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STATE OF WASHINGTON
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SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DAVID MCCUISTION,

Appellant.

RESPONDENT'S RESPONSE TO BRIEF OF AMICUS CURIAE

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ORIGINAL

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I. INTRODUCTION

Amicus Curiae Washington Association of Criminal Defense Attorneys, et al, encourages the Court to strike down the 2005 Amendments to the Sexually Violent Predator Act. This case presents a facial challenge based on substantive due process against the 2005 amendments, namely RCW 71.09.090(4). A law is presumed constitutional until proven unconstitutional beyond a reasonable doubt: "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that *no set of circumstances exists* under which the Act would be valid." U.S. v. Salerno, 481 U.S. 739, 745, 107 S.Ct. 2095, 2100 (1987) (emphasis added). Because this is a facial challenge based on substantive due process, the need for judicial restraint is substantially heightened in order to avoid an unwarranted interference with legislative function. A request to invalidate a statute through a facial challenge is disfavored. As noted by the U.S. Supreme Court:

Facial challenges are disfavored for several reasons. Claims of facial invalidity often rest on speculation. As a consequence, they raise the risk of "premature interpretation of statutes on the basis of factually barebones records." *Sabri v. United States*, 541 U.S. 600, 609, 124 S.Ct. 1941, 158 L.Ed.2d 891 (2004) (internal quotation marks and brackets omitted). Facial challenges also run contrary to the fundamental principle of judicial restraint that

courts should neither “ ‘anticipate a question of constitutional law in advance of the necessity of deciding it’ “ nor “ ‘formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.’ “*Ashwander v. TVA*, 297 U.S. 288, 347, 56 S.Ct. 466, 80 L.Ed. 688 (1936) (Brandeis, J., concurring) (quoting *451 *Liverpool, New York & Philadelphia S.S. Co. v. Commissioners of Emigration*, 113 U.S. 33, 39, 5 S.Ct. 352, 28 L.Ed. 899 (1885)).

Washington State Grange v. Washington State Republican Party, 552 U.S. 442, 449-451, 128 S.Ct. 1184, 1190 - 1191 (2008).

A. Amicus’ Reliance on the Prior Injunction is Misplaced as Mr. McCuiston Was Never a Treatment Participant Nor Was He Ever Eligible for Placement at a Secure Community Transition Facility.

Amicus references the injunction ordered by the Federal District Court for Western Washington in 1994 requiring the Special Commitment Center (SCC) to provide residents with “constitutionally adequate mental health treatment.” See Brief of Amicus, at 4. However, the SCC has not been operating under that injunction for a number of years. In June 2004, the federal district court lifted the injunction regarding treatment standards at the SCC, and the Ninth Circuit Court of Appeals subsequently affirmed the court’s order. *Cunningham v. Weston*, 180 Fed. Appx. 644 (9th Cir. May 9, 2006). Although a narrowed injunction remained regarding development and funding of an off-island Secure Community Transition Facility (SCTF), the federal district court dismissed this last injunction in

its entirety and closed the case in March 2007. The prior injunction regarding the SCC has no bearing on Mr. McCuiston's case. First, Mr. McCuiston has refused to participate in any treatment at the SCC. Second, Mr. McCuiston was never eligible for placement at the SCTF.

Amicus also argues that the State's reliance on *Parham v. J.R.*, 442 U.S. 582, 99 S.Ct. 2493, 61 L.Ed.2d 101 (1979) is misplaced. However, there is no case law that holds individuals subject to commitment are entitled to an adversarial hearing, or a new trial. The United States Supreme Court has held that there is no reason to think judges are better suited to make professional judgments than professional or medical staff. *Youngberg v. Romeo*, 457 U.S. 307, 322-23, 102 S.Ct. 2452, 2456 (1982). The 9th Circuit has held similarly, that due process does not entitle one to a judicial hearing. *Hickey v Morris*, (9th Circuit) 722 F.2d 543, 548 (1984). Because the Washington legislature granted the opportunity to petition for a new trial after the annual review confirmed the basis of the commitment, it is an extra-constitutional grant and limits placed on the conditions required in order to petition do not touch on the constitutional requirements.

B. The Court of Appeals Decisions in Young and Ward Substantially Altered The Means By Which Committed Sexually Violent Predators Could Obtain a New Trial.

