

NO. 68579-1-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

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IN RE: THE DETENTION OF CLAY PARSONS

STATE OF WASHINGTON,

Respondent,

v.

CLAY PARSONS,

Appellant.

---

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

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APPELLANT'S OPENING BRIEF

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A. INTRODUCTION.

Days before Clay Parsons was set to be released from prison after more than 20 years in custody, a psychologist hired by the State evaluated him and concluded he did not meet the criteria for civil commitment under RCW ch. 71.09. Despite this expert's opinion, the court found there was probable cause for the State to detain Parsons and pursue his commitment.

On the first day of his civil commitment trial, Parsons asked to waive his presence in the courtroom. At the State's request, the court insisted that Parsons would lose his right to attend any of the proceedings, through and including the issuance of the verdict, if he waived his presence for a portion of the trial. Based on the court's instructions that he could not return, Parsons did not attend his trial.

By proceeding with a civil commitment prosecution without the requisite probable cause and pressuring Parsons to waive his right to attend the entirety of the trial for faulty reasons, Parsons was denied his right to due process of law.

B. ASSIGNMENTS OF ERROR.

1. The court lacked authority to detain Parsons upon the State's civil commitment petition when the State did not present probable cause that he met the criteria for confinement under RCW ch. 71.09.

2. The court misconstrued the essential elements of civil commitment at the probable cause stage and improperly weighed the evidence to find probable cause.

3. The court denied Parsons his due process right to be present at his jury trial.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. The State must prove it has probable cause that an individual meets all necessary criteria for civil commitment before it is authorized to detain a person, compel his participation in testing, demand a videotaped deposition, and pursue civil commitment. The State's expert did not believe Parsons was likely to reoffend if not confined, which is an essential element of civil commitment. Did the court improperly dilute the State's burden and impermissibly disregard the expert's opinion when it found there was sufficient evidence to detain Parsons and pursue civil commitment? (assignments of error 1 and 2)

2. The right to be present at a jury trial is a critical component of the right to due process of law. The court restricted Parsons' right to be present by requiring him to irrevocably forgo any opportunity to appear at trial if he opted not to appear at a single portion of the proceedings. Did the court unreasonably and improperly deny Parsons his right to appear at trial? (assignment of error 3).

D. STATEMENT OF THE CASE.

Clay Parsons was convicted of several sexually violent offenses in that occurred in 1983, and another in 1989. Supp. CP \_\_, sub. no. 1 (Damon evaluation, at 5-6).<sup>1</sup> On December 30, 2009, as Parsons was due to be released from the prison terms imposed in the 1980s, he was evaluated by Dr. Will Damon, an expert appointed by the Department of Corrections (DOC) End of Sentence Review Committee. Id. (Damon evaluation, at 1). Damon was a member of the Joint Forensic Unit assigned to evaluate whether Parsons met the criteria for civil commitment under RCW ch. 71.09. Id. (Damon evaluation, at 1).<sup>2</sup>

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<sup>1</sup> The supplemental designation of clerk's papers was filed on December 18, 2012.

<sup>2</sup> The DOC website describes the Joint Forensic Unit as a "pre-selected group of expert forensic psychologists who specialize in sexually violent predator and sex offense risk evaluations." See <http://www.doc.wa.gov/community/sexoffenders/civilcommitment.asp> (last viewed Dec. 20, 2012).

Damon interviewed Parsons and reviewed volumes of records. Id. (Damon evaluation, at 2-5 (listing 83 records reviewed and types of testing used)). He wrote a detailed 74-page report explaining Parsons' prior offenses, mental health diagnoses, and the process for evaluating his likelihood of reoffending. Id. Based on his assessment of numerous risk prediction tools used in the scientific community, Damon concluded that Parsons did not present the required likelihood of reoffending necessary to seek a civil commitment. Id. (Damon evaluation, at 73-74).

