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66822-6

NO. 66822-6-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

IN RE: DETENTION OF ELMER CAMPBELL

STATE OF WASHINGTON,

Respondent,

v.

ELMER CAMPBELL,

Appellant.

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

APPELLANT'S OPENING BRIEF
AND RESPONSE TO STATE'S MOTION TO REDESIGNATE AS
FOR DISCRETIONARY REVIEW

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A. SUMMARY OF ARGUMENT.

The judge who presided at Elmer Campbell's civil commitment trial granted him a new trial on annual review after determining that the State had not sufficiently alleged by competent evidence that Campbell currently met the criteria for continued commitment. The State did not appeal. Years of delay ensued while Campbell and the State litigated numerous issues and prepared for trial. Each delay was approved by the court.

In 2010, when Campbell tried to set a trial date after the reason for an existing court-approved stay of proceedings had elapsed, the court declined. Instead, without any in-court hearing, the court determined that the 2010 annual review indicated Campbell was constitutionally confined and, on that basis, it vacated its prior order granting Campbell a new trial. Because the court's prior order granting Campbell a new trial was a final order that cannot be vacated or superceded based on a later annual review, Campbell is entitled to a new trial as previously ordered.

B. ASSIGNMENTS OF ERROR.

1. The court erroneously vacated its prior, final order granting Campbell a new trial to determine the constitutionality of his indefinite commitment.

2. The court's order vacating its previous order granting Campbell a new trial is appealable as a matter of right.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Once a court grants a new trial, the State may appeal, but it may not ignore the order or subvert it. Here, the court granted Campbell a new trial based on its determination that the State had not sufficiently proved the basis of the continued confinement on annual review. Did the court have authority to deny Campbell the trial it had ordered because pretrial delay led to later annual review evaluations and the court found a later annual review evaluation provided a sufficient basis to maintain Campbell's commitment?

2. Orders granting or denying a new trial, vacating a judgment, or determining an issue in a final manner that affects a party's substantial rights are appealable as a matter of right. The court granted Campbell a new trial and then, years later, vacated that order without apparent procedural authority. Does Campbell have the right to appeal the order vacating his right to a new trial?

3. Orders that are not appealable as of right are treated as motions for discretionary review. Did the court obviously or probably err by vacating a long-standing order granting Campbell a

new trial when it had issued an order granting Campbell a new trial, Campbell had relied on that order and had not contested the State's annual review evaluations filed while he was waiting for a new trial, and then, without any hearing, the court vacated its order granting Campbell a new trial?¹

D. STATEMENT OF THE CASE.

Elmer Campbell was indefinitely committed under RCW ch. 71.09 after a jury trial in 1994. CP 31-32. When the State submitted a report to the court during annual review in late 1995, the court ruled that the report was inadequate in several respects. CP 174. The court gave the State an additional opportunity to correct the identified deficiencies, but the court found the revised report still lacked sufficient indication that Campbell presently suffered from a current mental abnormality that rendered him dangerous beyond his control. CP 175. The court ordered that Campbell was entitled to a new trial on whether he may be involuntarily detained under RCW ch. 71.09. Id.

¹ The State filed a motion to designate the appeal as a motion for discretionary review. This Court directed Campbell to file a response on the same date as the due date for the opening brief. Counsel is including the answer to the motion within the opening brief because it involves the same subject matter and a separate motion would be duplicative. See RAP 17.4(e) (authorizing motion within brief); RAP 1.2(a) & (c) (directing court to liberally interpret rules to

The State did not appeal the court's order. Later, it filed a motion to vacate the order for a new trial under CR 60(b), and also sought reconsideration. CP 275; 310. After receiving further briefing and hearing oral argument, the court ruled that "the State's motion to vacate the court's prior orders granting Mr. Campbell a new trial on all issues is denied." CP 184-85. The court directed the parties to prepare for trial. CP 185. The State did not appeal these orders from the trial court.

Various issues arose in the course of proceedings causing delay. During discovery, Campbell objected to the State's request that he submit to a mental examination by the State's expert for discovery purposes. CP 156. As a sanction for Campbell's refusal, the court stayed the trial proceedings, and Campbell sought discretionary review of the stay. CP 20 (COA 40235-8-I). The Court of Appeals noted that the same issue was before the Court in another case but it did not find the trial court clearly erred by staying the proceedings as a discovery sanction. CP 24-25.

