than the initial criteria for SVP commitment. Id.

The present version of RCW 71.09.090 limits the type of evidence that may be used to demonstrate a person is entitled to a release hearing. RCW 71.09.090(4)(b) provides that a court may order a new trial proceeding only when there is current evidence from a licensed professional of one of the following and the evidence presents a change in condition since the person's last commitment trial proceeding:

(i) An identified physiological change to the person, such as paralysis, stroke, or dementia, that renders the committed person unable to commit a sexually violent act and this change is permanent; or

(ii) A change in the person's mental condition brought about through positive response to continuing participation in treatment which indicates that the person meets the standard for conditional release to a less restrictive alternative or that the person would be safe to be at large if unconditionally released from commitment.

RCW 71.09.090(4)(b).

In the case at bar, the State alleged that the 2005 amendments to the annual review hearing statute, RCW 71.09.090, strictly prohibit an individual's right to a release hearing unless the person shows a specific physical incapacity or proves that participation in treatment has caused the person to no longer be mentally disordered or dangerous to others. CP 493-97 (State's Response to Memorandum Regarding Annual Review).

The Ambers Court ruled that a person must merely show that he or she no longer meets the definition of an SVP in order to obtain further review of the commitment order. 160 Wn.2d at 552-57 (determining that issue at annual review hearing remains whether petitioner “meets the definition of an SVP”).

In the now-reversed Fox, a two-judge majority rejected several constitutional challenges to the 2005 amendments to RCW 71.09.090. 138 Wn.App. at 393-402. The majority in Fox ruled that a person may still seek and obtain release by showing he or she is no longer a danger to society or has completed behavioral treatment, so long as that finding is not based on a single demographic factor, thereby complying with due process requirements. 138 Wn.App. at 399.

Judge Armstrong wrote a sharp dissent in Fox. Judge Armstrong argued that it violates the right to due process of law to limit a person’s ability to obtain a release hearing when that person is not dangerous or mentally disordered as required by the initial commitment procedure. 138 Wn.App. at 407-08 (Armstrong, J. dissenting). The 2005 amendments to RCW 71.09.090 bar a person from making a *prima facie* case he or she is entitled to release based on certain evidence. Id. at 407. Yet a person may be able to show he or she has lost desire or interest in violent

sexual acts, or has attained a significant measure of control over those receding impulses, even if he or she has not suffered paralysis or has not made significant gains in the State's treatment program. Id. at 407-08. By denying a release hearing even if the person no longer meets the basic dangerous or mentally ill requirements of a civil commitment, the statute violates due process. Id.

Mr. McCuiston was denied due process and equal protection of the laws when the superior court denied him an evidentiary hearing and summarily dismissed his petition when he presented evidence that he did not currently have a mental disorder and was able to control sexually violent his behavior. The statutory framework that bars a court from ordering a new hearing unless the petition for release is based on treatment success or physical incapacity violates the fundamental rights to due process and equal protection of the laws.

c. The evidentiary limits in the amended statute violates the separation of powers. The judicial power of the state is vested in the Supreme Court, and other authorized courts, by the Washington Constitution. Wash. Const. Article IV; section 1; State v. Fields, 85 Wn.2d 126, 129, 530 P.2d 284 (1985). The Supreme Court has authority to dictate court procedures pursuant to this

constitutional provision, as well as under RCW 2.04.190, which states that the Supreme Court has authority to prescribe the mode and manner of taking and obtaining evidence. See State v. Ryan, 103 Wn.2d 165, 178, 691 P.2d 197 (1984) (court rule supercedes procedural statute).

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[] judicial functions from legislative encroachment”). The Legislature may not enact statutes that threaten the independence of the judiciary. Fox, 138 Wn.App. at 393.

RCW 71.09.090 not only sets forth the procedures to be used when an SVP detainee asks for an evidentiary hearing to determine the legality of the continuing detention, but also limits the type of evidence a person may offer to show he or she deserves a hearing, even when that evidence would show the person does not meet the constitutional criteria for lawful civil commitment. These same restrictions are not in place at an initial SVP commitment trial.