The State disagreed with Damon's conclusion. It immediately located another psychologist to evaluate Parsons. 5/20/10RP 6.<sup>3</sup> Dr. Henry Richards conducted this last minute evaluation. 5/20/10RP 6. Richards largely concurred with Damon's analysis of Parsons but, based on his own interpretation of the risk assessment tools, he concluded Parsons met the criteria for commitment. Supp. CP \_\_, sub. no. 1 (Richards evaluation, at 1, 29-30).

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<sup>3</sup> The verbatim report of proceedings from the 5/20/2012 hearing is contained at in the superior court file as sub. no. 28 and has been designated as a clerk's paper.

The State offered both Damon and Richards' evaluations in its petition for probable cause seeking necessary court permission to detain Parsons and pursue civil commitment. Id. Parsons objected to the State's reliance on Richards' evaluation, arguing the State had no authority to conduct a second evaluation and never informed Parsons of the purpose of the second evaluation when obtaining his cooperation. 5/20/10RP 6. The court agreed to confine itself only to Damon's evaluation when assessing the petition for commitment. 5/20/12RP 20.

Although Damon's evaluation thoroughly explained the application of several tools used in risk assessments and concluded that Parsons did not meet the criteria for commitment, the court disregarded that opinion. The court substituted its own finding that Parsons should be judged as likely to commit offenses in the future and ordered the State to detain Parsons and pursue his commitment. 5/20/10RP 20-23.

At Parsons' commitment trial, Parsons indicated his desire to waive his presence. 2/29/12RP 2, 4. He told the court that his reason was that he did not "want to cause any further trauma for the victims seeing me." 2/29/12RP 4. The court told Parsons if "you now waive your right to be present during the trial, that is a waiver effective for the rest of the trial." Id. The court told Parsons he would not be permitted

to return except for in the limited capacity of testifying as a State witness if called, and would not be permitted to hear the verdict announced in court. Id. Based on this ruling, Parsons never appeared at the trial except when the prosecution called him to testify. CP 18, 20-38.<sup>4</sup>

The jury found Parsons met the commitment criteria under RCW ch. 71.09. CP 4.

E. ARGUMENT.

**1. The court lacked authority to detain Parsons and order a commitment trial without probable cause**

The State may not institute indefinite civil commitment proceedings under RCW ch. 71.09 unless it first proves there is probable cause that the individual facing detention meets the criteria for commitment. The State authorized a psychologist to evaluate Parsons' eligibility for commitment. After a detailed evaluation, the psychologist concluded that Parsons did not meet the mandatory criteria because he did not present the necessary risk of reoffending. The trial judge decided the expert's opinion was wrong and substituted his own

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<sup>4</sup> The clerk's minutes detail Parsons' lack of presence throughout the trial, from February 29, 2012, until the verdict was received on March 12, 2012. CP 18-38.

conclusion that Parsons met the criteria for confinement. The judge exceeded his authority when he found there was probable cause to detain Parsons for civil commitment.

- a. The State may institute a commitment trial under RCW ch. 71.09 only after it proves to the court it has probable cause that the accused person meets the criteria for commitment.

Civil commitment under RCW ch. 71.09 constitutes a severe deprivation of individual liberty that mandates strict adherence to the substantive and procedural restrictions of governing statutes and the constitutional right to due process of law. Foucha v. Louisiana, 504 U.S. 71, 80, 112 S. Ct. 1780, 1785, 118 L. Ed. 2d 434 (1992); In re Det. of Thorell, 149 Wn.2d 724, 732, 72 P.3d 708 (2003); U.S. Const. amend. 14; Const. art. I, § 3. Due process requires state laws impinging on the fundamental right to liberty must advance compelling state interests and be “narrowly drawn to serve those interests.” In re Det. of Young, 122 Wn.2d 1, 26, 857 P.2d 396 (1993).

There is no constitutional basis for holding someone indefinitely if that person is not dangerous. O’Connor v. Donaldson, 422 U.S. 563, 574-75, 95 S. Ct 2486, 45 L. Ed. 2d 396 (1975); Jones v. United States, 463 U.S. 354, 368, 103 S. Ct. 3043, 77 L. Ed. 2d 3043 (1984) (insanity

acquittee “entitled to release” when no longer dangerous or has recovered sanity); Foucha, 504 U.S. at 78 (faulting state court for failing to attach “constitutional significance” to individual’s right to release when not dangerous and mentally ill).