Shortly after Campbell's appeal of the order staying the case ended, the State sent a letter to the trial court indicating that

facilitate decisions on the merits and based on interest of justice).

Campbell was presently "entitled to a new release trial under the provisions of RCW 71.09.090." CP 19, 298. It conceded that "Campbell has already won the right to a release trial," and there was no need to set another show cause hearing. CP 298.

Campbell agreed to meet with the State's expert in preparation for trial, but, in the interim, the State had filed a motion to vacate the new trial order. CP 310 (State's CR 60(b) motion to vacate new trial order). Campbell asked the trial court to rule on the State's motion before requiring him to submit to a mental health examination by the State's expert, since no examination would be mandated if Campbell was not going to receive the trial he had been granted. CP 323 (Sept. 21, 1999 hearing on State's motion to vacate delayed for further briefing); CP 362 (State's brief discussing stay and briefing schedule). The court denied the State's motion to vacate its new trial order and directed the parties to proceed to trial, in an order dated April 11, 2001. CP 185.

Thereafter, the court set a trial schedule and monitored trial preparation. Supp. CP __, sub. no. 333. Upon a "joint motion of the parties," the court continued the trial from its scheduled date on January 2, 2002, until March 18, 2002. CP 438. Another agreed order continued the trial for 18 months so that Campbell could

propose a less restrictive alternative. CP 439. In the interim, Campbell was directed to prepare a less restrictive alternative proposal and meet with the State's expert. CP 439-40.

The parties again agreed, with the court's approval, to continue the trial until March 15, 2004, pending further preparation and consideration of Campbell's proposed less restrictive alternative. CP 443. The court entered another "agreed order" continuing the trial date until February 14, 2005. CP 444. This order was based on Campbell's explanation that he "is at a critical juncture in his treatment program and hopes to make significant progress toward treatment goals in the next trimester at the SCC [Special Commitment Center]." Supp. CP __, sub. no. 428, p. 2.

Before the scheduled trial date, the State filed a motion for summary judgment on the issue of a less restrictive alternative. Supp. CP __, sub. no. 430. The State asked the court to rule that Campbell could not raise the possibility of a less restrictive alternative at his scheduled trial because the State was entitled to prevail on this claim as a matter of law and there were no disputed issues of material fact. Id. The court granted the State's motion for summary judgment and denied Campbell's motion to reconsider. Supp. CP __, sub. no. 437; Supp. CP __, sub. no. 445. Campbell

appealed the ruling granting summary judgment. CP 89-101 (COA 55812-9-I).² In a published decision, the Court of Appeals affirmed the trial court's ruling. Id.

Following the Court of Appeals mandate, the trial court set an agreed case schedule, with a trial date of June 7, 2007. CP 449-50. However, on May 15, 2007, the State accused Campbell of possessing child pornography and informed him it would file criminal charges against him. Campbell asked the court for a protective order, staying his obligation to appear at the upcoming deposition the State had requested while he faced criminal prosecution, and explained that he had "been informed that the referral for prosecution will occur in the near future." Supp. CP __, sub. no. 522, p.1.

After consideration of issue and upon pleadings submitted, the court entered an order staying the deposition "pending the resolution of the criminal matter or by further order of this Court." Supp. CP __, sub. no. 525. The court deferred consideration of the State's request to stay proceedings until February 15, 2008, based on the status of the criminal prosecution. Id. On February 28,

² Rulings granting summary judgment are appealable as a matter of right. RAP 2.2(a)(3).

2008, the court struck the trial date and stayed the case “pending resolution of the criminal matter.” CP 446. The stay was entered as an “agreed order.” Id.

However, despite the State’s claim that criminal charges were imminent, none were filed. CP 171. After waiting without ever learning whether state or federal prosecutors would file charges against him, Campbell asked the State to set a new trial date. CP 171-72. The State refused and asked the court to vacate the original order granting Campbell a new trial. CP 172, 190-219. Campbell set out the many instances when the State had raised the same objection in the past and the court had denied the State’s request to revisit and vacate the order granting a new trial. CP 220-25. He also explained that he had not been filing frivolous motions or obstructing the proceedings as the case proceeded through various legal and factual hurdles. CP 220-25. The court granted the State’s motion to vacate its order awarding Campbell a new trial based on the most recent annual review evaluation prepared by the State. CP 134-35.