The Fox Court found that the legislature has the prerogative “to clarify the definition of when a committed SVP’s mental or physical condition has substantially changed such that he or she is

no longer a danger to the community and may be released.” 138 Wn.App. at 394. However, this legislation not only clarifies the statutory definitions, it intrudes upon the province of the fact-finder and bars the correct from considering otherwise reliable, admissible, scientifically valid evidence that would cast doubt on the legality of continued commitment. It infringes upon the court’s authority to weigh evidence and prohibits the court from considering a valid expert opinion as to whether a person is dangerous. RCW 71.09.090 strips the judiciary of its independence, invades the province of the fact-finder in weighing admissible evidence, and violates the principle of separation of powers.

d. The decision of the trial court was erroneous and requires review. Under the governing probable cause standard, the trial court does not weigh evidence when considering whether there is some evidence supporting the petitioner’s release from total confinement. RCW 71.09.090(2); Petersen, 145 Wn.2d at 797.

Yet in the case at bar, the trial court refused Mr. McCuiston a new hearing on the grounds that he had not proven that Dr. Coleman’s opinion that Mr. McCuiston did not suffer from a mental abnormality, was necessarily “the correct one [opinion].” CP 580 (Finding of Fact 6). In reference to evidence indicating Mr.

McCuistion's lack of present risk of dangerousness, the court complained that Mr. McCuistion had not presented "persuasive evidence that would compel a finding that a further hearing is required . . ." regarding whether Mr. McCuistion may be indefinitely confined. CP 580 (Finding of Fact 8).

These findings demonstrate the trial court denied Mr. McCuistion's petition based on an incorrect application of the law. Mr. McCuistion did not need to convince the court that Dr. Coleman's opinion was the correct one, or even that it was as equally credible as the opinions offered by the State. As in Young, Mr. McCuistion simply bore the burden of presenting some evidence, if believed, that would show he did not meet the criteria for SVP commitment. 120 Wn.App. at 759. "The State will have an opportunity to challenge Dr. [Coleman's] opinion, and a trier of fact will have the opportunity to weigh his opinion against the State's evidence in a proper venue--a new commitment hearing." Id. at 760. The court's comments indicate it weighed the evidence, rather than determining whether Mr. McCuistion offered a *prima facie* case. Id.

Mr. McCuistion offered evidence indicating he had gained substantial control over his behavior while at SCC, while many other people similarly routinely engaged in misbehavior. The court

found this evidence “relevant” and “pertinent to the issues before this Court.” CP 580 (Finding of Fact 8). Yet the court concluded that those materials were not “persuasive evidence that would compel” an additional hearing, instead of asking whether there was some evidence, if believed, that would serve as grounds for release, the court misapplied the pertinent legal threshold. Young, 120 Wn.App. at 759.

The court’s role was not to weigh evidence or seek persuasive proof that Mr. McCuiston must be released, but to determine whether the evidence presented, if believed, would present grounds to release from total confinement. Mr. McCuiston did not need to “rebut” the State’s evidence, but rather offer information that, if believed, would warrant a new hearing. CP 585.

The court’s failure to afford Mr. McCuiston a new hearing when there was some evidence indicating that Mr. McCuiston no longer met the criteria for commitment must be reversed.

Mr. McCuiston presented an expert’s evaluation stating that he did not meet the criteria for commitment as he did not suffer from a mental disorder. Dr. Coleman disputed the State’s experts’ opinions that he suffered from a mental disorder. He contradicted the State psychologists’ evaluations which repeated his criminal history and found that based upon that history alone, he

necessarily met the criteria for indefinite commitment. Dr. Coleman argued that these diagnoses are flawed and not scientifically supported. The trial court did not dispute Dr. Coleman's credentials or qualifications to state such an opinion, but found that Mr. McCuiston had not proven Dr. Coleman's opinion was the correct one. CP 580.