Because of the “massive curtailment of liberty” at stake this Court “must narrowly construe the present statute,” RCW 71.09.040, defining the requirements of the civil commitment scheme. In re Det. of Hawkins, 169 Wn.2d 796, 801, 238 P.3d 1175 (2010) (quoting *inter alia* Humphrey v. Cady, 405 U.S. 504, 509, 92 S. Ct. 1048, 31 L. Ed. 2d 394 (1972)); see In re Det. of Martin, 163 Wn.2d 501, 508, 182 P.3d 951 (2008) (“we strictly construe statutes curtailing civil liberties to their terms”).

In order to institute indefinite detention proceedings under RCW ch. 71.09, the court must find that the State has established probable cause that the individual meets the criteria for confinement. RCW 71.09.040(1). The probable cause hearing must be an adversarial proceeding in open court, with the rights to appear, present evidence, and cross-examine witnesses. RCW 71.09.040(3); Young, 122 Wn.2d at 46 (“Absent an opportunity to appear and respond to the petition for

commitment, we believe that the risk of wrongful detention is too great.”).

If a court finds probable cause, an accused person loses his liberty. By statute, the individual must be “taken into custody” and held in “total confinement.” RCW 71.09.040(1), (3). “In no event shall the person be released from confinement prior to trial.” RCW 71.09.040(3). In addition to total confinement, the accused person must submit to a mental evaluation, take part in invasive court-ordered tests such as a penile plethysmograph, and submit to a videotaped deposition recounting the person’s sexual and mental health history. RCW 71.09.050(1); In re Det. of Williams, 147 Wn.2d 476, 492, 55 P.3d 597 (2002); see also In re Det. of Young, 163 Wn.2d 684, 695, 185 P.3d 1180 (2008) (affirming imposition of contempt sanctions upon detainee for refusing to submit to pretrial examination). In sum, a court’s finding that probable cause supports the petition for civil commitment triggers invasive and extreme deprivations of both privacy and liberty in addition to serving as the mandatory mechanism for instituting civil commitment proceedings.

The standard of probable cause is akin to the standard used in criminal cases. Thorell, 149 Wn.2d at 744 (citing In re Det. of Petersen,

145 Wn.2d 789, 42 P.3d 952 (2002)). “A court may not weigh the evidence in determining whether probable cause exists.” In re Det. of Elmore, 162 Wn.2d 27, 37, 168 P.3d 1285 (2007).

The threshold standard for a civil commitment petition mandates that the court “perform a critical gate-keeping function.” In re: Det. of McCuiston, 174 Wn.2d 369, 382, 275 P.3d 1092 (2012). “Under this standard, a court must assume the truth of the evidence presented; it may not ‘weigh and measure asserted facts against potentially competing ones.’” Id. (quoting Petersen, 145 Wn.2d at 798). The court may not weigh the credibility of an expert’s opinion. In re Det. of Ward, 125 Wn.App. 381, 387, 104 P.3d 747 (2005). Instead, the court takes the assertions in the expert’s evaluation as true, and determines whether the evidence suffices to establish probable cause. Id.

The essential elements of a civil commitment under RCW 71.09 are that a person meets the definition of a “sexually violent predator.” This label requires proof that the individual has a mental abnormality, has “serious difficulty controlling dangerous, sexually predatory behavior,” and is likely to commit dangerous sexually predatory behavior in the future. Thorell, 149 Wn.2d at 735, 744-45; RCW 71.09.020(18).

- b. The court diluted the essential elements required for civil commitment under RCW ch. 71.09 and impermissibly disregarded contrary evidence to conclude Parsons met the criteria for civil commitment.