E. ARGUMENT.

1. THE COURT IMPERMISSIBLY VACATED ITS RULING ENTITLING CAMPBELL TO A NEW TRIAL AND THE STATE NEGLECTED ITS OBLIGATION TO PROVIDE A NEW TRIAL AS THE COURT HAD ORDERED

The trial court ordered that Campbell was entitled to a new trial to determine whether he met the criteria for continued confinement under RCW 71.09. Rather than respect that binding ruling, or appeal it, the prosecution repeatedly asked the court to vacate its ruling. Because the court's order granting Campbell a new trial was a final order, it cannot be cast aside by the State or vacated, years later, by the Court.

a. Complete and accurate annual review is essential to the constitutionality of indefinite civil commitment. Civil commitment is a massive curtailment of the fundamental right to liberty protected by the right to due process of law. In re Detention of Thorell, 149 Wn.2d 724, 732, 72 P.3d 708 (2003); U.S. Const. amend. 14; Const. art. I, § 3. Commitment for any reason constitutes a significant deprivation of liberty triggering due process protection. Foucha v. Louisiana, 504 U.S. 71, 80, 112 S. Ct. 1780, 1785, 118 L. Ed. 2d 434 (1992).

While civil commitment under RCW ch. 71.09 is indefinite in duration, the constitutionality of the confinement rests on the detainee's continued, current mental disorder that causes the individual to be unable to control violent sexually offending behavior. Foucha, 504 U.S. at 77; In re Det. of Young, 122 Wn.2d 1, 26, 857 P.2d 989 (1993). Accordingly, every year the State must notify the court whether it continues to find the offender meets the criteria for confinement. RCW 71.09.070. If the State fails to demonstrate that a committed person continues to meet the criteria for confinement, the court must order a new trial. RCW 71.09.090.

Once the court orders a new trial, all of the procedural protections of an original commitment trial apply. RCW 71.09.050; former RCW 71.09.090(2) (1996).³ The State bears the burden of proof beyond a reasonable doubt, and the jury must unanimously agree the State has met its burden of proof. Id. At the new trial, "the committed person shall be entitled to be present and to the benefit of all constitutional protections that were afforded to the person at the initial commitment proceeding." Id. This includes the

³ Full text attached as Appendix A.

right to a speedy trial, codified as 45 days from the probable cause hearing. RCW 71.09.050(1).

In 1996, and again in 2001, the trial court ruled that Campbell had the right to a new commitment trial. CP 174-75, 275, 310. The State did not appeal. Although there was substantial delay in setting Campbell's new trial, the court did not blame Campbell for taking too long to move his case to trial. CP 452. The court ruled that the pretrial delay was "not significant" to its ruling on whether to vacate the order granting a new trial. CP 452. But the court impermissibly vacated its ruling entitling Campbell to a new trial by relying solely on the 2010 annual review.

b. Campbell's right to a new commitment trial cannot be vacated by a subsequent annual review. Under former RCW 71.09.090(2) (1996), the court "shall" set a new trial on the issue of whether a detained individual continues to meet the criteria for total confinement when the State has not met its burden of establishing probable cause for continued commitment.⁴

⁴ The "triggering act" for the prior version of the statute to govern the proceedings occurs when there is a probable cause hearing on annual review. In re Det. of Elmore, 162 Wn.2d 27, 36, 168 P.3d 1285 (2007). Campbell's probable cause hearing occurred in 1996, and therefore, the version of the statute in effect at that time controls. All statutory references herein are based on the statute in effect at the time the court ordered that Campbell receive a new trial.

When a trial court orders a new trial, that order is “final for all purposes” other than matters related to the new trial. Marie’s Blue Cheese Dressing, Inc. v. Andre’s Better Foods, Inc., 68 Wn.2d 756, 759, 415 P.2d 501 (1966). A trial court may not vacate its order granting a new trial even if it deems its judgment to have been erroneous. Id. The court’s order granting a new trial is “not the final judgment in the case, to be sure, but it [is] final upon that subject,” and an objecting party’s recourse is to appeal. Id. (quoting Coyle v. Seattle Elec. Co., 31 Wash. 181, 189, 71 Pac. 733 (1903)). When the losing party believes the court’s order granting a new trial is based on a legal error, a direct appeal is the proper means of remedy. Burlingame v. Consolidates Mines and Smelting Co., Ltd., 106 Wn.2d 328, 336, 722 P.2d 67 (1986).

In 1996, the court ruled that Campbell was entitled to a new trial on the lawfulness of his continued commitment. CP 173. It rested its order on the State’s failure to supply prima facie evidence supporting his current confinement. CP 174-75.