The court misapplied the probable cause standard required at the show cause hearing. Based upon the diagnostic evidence presented from a license professional as well as the evidence of his good behavior and high regard in which he is held by the staff members who interact with him on a regular basis, Mr. McCuiston presented probable cause that he no longer suffers from a mental abnormality or personality disorder that renders him unable to control his ability to refrain from committing sexually violent acts in the future.

2. THE TRIAL COURT USED THE INCORRECT STATUTORY STANDARD FOR THE PRE-2005 HEARING.

In Elmore, the Supreme Court found that 2005 statutory amendments to RCW 71.09.090 amounted to a substantive change in the burden for which an SVP detainee must meet before he may have a recommitment trial. 162 Wn.2d at 36. The Court found these statutory changes are not retroactive and hearings that

involve show cause applications from before the statute changed must be conducted under the pre-2005 version of the statute. Id.

In the consolidated cases in Fox, Mr. Fox appealed from a show cause hearing held in March 2005; Mr. Jones's hearing was held in June 2005; Mr. Jacka's annual review report was filed in January 2005 but the hearing was not conducted until March 2006. 138 Wn.App. at 382, 384, 386. The Legislature amended RCW 71.09.090 effective May 9, 2005. This Court recently accepted the State's concession that the pre-2005 version of the statute should apply to each of the detainee's show cause hearings and ordered the Court of Appeals to decide whether each of the petitioners in Fox should have been accorded new trials based on the pre-2005 standard of review. See supra, n.1.

The same analysis applies here. Mr. McCuiston sought annual review in 2004. Due to delays, he did not obtain his hearing until 2006, and at that time agreed to consolidate the annual review hearings from 2004-2006 as a matter of administrative convenience. However, the version of the statute in effect before May 2005 must be the standard of review used for Mr. McCuiston's annual review hearing since he sought annual review in 2004, before the statutory change. Under the pre-2005 statute, he should receive a new commitment trial based on the expert and factual

evidence he presented which cannot be weighed by the court.

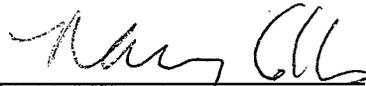
Elmore, 162 Wn.2d at 36.

F. CONCLUSION

For the reasons stated above, this Court should accept review under RAP 13.5 and RAP 13.4(b)(2), (3) and (4).

Dated this 27th day of May 2008.

Respectfully submitted,



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APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

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STATE OF WASHINGTON,

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DAVID W. McCUISTION,

Petitioner.

No. 35805-1-II

RULING DENYING REVIEW

David McCuiston seeks discretionary review of the trial court's order that continued his civil commitment as a sexually violent predator (SVP). McCuiston argues that the statute governing reviews of a SVP's commitment, RCW 71.09.090, violates due process and the separation of powers. He also argues that the trial court obviously or probably erred in denying his motion for an evidentiary hearing because he presented sufficient evidence that he no longer met the definition of a SVP. Concluding that RCW 71.09.090 is constitutional and that McCuiston fails to demonstrate either obvious or probable error, this court denies review.

In 1993, McCuiston pleaded guilty to one count each of third degree rape and third degree assault. The trial court sentenced him to 90 months of incarceration. In October 1998, while he was still incarcerated, the State petitioned to commit McCuiston as a SVP. The court found probable cause and

ordered that McCuiston be held at the Special Commitment Center (SCC). On October 3, 2003, the trial court found that McCuiston met the criteria for a SVP and committed him indefinitely to the SCC. He appealed that judgment; this court affirmed it in an unpublished opinion.¹

In October 2004, Dr. Carole DeMarco completed an annual review to determine whether McCuiston continued to meet the definition of a SVP. McCuiston did not complete his interview with her. As a result, Dr. DeMarco relied on material contained in McCuiston's initial civil commitment evaluation, a December 1998 annual review, and his SCC clinical records. McCuiston was initially diagnosed with Paraphilia, Not Otherwise Specified (NOS) in 1995. Two additional psychological evaluations confirmed that diagnosis in 1998. In her report, Dr. DeMarco noted that McCuiston had not participated in sexual deviancy treatment while he was incarcerated. Nor had he participated in any treatment during his time at the SCC. She diagnosed him with Paraphilia NOS, alcohol dependence and antisocial personality disorder. She concluded that McCuiston continued to meet the definition of a SVP and recommended that he remain committed in the SCC.