Amicus argues that the “pre-2005 amendment annual review process was in place for many years and did not cause an overwhelming number of unnecessary trials on annual review.” See Brief of Amicus, at 9. However, this was prior to the Court of Appeals decisions in *In re Detention of Young*, 120 Wn. App. 753, 86 P.3d 810 (2004) and *In re Detention of Ward*, 125 Wn. App. 381, 104 P.3d 747 (2005). These decisions paved the way for a mere collateral attack on the initial commitment by holding that the trial courts should have granted new trials.

C. Amicus Misconstrues the Statute

Amicus claims the statutory procedures in RCW 71.09.090(4)(b) violates substantive due process. A careful read of the provisions surrounding the clause disproves this theory. “The primary goal in statutory interpretation is to ascertain and give effect to the intent of the Legislature.” *Quadrant Corp. State Growth Management Hearings Bd.*, 154 Wn.2d 224, 238-39, 110 P.3d 1132 (2005) (citing *King County*, 142 Wn.2d at 555, 14 P.3d 133). To discern legislative intent, “the court begins with the statute’s plain language and ordinary meaning,” but also

looks to the applicable legislative enactment as a whole, harmonizing its provisions by reading them in context with related provisions and the statute as a whole. *Id.* at 239. If, among alternative constructions, one or more would involve serious constitutional difficulties, the court will reject those interpretations in favor of a construction that will sustain the constitutionality of the statute. *Grant v. Spellman*, 99 Wn.2d 815, 819, 664 P.2d 1227 (1983).

Amicus argues that the provisions regarding the standard of probable cause to show an individuals' condition has "so changed" in RCW 71.09.090(4)(b) "prohibits a court from ordering a new trial absent evidence of continued treatment progress." (Brief of Amicus WACDL, et al at 13.) Reviewing the post-commitment procedures as a whole, and harmonizing them reveals that the interpretation of amicus misses a critical aspect. RCW 71.09.070 requires the DSHS annual review to conduct a complete evaluation to determine whether "the individual "currently meets the definition of a sexually violent predator." If the secretary authorizes the individual to petition for a new trial, "the court upon receipt of the petition... *shall* within forty-five days order a hearing." RCW 71.090.090(1).

Furthermore, the State never has the burden to show that there has been a "change" in the individual's condition. The state's burden at show

cause is to show that the individual “continues to meet the definition of a sexually violent predator.” RCW 71.09.090(2)(c). The provisions in 71.09.090(4)(b) limit the type of evidence that may be presented to demonstrate “change”. The argument of Amicus that the statute violates due process because a trial may never be ordered ignores the fact that if the prosecutor cannot make a *prima facie* case that the individual currently meets the full definition of a sexually violent predator, a new trial is ordered.

In reviewing the statute, this court must harmonize the provision in 71.09.070, .090(1) and 090.2(c) with the amendments. Thus, the department evaluation looks at full criteria, and if either the Secretary so authorizes or the state cannot meet its burden at the show cause hearing, a new trial is ordered. Trial courts are ordering and holding trials throughout the state under either of these scenarios, and the concerns of amicus are unwarranted.

D. Long Term Treatment is Required for Mentally Disordered Dangerous Individuals

Amicus notes that high risk offenders can be treated in a short period of time. (Brief of WACDL at 12.) The state agrees. In Washington, high risk sex offenders are offered treatment while incarcerated at the Department of Corrections for 12-18 months. But individuals committed

as sexually violent predators are more than just high risk offenders. They are high risk offenders who have been found beyond a reasonable doubt to suffer from a mental disorder that causes them serious difficulty controlling their sexually violent behavior. RCW 71.09.020(18). SVPs are very different population from the ordinary high risk sex offender. *In re the Detention of Bernard Thorell*, 149 Wn.2d 724, 732, 72 P.3d 708 (2003). Thus the treatment needs are very long term and unique. *Id.* at 749-750 (upholding rational basis for requiring treatment in conditional release.)

Amicus speculates without any evidence or authority that the SCC would have no incentive to provide treatment if the 2005 amendments are allowed to stand. This argument is baseless and should be ignored. Importantly, amicus does agree that treatment is the best way to prevent reoffending. (Brief of WACDL at 17.)

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II. CONCLUSION

The Court should uphold the 2005 amendments as they do not infringe on McCuiston's due process rights.

RESPECTFULLY SUBMITTED this 12th day of May, 2011.

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