The court rejected the State’s annual review report in part because it contained no explanation of the qualifications of the expert rendering an opinion. When reviewing the adequacy of the State’s claim there is probable cause to continue a person’s

commitment, the court may disregard allegations if it finds insufficient evidence of the expert's credentials or basis of her opinion. In re Det. of Ambers, 160 Wn.2d 543, 553 n.5, 158 P.3d 1144 (2007).. The court is not required to accept allegations from a purported expert at face value. Id. The court acted within its discretion by finding the State did not supply probable cause to continue the commitment when the court could not tell whether the people writing the report had a basis, either scientific or factual, to render an opinion. Id.

The court further found an absence of evidence indicating Campbell's current mental condition constituted a mental disorder necessary to continued confinement. Even after the court gave the State additional time to supplement its report, the revised evaluation did not provide a current diagnosis. CP 174. The court ordered Campbell receive a new trial based on his failure to demonstrate prima facie evidence of continued confinement.

The State did not appeal the court's order granting a new trial and the parties treated the court's order as a final order. The State began planning for a new trial, but it also asked the court to vacate its order granting a new trial, citing CR 60(b)(11). CP 310. Under CR 60(b), a party may challenge only a final order. In re

Det. of Mitchell, 160 Wn.App. 669, 677, 249 P.3d 662 (2011) (“The plain language of CR 60(b) applies only to final judgments, orders, and proceedings.”). The prosecution’s request for relief under CR 60(b) implicitly acknowledged that the court’s ruling granting a new trial was a final order.

The court denied the State’s requests to reconsider its ruling granting a new trial. CP 435-36. Although a variety of delays postponed the trial, each delay was supported by good cause and accompanied by either a speedy trial waiver or a court order delaying the proceedings.

i. Timely and legitimately pursued litigation caused delay. When the court ordered a new trial in 1996, Campbell timely filed for discretionary review. CP 12-18 (COA 39329-4-I). He sought discretionary review to pursue his argument that the commitment order should be dismissed. CP 15. This Court agreed that the law was unsettled but did not find the trial court obviously or probably erred and denied review. CP 17.

Shortly thereafter, during the process of discovery in preparation for the new trial, Campbell objected to the State’s demand that he submit to a mental health examination. CP 156. As a sanction for Campbell’s refusal to submit to a psychological

examination, the court stayed the trial. CP 20. Campbell timely appealed, contesting the stay of proceedings. Id. This Court deemed the issue appealable as a matter of discretionary review and ruled that the court had authority to stay the trial as a discovery sanction. CP 24-25.⁵

Later, the parties agreed Campbell could delay his trial while he attempted to advance in his treatment so that he could arrange a less restrictive alternative. CP 438-39. This agreed delay was originally set to last for one year, but the parties jointly extended the delay for another year, during which Campbell was directed to prepare his proposed less restrictive alternative in advance of trial. CP 438-39, 443-44.

Once Campbell offered a less restrictive alternative, the State objected to it as inadequate. The State moved for summary judgment on the issue of the less restrictive alternative for Campbell's pending trial. See CP 90. After substantial briefing, including a lengthy motion to reconsider, the court granted the

⁵ As an indication of the unsettled nature of whether the trial court may stay a new trial based on the failure to submit to a mental health examination at the time of Campbell's appeal, the Supreme Court granted review and ruled on the same issue in In re Det. of Young, 163 Wn.2d 684, 185 P.3d 1180 (2008). The unresolved nature of the State's authority to demand additional mental health examinations while Campbell's case was proceeding is further demonstrated by

State's motion for partial summary judgment, barring Campbell from pursuing his less restrictive alternative at trial. Supp. CP __, sub. no. 445.

Campbell appealed this summary judgment ruling. In a published decision, this Court affirmed. CP 89-101. The Court issued a mandate on November 3, 2006. CP 89.

The parties again prepared for trial, and the court issued a trial schedule. In the interim, the State accused Campbell of possessing child pornography and claimed it would be pressing a criminal prosecution. Campbell then asked the court to postpone of relieve Campbell from submitting to the deposition that the State had requested, invoking his right to be free from the risk of self-incrimination in the pending criminal case. Rather than proceed to trial without the deposition, the State asked the court to stay the commitment trial while it pursued criminal charges. The court stayed the case pending the resolution of the pending criminal charges.

