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NO. 63222-1-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

IN RE THE DETENTION OF

CHRISTOPHER MULKINS

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

REPLY BRIEF OF APPELLANT

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A. ARGUMENT

THE 2006 AMENDMENT TO RCW 71.09.060,
PRECLUDING EVIDENCE OF THE COMMUNITY
PROTECTION PROGRAM AS A DEFENSE TO CIVIL
COMMITMENT, IS UNCONSTITUTIONAL.

In his opening brief, Mr. Mulkins argued that E2SSB 6630 violates due process.¹ The bill amended RCW ch. 71.09 to prohibit the jury in a civil commitment trial from considering evidence of the Community Protection Program in determining whether a defendant is likely to reoffend if not committed. The statute violates due process under Mathews v. Eldridge² because it implicates cases in which the private interest at stake (liberty) is paramount and increases the risk of erroneous deprivation of liberty without a demonstrated administrative benefit to the State. App. Br. at 5-16.

a. The standard of review is de novo. The State responds by first citing the wrong standard of review. Br. of Resp't at 10-11. The standard is not abuse of discretion. Rather, this Court reviews de novo whether a statute is unconstitutional. In re Detention of Fair, 167 Wn.2d 357, 362, 219 P.3d 89 (2009) ("The applicability of

¹ Mr. Mulkins also argued that the portion of RCW 71.09.060 allowing the commitment of a defendant based on a finding he is "likely" to reoffend is unconstitutional. App. Br. at 17-22. Mr. Mulkins rests on his opening brief for this argument.

² Mathews v. Eldridge, 424 U.S. 319, 333, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976).

the constitutional due process guaranty is a question of law subject to de novo review”); Bellevue School District v. E.S., 148 Wn. App. 205, 211-12, 199 P.3d 1010 (2009) (reviewing de novo whether Mathews v. Eldridge requires appointment of counsel in truancy cases as a matter of due process).

b. The Community Protection Program is a placement condition and voluntary treatment option that would exist for Mr. Mulkins pursuant to RCW 71.09.060(1). The State then incorrectly argues that the Community Protection Program (“CPP”) is not an option that “would exist” for Mr. Mulkins under RCW 71.09.060(1)³, and therefore would not be admissible regardless of the unconstitutional amendment creating a per se bar to evidence of the CPP. Br. of Resp’t at 11-15.

The State’s contention is wrong as a matter of fact. The record shows that DSHS had deemed Mr. Mulkins eligible for the Community Protection Program. CP 165, 249-50. DSHS Policy 15.01 sets forth the process for identifying persons who are eligible

³ The relevant portion of the statute reads, “In determining whether or not the person would be likely to engage in predatory acts of sexual violence if not confined in a secure facility, the fact finder may consider only placement conditions and voluntary treatment options that would exist for the person if unconditionally released from detention on the sexually violent predator petition.” RCW 71.09.060(1).

for the Community Protection Program. CP 238-50. It includes two different form letters – one for individuals who meet the Community Protection Program criteria, and one for those do not meet the criteria but whose names have been entered in a database for tracking. CP 249-50. In 2001, while he was incarcerated in Shelton, Christopher Mulkins received a letter of the former type, indicating he met the program criteria. CP 165. Accordingly, the State’s argument that the program would not exist for Mr. Mulkins is contradicted by the record.

Insofar as the State’s argument rests on an assumption that the defendant’s placement condition must be 100% likely to exist in order for it to be admissible under the statute, it is without merit. The State relies for this argument on Harris, which is inapposite. Br. of Resp’t at 11 (citing In re Harris, 141 Wn. App. 673, 679, 174 P.3d 1171 (2007)). In Harris, the defendant did not seek to introduce evidence of placement conditions or treatment options that would exist upon his release, but to argue that, if he were released unconditionally, the State could file another petition for commitment at some point in the future. Id. at 679-80. The case is wholly irrelevant to the issue at hand.

As discussed in Mr. Mulkins' opening brief, this Court's decision in Post resolves the issue of whether the Community Protection Program is a placement condition and voluntary treatment option that "would exist" for Mr. Mulkins under RCW 71.09.060(1). In re Detention of Post, 145 Wn. App. 728, 187 P.3d 803 (2008), review granted, 166 Wn.2d 1033 (2009). In Post, as here, the defendant planned to engage in a particular treatment program if released. And, as here, the State argued that Post was not likely to complete the program and the program was not effective. But the fact that the defendant was not 100% certain to enter the program was irrelevant to whether the program "would exist" for the defendant under the statute. This Court noted:

At trial, to support his contention that he was not likely to reoffend, Post presented evidence of his proposed voluntary community treatment program. The legislature has specifically authorized a person in Post's position to introduce such evidence.