The sole evidence the court considered in determining whether there was probable cause to detain Parsons and seek his indefinite commitment was Damon's evaluation and the brief statement of Parsons' admissions of prior sexual offenses contained in the State's certification of probable cause. 5/20/10RP 20; Supp. CP \_\_, sub. no. 1. Although the State tried to present the court with another expert's opinion, the court refused to consider it and "confined" itself to Damon's evaluation. 5/20/10RP 20. Yet the court disregarded the substance of Damon's evaluation and misrepresented or misunderstood the essential legal requirements to support a petition for civil commitment.

The court treated the legal criteria of commitment as containing three elements. 5/20/10RP 19. The first two elements are the requisite prior criminal history and "a mental disease or defect that predisposes him to the commission of criminal sexual offenses." 5/20/10RP 19. Damon found Parsons met these criteria. Id. The court characterized the

“third element” as whether Parsons “is likely to engage in future violent criminal offenses.” Id.

Contrary to the court’s explanation of the “third element,” the controlling statute provides that to be a “sexually violent predator,” the individual must “suffer from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility.” RCW 71.09.020(18). The statute explicitly permits commitment based on sufficient risk of only a certain type of behavior – “predatory acts of sexual violence” – and it defines “predatory” and “sexually violent offenses” to specify the type of future conduct that must be “more likely than not” to occur. RCW 71.09.020(10), (17). The constitutionality of civil commitment hinges on the scheme’s specific inclusion of a narrow subset of offenders and its explicit exclusion of people simply because they are repeat criminal offenders. Kansas v. Hendricks, 521 U.S. 346, 360, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997).

The trial court improperly muddled this constitutionally critical distinction. Id. at 372-73 (civil commitment is not a “mechanism for retribution or general deterrence – functions properly those of criminal law, not civil commitment.”). The court misrepresented this

fundamental legal standard by asking only whether there was probable cause that Parsons was “likely to engage in future violent criminal offenses.” 5/20/10RP 19.

After diluting the evidentiary threshold that the State needed to prove to detain and commit Parsons, the court decided it could “reach its own independent conclusion as to whether or not Mr. Parsons meets the statutory definition.” 5/20/10RP 20. The court claimed Damon did “not reach the conclusion that” Parsons met the criterion of being likely to engage in future violent acts. 5/20/10RP 19. This characterization of Damon’s report is misleading, because Damon reached a conclusion, and that conclusion was that Parsons did not demonstrate sufficient likelihood of reoffending. Supp. CP \_\_, sub. no. 1 (Damon evaluation, at 73 (“Consequently, this evaluator does not believe it is defensible to argue that Mr. Parsons’ recidivism risk would increase such that he would meet the more likely than not burden of lifetime risk exceeding 50%.”)); *Id.* at 74 (“Based on the information above, it is my opinion that Mr. Parsons does not meet the criteria as a sexually violent predator as described in RCW 71.09.”).

The court implied that Damon was silent on the question of Parsons’ risk in order to mask that the court was rejecting Damon’s

conclusion and not filing in a gap in Damon's evaluation. 5/20/10RP  
19. At the probable cause stage, it is impermissible for a court to reject the expert opinion on the ground that it is not credible or endorsed by the court. McCuiston, 174 Wn.2d at 382.

Damon's report was based on a sophisticated assessment of actuarial tables and clinical judgment whose credibility was not before the court to weigh and then discount. Damon was the psychologist employed by the State to evaluate whether Parsons met the criteria and he concluded Parsons did not satisfy the mandatory elements of commitment. Supp. CP \_\_, sub. no. 1 (Damon evaluation, at 1). Damon was a member of the Joint Forensic Unit, which is charged with evaluating people for commitment and consists of a "pre-selected group of expert forensic psychologists who specialize in sexually violent predator and sex offense risk evaluations." Department of Corrections (DOC) website, Civil Commitment of Sexually Violent Predators; see also DOC Policy 350.500, Directive (VI)(B) (explaining End of Sentence Review Committee assigns "an expert Joint Forensic Unit psychologist/psychiatrist" to conduct "the forensic psychological evaluation"). Damon was a pre-selected expert whose credentials were not challenged in the probable cause hearing. Damon's report was 74

pages long, and was thorough and detailed in its assessment. Supp. CP \_  
, sub. no. 1 (Damon evaluation, attached as Exhibit B to Petition).  
Damon documented his statements and explained his conclusions. Id.