The State never informed Campbell that it would not be bringing criminal charges against him. Yet it also neglected to

the Supreme Court's consideration of the issue in In re the Detention of Williams, 147 Wn.2d 476, 55 P.3d 597 (2002).

reschedule Campbell's case. When Campbell filed a motion to reset his trial date, the State opposed having any trial and repeated its argument that the court never should have granted Campbell a new trial. CP 190-94, 221, 224-25. This time, the court ruled that Campbell was not entitled to a trial, notwithstanding its prior orders, because the 2010 annual review report contained sufficient allegations to establish probable cause for further confinement. CP 452-53.

ii. Campbell did not lose his right to a new trial based on legitimate delay in prosecuting the case. The court did not fault Campbell for the delay that occurred in the course of the case. He did not waive his right to a new trial by engaging in legal challenges to his commitment, trying to negotiate release through a less restrictive alternative, or protecting his constitutional right to be free from self-incrimination when the State claimed it was bringing criminal charges against him. See e.g., King v. Olympic Pipeline, Co., 104 Wn.App. 338, 352, 16 P.3d 45 (2000) (court may stay civil case when criminal prosecution pending on similar matter); State v. Braithwaite, 34 Wn.App. 715, 722, 667 P.2d 82 (1983) (five year delay between verdict and sentence not unreasonable where delay

caused by both parties exercising right to seek discretionary review).

As an example of the delay that may occur in the course of preparing for a new trial under RCW 71.09.090, and to show that Campbell's case is not an anomaly, the case of Andre Young is instructive. Young was granted a new trial on annual review. In re Det. of Young, 120 Wn.App. 753, 761-62, 86 P.3d 810, rev. denied, 152 Wn.2d 1035 (2004). Young objected to the State's request that he submit to a mental examination and deposition. Young, 163 Wn.2d at 687. The court stayed the new trial as a discovery sanction. Id. at 688. Young appealed the stay and lost. Id. at 694. Young eventually agreed to participate in the new trial proceedings after six years had passed since the appellate court ruled his had a right to a new trial. Id. at 688; Jennifer Sullivan, "Rapist Freed After 20 Years," Seattle Times, July 7, 2010.⁶

In Campbell's case, the State must bear some responsibility for the delay. The State agreed to and jointly requested continuances throughout the pendency of the case. It insisted that the case be stayed when Campbell was threatened with criminal

sanctions rather than proceed without a deposition from Campbell. Supp. CP _, sub. no. 523. The trial was stayed pending the resolution of potential criminal charges that were never filed, and the State had the unique ability to know whether Campbell would face criminal prosecution. CP 186, 188. The State never notified Campbell it would not criminally prosecute him and objected when Campbell tried to reset the trial schedule after no criminal prosecution occurred. CP 171-72. Apparently, the allegations were the result of the State's own error: it mixed another resident's child pornography with Campbell's computer and incorrectly accused Campbell of having the illicit materials. CP 457. Had the State not mistakenly accused Campbell of possessing pornography, he could have had his trial as the parties were preparing for it at the time the case was stayed. Id.; see CP 459-50 (agreed case schedule in place when case stayed pending prosecution); CP 446 (agreed order on motion to stay pending prosecution).

Furthermore, as between the State and the defendant, the State bears the burden of proceeding to trial in a timely fashion.

⁶ Available at:
http://seattletimes.nwsourc.com/html/localnews/2012303061_young08m.html

See State v. Wilks, 85 Wn.App. 303, 311, 932 P.2d 68 (1997)

(“The court and the State cannot completely shift their responsibility to bring a defendant to trial within the time limits of CrR 3.3 to the defendant.”). Campbell did not file frivolous appeals or otherwise abandon his right to a new trial. The court did not dismiss the trial based on the notion of undue delay. Campbell’s right to a new trial never abated by virtue of the pretrial delay.

iii. The 2010 annual review report is not grounds to vacate a new trial order. The court vacated its new trial order based on the 2010 annual review report. CP 451-53. The court applied the “current statute” and explained that to determine whether Campbell is entitled to a new trial,

the court must look not at the deficient 1996 annual review but at the most recent annual review. The 2010 annual review presents prima facie evidence that respondent continues to meet the definition of a sexually violent predator, and that neither unconditional release nor release to a less restrictive alternative is in the best interest of respondent or would adequately protect the community. At this time, respondent has not presented evidence to the contrary.

Absent evidence from the respondent, the court finds no basis to order a recommitment trial, or a trial on the issue of less restrictive alternative.