In December 2005, Dr. Carla Van Dam completed an annual review to determine whether McCuiston continued to meet the definition of a SVP. She relied on Dr. DeMarco's review and the materials upon which it was based. Dr. Van Dam also interviewed McCuiston as part of the evaluation. McCuiston believed that he was not likely to commit sexual offenses in the future because

¹ *In re Detention of David W. McCuiston v. State*, No. 30729-4-II (June 7, 2005).

he "no longer consumed alcohol" and was older, "and therefore less impulsive[.]"² In her report, Dr. Van Dam noted that McCuistion minimized and did not accept responsibility for his past behavior. She explained that McCuistion did not "believe that he had a psychiatric condition" that required any treatment.³ The results of the personality testing Dr. Van Dam completed with McCuistion were consistent with individuals who "see little need for making personal changes."⁴ She diagnosed him with Pedophilia, Paraphilia NOS, alcohol dependence and antisocial personality disorder. Dr. Van Dam concluded that McCuistion continued to meet the definition of a SVP and recommended that he remain committed in the SCC.

On February 16, 2006, McCuistion moved for an evidentiary hearing to determine whether his mental condition had changed such that he no longer met the definition of a SVP. In support of his motion, McCuistion filed a declaration from Dr. Lee Coleman, who stated that he had reviewed all of McCuistion's institutional records and psychiatric evaluations. Dr. Coleman opined that none of McCuistion's previous evaluators had "presented any evidence" that McCuistion had ever suffered from "a mental abnormality."⁵

² Clerk's Papers (CP) at 62.

³ CP at 63.

⁴ CP at 64.

⁵ CP at 617.

McCuistion also filed declarations from several employees at the SCC, who stated that McCuistion's work performance evaluations were "of the highest quality,"⁶ that he required "little to no supervision"⁷ and that he had not "exhibited any inappropriate sexual [] or assaultive behavior" during his time at the SCC.⁸ Finally, McCuistion submitted a study regarding the recidivism of sex offenders.

In its written findings, the trial court explained that McCuistion "is a very capable and well-regarded man within the confines of the SCC."⁹ But it concluded that any change in McCuistion's behavior at the SCC did not "demonstrate that his mental disorder [had] changed in any way."¹⁰ The court found that the State presented evidence that McCuistion's mental condition remained the same and that he, therefore, continued to meet the definition of an SVP. It also found that McCuistion failed to present evidence to the contrary. As a result, the court ordered McCuistion to remain committed at the SCC.

McCuistion seeks discretionary review of that decision. This court grants discretionary review when, among other things:

(1) The superior court has committed an obvious error which would render further proceedings useless; [or]

⁶ CP 642.

⁷ CP 644.

⁸ CP 639.

⁹ CP 585. Because of delays in obtaining an expert witness for McCuistion, the 2004 and 2005 review hearings were postponed. They were held along with the 2006 review hearing.

¹⁰ CP 585.

(2) The superior court has committed probable error and the decision of the superior court substantially alters the status quo or substantially limits the freedom of a party to act[.]

RAP 2.3(b).

A person committed as a SVP may petition the trial court for an unconditional discharge. RCW 71.09.090(2)(a). If a committed person files such a petition, the trial court must set a "show cause hearing to determine whether probable cause exists to warrant a hearing on whether the person's condition has so changed" such that he no longer meets the definition of a SVP. RCW 71.09.090(2)(a). Probable cause to believe that the person's condition has changed exists "only when" there is evidence that his "physical or mental condition" has substantially changed since his previous commitment trial such that he no longer meets the definition of a SVP. RCW 71.09.090(4)(a). The committed person may demonstrate this change by presenting evidence of either (1) a permanent physiological change that renders him unable to commit a sexually violent act, or (2) a change in his "mental condition brought about through positive response to continuing participation in treatment[.]" RCW 71.09.090(4)(b)(ii). To keep the person confined, the State must present "prima facie evidence establishing that the committed person continues to meet the definition" of a SVP. RCW 71.09.090(2)(b). If the trial court concludes that (1) the State failed to present prima facie evidence that the committed person continues to meet the definition of a SVP, or (2) probable cause exists to believe that the person's condition has changed such that he no longer meets that

definition, the court must "set a hearing on either or both issues." RCW 71.09.090(2)(c).