While the court was not required to rubber stamp Damon's  
evaluation, it was not permitted to disregard it. It could assess whether  
his conclusions were supported by sufficient facts to establish probable  
cause. See In re Det. of Jacobson, 120 Wn.App. 770, 780-81, 86 P.3d  
1202 (2004). The court "exceeded its role" in assessing probable cause  
by judging the credibility of the expert's opinion and substituting its  
own judgment. Id. at 781.

Even a trained and credentialed psychologist may not "simply  
incorporate" his own judgment into an actuarial score "absent any  
systematic, transparent procedure for doing so that is recommended by  
the authors of the scale" without risking "nullifying the advantage of  
objectivity" the actuarial test is designed to provide. In re Rosado, 889  
N.Y.S.2d 369, 381 (NY Supreme Ct 2009) (quoting Prentky, Janus,  
Barbaree, and Schwartz, Sexually Violent Predators in the Courtroom:  
Science on Trial, Psychology, Public Policy and Law, 2006, Vol. 12,  
No. 4, 357-393, at 384)); see also Melissa Hamilton, Public Safety,  
Individual Liberty, and Suspect Science: Future Dangerousness

Assessments and Sex Offender Laws, 83 Temp. L. Rev. 697, 743 (2011) (“There is, indeed, no empirical evidence that modifying actuarial scores [by clinical judgment] improves the accuracy of predictions”).<sup>5</sup>

The court’s authority was limited to accepting the expert’s evaluation or rejecting it as inadmissible for an evidentiary reason, not based on the court’s disagreement with the expert’s assessment of sophisticated tests. Damon was a qualified expert who concluded that Parsons did not present the requisite likelihood of committing predatory acts of sexual violence. The State did not present competent evidence Parsons met the criteria for confinement and it lacked authority to prosecute the civil commitment.

Under RCW ch. 71.09, Parson’s release was mandated and unless he committed a recent overt act upon his release, the State could not seek his commitment. Young, 122 Wn.2d at 41.

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<sup>5</sup> While an expert’s clinical judgment may serve as the basis for civil commitment in some circumstances, the court’s use of its own non-expert judgment is highly problematic. See E. Beecher-Monas & E. Garcia-Rill, The Impact of Behavioral Genetics on the Criminal Law: Genetic Predictions of Future Dangerousness: Is there a Blueprint for Violence?, 69 Law & Contemp. Prob. 301, 317 (2006) (“Future dangerousness testimony based on clinical judgment alone has been overwhelmingly castigated by the profession and so fails peer review, publication, and the general acceptance prongs of Daubert.”).

- c. The improperly obtained substitute evaluation may not be used to save the improperly entered probable cause finding.

The trial court disregarded the second evaluation the State obtained based on its disapproval of Damon's conclusion that Parsons did not meet the criteria for confinement. 5/20/10RP 20. In the event the State seeks to have this second evaluation used on appeal, this Court should decline to consider it.

First, the trial court did not review or evaluate the second evaluation. 5/20/10RP 20. If the State wants to recreate the probable cause hearing and rely on Richards' evaluation, Parsons has the right to a hearing at which he is present and able to cross-examine the witness against him as well as present evidence on his own behalf. Young, 122 Wn.2d at 46; RCW 71.09.040. The trial court cast no critical eye on Richards' evaluation and this Court should not act as the fact-finder in the trial court's stead when Parsons has not had a hearing on that evaluation.

Second, the substitute evaluation performed by Richards was obtained without authority of law and the court below properly disregarded it for that reason. RCW 71.09.025(1)(v) permits the State to obtain "[a] current mental health evaluation." See In re Det. of Strand,

167 Wn.2d 180, 187-88, 217 P.3d 1159 (2009). In Strand, the court strictly construed the language in RCW 71.09.025. Id. at n.3 (“We strictly construe the SVP statute, limiting our inquiry to its terms”). The court concluded that the State could obtain “a” “singular” evaluation and rejected the argument that the State had to rely on prior evaluations. Id. at 188-89. Its ruling emphasized the “singular” nature of the noun “evaluation.” Id.