(last viewed July 28, 2011).

CP 452-53.

The passage of time and the State's continued efforts to justify its confinement do not authorize the court to vacate its order for a new trial. The court did not rule that its prior order had been wrong, or that case law changed the propriety of its decision, as the prosecution contended. Instead, it relied on the current annual review evaluation as undermining the factual basis for its prior order. Additionally, the Supreme Court has already ruled that RCW 71.09.090 as amended in 2005 cannot be applied retroactively to people whose show cause hearing was held before those amendments went into effect. Elmore, 162 Wn.2d at 36. The court improperly relied on the current version of RCW 71.09.090 when reviewing its grant of a new trial in 1996. CP 452-53.

The court's basis for vacating its new trial order is illogical and offers a perverse incentive to the State. Rather than file an appeal, as the State could have done if there was a legal error in the court's order, the State kept Campbell confined and continued to pressure the court to alter its ruling. See e.g., CP 220-23 (detailing State's efforts to overturn prior order without filing appeal).

The court's reversal of its order encourages the State to delay providing a new trial so it can try to remedy the flaws in future annual review reports, and thereby save itself from giving anyone a new trial. A new annual review report does not cure the error in a prior report or undermine the validity of an order granting a new trial.

The court's reliance on the 2010 annual review report disregards Campbell's lack of incentive to contest each annual review or demand a hearing once awarded a new trial. After the court ordered a new trial, Campbell did not need to contest later annual review reports prepared by the State. Campbell legitimately believed, and the State agreed, he had no reason to participate in the State's annual review procedure because he had already secured the remedy of a new trial. CP 298. Campbell had not participated in the State's efforts to gather information about him during annual review proceedings because he was actively preparing for a new trial. By relying on later annual review reports, when Campbell was operating under the belief that the court had ordered he receive a new trial, the court subverted his rights to due process of law. The court necessarily relied on incomplete information when it decided that the 2010 annual review after

misleading Campbell into believing that he did not need to contest later annual review evaluations.

The State asked the court to vacate its order based on its claim that the court's order granting the new trial had become "moot." CP 192, 197. But it did not elaborate on how the order could be moot while Campbell remained confined and sought a new trial. An issue is moot if the court "can no longer provide effective relief." Brown v. Vail, 169 Wn.2d 318, 337, 237 P.3d 263 (2010). Campbell remains an aggrieved party. See Kuhn v. Schnall, 155 Wn.App. 560, 572, 228 P.3d 828 (2010) (aggrieved party includes person who could obtain relief by new trial). The State's contention that Campbell's right to a new trial is moot is wrong. Effective relief is available as long as Campbell is involuntarily and indefinitely committed.

The State also claimed that "equity" favored the court abandoning its long-standing order for a new trial. CP 197. It cited no authority. Id. Campbell never abandoned his pursuit of a new trial. The unsettled nature of the law led to various appeals and stays, and he also sought a negotiated resolution. The court oversaw and approved each delay. His actions do not constitute an abdication of his right to a new trial, and the trial court did not

find that Campbell's actions constituted any waiver if his right to a new trial. The court's order granting a new trial was a final order that, absent an appeal, should not have been overturned based on a subsequent annual review. Campbell should be accorded the trial originally ordered.

2. CAMPBELL IS ENTITLED TO APPEAL FROM
THE COURT'S VACATION OF ITS ORDER
REQUIRING A NEW TRIAL

The State contends that Campbell may not appeal the trial court's vacation of its motion for a new trial, but its argument rests on a misunderstanding of the posture of the case.

It is a basic tenet of the Rules of Appellate Procedure that they must be construed liberally to promote the interest of justice. RAP 1.2(a). These rules set forth a number of instances where a party has an appeal of the right to the Court of Appeals. RAP 2.2(a). Campbell's claim falls within several of these provisions.

RAP 2.2(a)(9) authorizes a person to appeal, as a matter of right, orders stemming from the grant or denial of a motion for a new trial. RAP 2.2(a)(10) permits an appeal from orders vacating or refusing to vacate a judgment. RAP 2.2(a)(13) allows an appeal from "any final order which affects a substantial right."