First, McCuiston argues that RCW 71.09.090 violates due process because, according to McCuiston, the statute limits the evidence a SVP may present at a show cause hearing to demonstrate that his condition has changed. Specifically, he maintains that due process requires that a committed person be allowed to present evidence, other than of a physiological change or a positive response to treatment, that he no longer meets the definition of a SVP. Similarly, McCuiston argues that, by so limiting the evidence of a change in the person's physical or mental condition, the statute violates the separation of powers. But this court recently considered and rejected these arguments in *In re Detention of Fox*, 138 Wn. App. 374, 396-400 (2007). McCuiston fails to demonstrate that RCW 71.09.090 violates either due process or separation of powers.

Next, McCuiston argues that he presented sufficient evidence that he no longer meets the definition of a SVP. He maintains that the trial court thus obviously or probably erred in denying his motion for a new commitment trial. A trial court may order a new commitment trial when the committed person presents "current evidence from a licensed professional" that demonstrates a change in the person's physical or mental condition. RCW 71.09.090(4)(b).

Here, the State presented evidence that McCuiston's mental condition had not changed because he had not participated in treatment during his commitment. McCuiston presented evidence that challenged his initial and continued diagnoses of Paraphilia. He also presented evidence that his behavior

in the facility had improved during his commitment. But he presented no evidence that his physical or mental condition had changed since the trial court originally found him to be a SVP. Without such evidence, the trial court was not required to order a new commitment trial. As a result, the trial court did not obviously or probably err when it ordered McCuistion to remain confined as a SVP.

This court concludes that McCuistion fails to demonstrate that discretionary review of the order continuing his civil commitment as a SVP is appropriate under RAP 2.3(b). Accordingly, it is hereby

ORDERED that McCuistion's motion for discretionary review is denied.

DATED this 30th day of January, 2008.



Eric B. Schmidt
Court Commissioner

cc: David Donnan
Nancy P. Collins
Sarah Sappington
The Honorable James R. Orlando
Indeterminate Sentence Review Board
David McCuistion

APPENDIX B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,
Respondent,
v.
DAVID MCCUISTION,
Appellant.

RECEIVED

APR 28 2008

Washington Appellate Project

No. 35805-1-II

ORDER DENYING MOTION TO MODIFY

APPELLANT has filed a motion to modify a Commissioner's ruling dated January 30, 2008, in the above-entitled matter. Following consideration, the court denies the motion.

Accordingly, it is

SO ORDERED.

DATED this 25th day of April, 2008.

PANEL: Jj. Van Deren, Bridgewater, Penoyar

FOR THE COURT:

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STATE OF WASHINGTON
BY [Signature]
DEPUTY

Van Deren, A.C.J.
ACTING CHIEF JUDGE

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)
Respondent,) COA NO. 35805-1-II
v.)
DAVID MCCUISTION,)
Petitioner.)

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DIVISION II
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STATE OF WASHINGTON
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DECLARATION OF SERVICE

I, ANN JOYCE, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

1. THAT ON THE 27TH DAY OF MAY, 2008, A COPY OF *PETITIONER'S MOTION FOR DISCRETIONARY REVIEW* WAS SERVED ON THE PARTIES BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL:

[X] SARAH SAPPINGTON
OFFICE OF THE ATTORNEY GENERAL
800 5TH AVE., STE. 2000
SEATTLE, WA 98104-3188

[X] JOSHUA CHOATE
OFFICE OF THE ATTORNEY GENERAL
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STATE OF WASHINGTON
2008 MAY 27 PM 4:48

SIGNED IN SEATTLE, WASHINGTON THIS 20TH DAY OF MARCH, 2008

x Ann Joyce