Id. at 741 & n.9 (citing RCW 71.09.060(1)) (emphasis added). In a later portion of the opinion this Court reiterated:

Our legislature has specifically delineated several issues as being proper for jury consideration. In addition to the elements the State must prove in order to meet its burden of proving that a person meets the definition of a sexually violent predator, the legislature has also provided that respondents in such proceedings have a right to present evidence of

proposed voluntary treatment options in order to attempt to counter the State's contention that they are likely to reoffend if not committed to a secure facility.

Id. at 743 (emphasis added).

Clearly, then, Mr. Mulkins would have been able to introduce evidence of the Community Protection Program if the Legislature had not amended RCW 71.09.060 to remove that program and only that program from the jury's consideration. Thus, contrary to the State's argument, this Court must reach the due process issue.

c. The amendment prohibiting jury consideration of the Community Protection Program violates due process. As explained in Mr. Mulkins' opening brief, the amendment at issue violates due process under the balancing test set forth in Mathews because the private interest at stake – liberty – is of the highest order, the risk of erroneous deprivation of liberty is high were relevant evidence is excluded, and the administrative costs of admitting the evidence are low.

In response, the State cites the correct black letter law but fails to apply it. The State is correct in its recitation that “[t]he right to procedural due process applies only when state action deprives an individual of a liberty or property interest.” Br. of Resp't at 16. It is beyond obvious that State action in RCW 71.09 cases deprives

individuals of a liberty interest. Addington v. Texas, 441 U.S. 418, 425, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979) (“This Court repeatedly has recognized that civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection”); In re Young, 122 Wn.2d 1, 43-44, 857 P.2d 989 (1993) (The Mathews test is “the appropriate test for reviewing the constitutional adequacy of involuntary commitment procedures”); In re Harris, 98 Wn.2d 276, 279, 654 P.2d 109 (1982)(Involuntary civil commitment is a “massive curtailment of liberty”). The State’s hypothesis that procedural due process does not apply to civil commitment proceedings under RCW ch. 71.09 is simply preposterous.⁴

The State then opines that “[e]ven if procedural due process applied to this situation, the Legislature had a good reason to exclude sexually violent predators from the community protection program.” Br. of Resp’t at 19. But the Legislature did not exclude people in Mr. Mulkins’ position from the program; rather, it precluded them from introducing evidence of the program in civil

⁴ If, on the other hand, Mr. Mulkins were challenging a denial of entrance to the Community Protection Program, the State’s arguments might have merit because there is no right to enter the program. But this is not an appeal from the denial of an application to the Community Protection Program. This is an appeal from a commitment trial and its resulting order which deprived Mr. Mulkins of his liberty indefinitely.

commitment trials. RCW 71.09.060(1). And the only “good reason” for doing so, as noted in Mr. Mulkins’ opening brief, was that prosecutors requested the evidentiary prohibition in order to make it easier for them to commit people. App. Br. at 8.

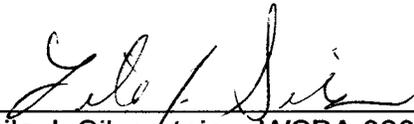
In any event, the test for whether limiting procedures is constitutional is not the “good reason” test; it is the Mathews v. Eldridge balancing test. App. Br. at 9-10. The State does not even attempt to satisfy this test. Br. of Resp’t at 1-26. Accordingly, this Court should reverse Mr. Mulkins’ commitment order and hold that the statute excluding evidence of the Community Protection Program violates due process.

B. CONCLUSION

For the reasons set forth above and in his opening brief, Mr. Mulkins asks this Court to reverse the commitment order and remand for a new trial.

DATED this 26th day of March, 2010.

Respectfully submitted,



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Attorneys for Appellant

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DIVISION ONE**

IN RE THE DETENTION OF)	
)	
CHRISTOPHER MULKINS,)	NO. 63222-1-I
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)	
APPELLANT.)	
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DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 29TH DAY OF MARCH, 2010, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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KING COUNTY ADMINISTRATION BLDG.		
500 FOURTH AVENUE, 9 TH FLR		
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[X] CHRISTOPHER MULKINS	(X)	U.S. MAIL
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STEILACOOM, WA 98388		

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