The State treats Campbell's appeal as something it is not to advance its argument. Campbell does not appeal from a denial of a request for a full hearing on annual review. Case law dictates that an appeal from a denial of a new trial on annual review should be considered under the discretionary review procedures of RAP 2.3. See e.g., In re Det. of Petersen, 138 Wn.2d 70, 980 P.2d 1204 (1999). Unlike the case at issue in Petersen, Campbell appeals from the court's vacation of a long-standing order that entitled him to a new trial. The Petersen Court limited its discussion of appealability to the three provisions of the RAPs raised by Petersen: (1) RAP 2.2(a) (1) (the final judgment provision); (2) RAP 2.2(a)(8) (an appeal from a decision ordering commitment after trial); and (3) RAP 2.2(a)(13) (applying to any final order after judgment affecting a substantial right). Id. at 87-88. None of these provisions applied to Petersen, since he was not appealing from a commitment trial as required by RAP 2.2(a)(8) and the other two provisions specifically required a final judgment but Petersen was appealing from a preliminary determination in an annual review proceeding. Id.

Campbell was entitled to receive the new trial, once granted, and the court's decision to vacate that decision constitutes a denial

of a new trial request, appealable under RAP 2.2(a)(9). The court's order and its vacation of that order could also be considered an order vacating a judgment under RAP 2.2(a)(10).

Additionally, RAP 2.2(a)(13) allows an appeal in the context of a request for a new trial. Alpine Industries, Inc. v. Gohl, 101 Wn.2d 252, 255, 676 P.2d 488 (1984). The "aim of the rules" is to accommodate appeals when the factual or legal basis of the claim changes and the rules otherwise contemplate an appeal as of right. Id. Campbell was "entitled to" a new trial, as the State previously conceded. CP 298.

When the court granted Campbell's motion for a new trial, the State was required to provide such a trial to him. If the State felt there was a legal error, it could appeal or file a motion pursuant to CR 60(b)(11) based on a trial irregularity, but either avenue of appeal is constrained by time limitations and not an open invitation to undermine the court's clear order granting a new trial.

When the court ordered a new trial, by statute the State had 45 days to commence the new trial proceedings. RCW 71.09.050(1) (setting 45 day speedy trial time for original commitment orders); RCW 71.09.090(2) (directing procedures of original commitment trial to apply to retrial). Additionally, the State

was required to provide him with a jury trial if requested, an expert of his choosing, and an opportunity to confront and challenge the State's case while holding the State to the burden of proving his continued confinement by proof beyond a reasonable doubt. RCW 71.09.090(2).

Campbell is entitled to appeal from the court's order vacating its prior order granting him a new trial. The original order was relied on as a definitive determination that Campbell had the right to a new trial. CP 198 (State's concession that "Mr. Campbell has already won the right to a release trial" and he is now "entitled to a release trial under the provisions of RCW 71.09.090.>").

The court's order was the basis for lengthy pretrial preparation over the course of many years and it was treated as a final order. By overturning that order without any apparent procedural authority, Campbell is denied his substantial rights and is entitled to appeal under RAP 2.2(a) (9), (10), (13), and the liberal interpretation of the court rules required by RAP 1.2(a), so that the case is considered on its merits. Campbell is not required to meet the additional threshold requirements of discretionary review.

3. IF THE CASE IS APPEALABLE UNDER DISCRETIONARY REVIEW PROCEDURES, CAMPBELL MEETS THE CRITERIA FOR DISCRETIONARY REVIEW.

In the event this Court finds Campbell's appeal of the order vacating his right to a new trial must be viewed as a motion for discretionary review, this Court should take discretionary review because of the important fundamental right at issue. Under RAP 2.3(b), this court may grant discretionary review:

- 1) If the superior court has committed an obvious error which would render further proceedings useless;
- 2) If 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; or
- 3) If the superior court has so far departed from the accepted and usual course of judicial proceedings . . . as to call for review by the appellate court.

As discussed above, the superior court committed probable error and its decision substantially limits Campbell's freedom to act. Indefinite civil commitment undeniably affects a person's substantial rights, and a person is entitled to due process in a commitment proceeding. In re Detention of Scott, 150 Wn.App. 414, 426, 208 P.3d 1211 (2009). The court's basis for vacating its long-standing order granting a new trial is the review of a later report, and yet Campbell had no incentive to contest that report or

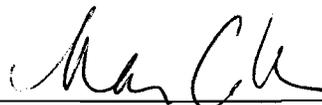
counter it with his own expert evaluation. By reversing its order based solely on the passage of time and Campbell's continued confinement, the court gives the perverse incentive to the State to delay trials once ordered in hopes that later reviews convince the court to change its ruling. The court's order disregards the principle of finality and undermines Campbell's legitimate right and expectation that he would receive a new trial. The court's order should be reversed and the case remanded for a new trial.