Strand involved a claim raised for the first time on appeal that RCW 71.09.025 authorized only a review of existing mental health records and did not permit the State to request an in-person evaluation. 167 Wn.2d at 186-87. Because this issue was not raised before the trial court, the Strand court ruled that its review was limited to whether the issue raised a manifest constitutional error. Id. Furthermore, the court construed the statute to permit a single “current” evaluation. Id. at 187-89. Unlike Mr. Strand, Parsons objected in the trial court to the State’s efforts to obtain a second evaluation and therefore he is entitled to relief if the evaluation was not properly obtained. 5/20/10RP 3; Supp. CP \_\_, sub. no. 21 (Respondent’s motion to dismiss for lack of probable cause). The strict construction of the “single” evaluation at issue in

Strand demonstrates the State's lack of authority to request additional evaluations under RCW 71.09.025.

The court similarly strictly construed the limitations of the State's right to obtain additional mental health evaluations in Williams, 147 Wn.2d at 480-82. The Williams court rejected the State's effort to use CR 35 as the basis for obtaining a second evaluation of a person facing a civil commitment trial because the statute did not plainly authorize any additional evaluations. Id. at 490.

Likewise, in Hawkins, the court construed the "evaluation" language of RCW 71.09.040 (4) to bar the court from ordering a person to submit to a sexual history polygraph examination. 169 Wn.2d at 801-02. The State's expert insisted he needed the detainee to submit to this polygraph as part of his evaluation, conducted pursuant to RCW 71.09.040(4), and noted that the administrative rules permitted the State to obtain a polygraph. Id. at 800. The court disagreed. It ruled that even if the administrative rules allowed the State's expert to request a sexual history polygraph examination, the State "cannot create rules that contradict the statute." Id. at 804. The plain text of the statute, narrowly construed, did not "specifically permit compelled polygraph

examinations in RCW 71.09.090(4), [thus] the statute prohibits such examinations.” Id. at 803.

RCW 71.09.025 permits the State to conduct “a current mental health evaluation.” If the statute does not expressly authorize the court to mandate an additional examination, the State lacks authority to obtain such an evaluation. Hawkins, 169 Wn.2d at 803.

Here, the State shopped for a second expert because it disagreed with and disliked the result of Damon’s evaluation, even though Damon was the “pre-selected” expert designated by the State to evaluate whether Parsons met the criteria for commitment. See Supp. CP \_\_, sub. no. 1 (Damon evaluation, at 1). The statutory scheme enacted in RCW ch. 71.09 provides a mechanism for civilly committing a person who has been released from total confinement. The State exceeded its authority by trying to keep Parsons in custody by virtue of an improperly obtained evaluation and the trial court properly disregarded that evaluation.

In addition, Parsons explained that he was not sufficiently apprised of Richards’ role in evaluating him and did not voluntarily submit to the evaluation. Supp. CP \_\_, sub. no. 21 (page 3-4). The court acknowledged that there was no evidence that Parsons adequately

understood Richards' role when he agreed to speak with him, which was one of the reasons the court did not consider Richards' evaluation. 5/20/10RP 6, 18.

d. The flawed probable cause finding undermines the State's authority to pursue civil commitment.

When the failure to follow substantive or procedural rules effects the ultimate outcome of the case, reversal is the appropriate remedy. Young, 122 Wn.2d at 46-47.

The detainee in Young was denied his right to be present during the probable cause hearing under a prior version of the statute. Id. at 43. The Supreme Court agreed that even though the statute in effect at the time did not specifically grant the right to be present at the hearing, such procedural protection was implicit in the statutory scheme and necessary to protect the substantive rights at issue in the commitment. Id. at 45-46. However, since Young did not claim there were substantive flaws in the probable cause findings, the court had no reason to believe the outcome would be different had a proper hearing been held. Id. at 47. On that basis, it declined to reverse the civil commitment as a remedy for the improper ex parte proceeding. Id.