F. CONCLUSION.

For the foregoing reasons, Elmer Campbell respectfully requests this Court reverse the order denying him a new trial.

DATED this 29th day of July 2011.

Respectfully submitted,



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Attorneys for Appellant

APPENDIX A

RCW 71.09.090 (1996)

Laws 2001, ch. 286, § 9 rewrote the section, which formerly read:

(1) If the secretary determines that the person's mental abnormality or personality disorder has so changed that the person is not likely to engage in predatory acts of sexual violence if conditionally released to a less restrictive alternative or unconditionally discharged, the secretary shall authorize the person to petition the court for conditional release to a less restrictive alternative or unconditional discharge. The petition shall be served upon the court and the prosecuting attorney. The court, upon receipt of the petition for conditional release to a less restrictive alternative or unconditional discharge, shall within forty-five days order a hearing. The prosecuting attorney or the attorney general, if requested by the county, shall represent the state, and shall have the right to have the petitioner examined by an expert or professional person of his or her choice. The hearing shall be before a jury if demanded by either the petitioner or the prosecuting attorney or attorney general. The burden of proof shall be upon the prosecuting attorney or attorney general to show beyond a reasonable doubt that the petitioner's mental abnormality or personality disorder remains such that the petitioner is not safe to be at large and that if conditionally released to a less restrictive alternative or unconditionally discharged is likely to engage in predatory acts of sexual violence.

(2) Nothing contained in this chapter shall prohibit the person from otherwise petitioning the court for conditional release to a less restrictive alternative or unconditional discharge without the secretary's approval. The secretary shall provide the committed person with an annual written notice of the person's right to petition the court for conditional release to a less restrictive alternative or unconditional discharge over the secretary's objection. The notice shall contain a waiver of rights. The secretary shall forward the notice and waiver form to the court with the annual report. If the person does not affirmatively waive the right to petition, the court shall set a show cause hearing to determine whether facts exist that warrant a hearing on whether the person's condition has so changed that he or she is safe to be conditionally released to a less restrictive alternative or unconditionally discharged. The committed person shall have a right to have an attorney represent him or her at the show cause hearing but the person is not entitled to be

present at the show cause hearing. If the court at the show cause hearing determines that probable cause exists to believe that the person's mental abnormality or personality disorder has so changed that the person is not likely to engage in predatory acts of sexual violence if conditionally released to a less restrictive alternative or unconditionally discharged, then the court shall set a hearing on the issue. At the hearing, the committed person shall be entitled to be present and to the benefit of all constitutional protections that were afforded to the person at the initial commitment proceeding. The prosecuting attorney or the attorney general if requested by the county shall represent the state and shall have a right to a jury trial and to have the committed person evaluated by experts chosen by the state. The committed person shall also have the right to have experts evaluate him or her on his or her behalf and the court shall appoint an expert if the person is indigent and requests an appointment. The burden of proof at the hearing shall be upon the state to prove beyond a reasonable doubt that the committed person's mental abnormality or personality disorder remains such that the person is likely to engage in predatory acts of sexual violence if conditionally released to a less restrictive alternative or unconditionally discharged.

(3) The jurisdiction of the court over a person civilly committed pursuant to this chapter continues until such time as the person is unconditionally discharged.”

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

IN RE THE DETENTION OF)	
)	
ELMER CAMPBELL,)	NO. 66822-6-I
)	
)	
APPELLANT.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 29TH DAY OF JULY, 2011, I CAUSED THE ORIGINAL **OPENING 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 PROSECUTOR'S OFFICE | <input type="checkbox"/> | HAND DELIVERY |
| SVP UNIT | <input type="checkbox"/> | _____ |
| KING COUNTY ADMINISTRATION BLDG. | | |
| 500 FOURTH AVENUE, 9 TH FLR | | |
| SEATTLE, WA 98104 | | |
|
 | | |
| <input checked="" type="checkbox"/> ELMER CAMPBELL | <input checked="" type="checkbox"/> | U.S. MAIL |
| SPECIAL COMMITMENT CENTER | <input type="checkbox"/> | HAND DELIVERY |
| PO BOX 88600 | <input type="checkbox"/> | _____ |
| STEILACOOM, WA 98388-0647 | | |

SIGNED IN SEATTLE, WASHINGTON THIS 29TH DAY OF JULY, 2011.

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