Unlike Young, the outcome of Parson's commitment would have changed if the trial court had correctly construed the legal elements of commitment and refrained from improperly weighing and rejecting Damon's conclusion. The court never used the unauthorized second evaluation from Richards as a basis for probable cause and that evaluation cannot provide a substitute basis for Parsons' commitment because it was improperly obtained and never vetted through an adversarial hearing. The petition for probable cause should have been denied.

**2. The court denied Parsons his right to be present at trial by demanding that he would forfeit his right to appear by failing to attend any portion of his trial.**

- a. The right to be present at trial may be waived only knowingly, intelligently, and voluntarily, with an understanding of the scope of the right to be present.

A civil commitment trial is a "quasi-criminal" proceeding that incorporates the fundamental substantive rights of a criminal trial even though the commitment is labeled civil in nature. Like a criminal trial, the State bears the burden of proof beyond a reasonable doubt and the accused person has the right to counsel, to cross-examine witnesses and to a unanimous jury verdict. See Young, 122 Wn.2d at 48 (due process

protections of criminal cases apply where RCW 71.09 indicates similar standards); see also In re Det. of Halgren, 156 Wn.2d 795, 809, 132 P.2d 714 (2006) (same “constitutionally prescribed unanimity requirement” as in criminal cases applies to RCW ch. 71.09 proceedings); RCW 71.09.050 (granting accused rights to attorney, expert witnesses, and 12-person jury); RCW 71.09.060 (requiring State to prove allegations beyond a reasonable doubt to unanimous jury).

The right to due process of law bars the State from massively curtailing Parsons’ liberty without adequate procedural protections. Foucha, 504 U.S. at 80; Vitek v. Jones, 445 U.S. 480, 491-92, 100 S. Ct. 1254, 1262-63, 63 L. Ed. 2d 552 (1980); U.S. Const. amend. 14; Wash. Const., art. I, § 3. Due process is a flexible concept that depends on the particular context. Morrissey v. Brewer, 408 U.S. 471, 481, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972). Courts consider the following factors: (1) the private interests affected, (2) the risk of erroneous deprivation of that interest through the procedures used, (3) the probable value, if any, of substitute procedural safeguards, and (4) the government’s objectives and interest, including the burdens entailed by additional or different procedural requirements. Mathews v. Eldridge, 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976).

Parsons is entitled to the same procedural protections afforded to involuntary mental committees. Baxstrom v. Herold, 383 U.S. 107, 110-11, 86 S. Ct. 760, 15 L. Ed. 2d 620 (1966). Mental health cases strictly guarantee the right to be present at trial. RCW 71.05.235(2) (trial right for criminal defendant subject to mental health commitment includes individual “shall be present at such proceeding, which shall in all respects accord with the constitutional guarantees of due process of law and the rules of evidence pursuant to RCW 71.05.360 (8) and (9)”); RCW 71.05.310 (same right to “be present” for civil commitment trial).

The right to be present at trial is inherent in the due process rights guaranteed by the state and federal constitutions. U.S. Const. amend. 14; Const. art. I, § 3. Under the Due Process Clause, an accused person is entitled to be personally present in court at all critical stages of the proceedings. State v. Irby, 170 Wn.2d 874, 883, 246 P.3d 796 (2011) (quoting Snyder v. Massachusetts, 291 U.S. 97, 105-06, 54 S. Ct. 330, 78 L. Ed. 674 (1934)).

The right to be present at trial stems in part from the fact that by his physical presence the defendant can hear and see the proceedings, can be seen by the jury, and can participate in the presentation of his rights.

Bustamante v. Eyman, 456 F.2d 268, 274 (9<sup>th</sup> Cir. 1972).

b. Parsons was forced to abandon his right to be present at trial.

Parsons had the right to be present at trial as a matter of due process, and he also had the right to waive his presence. However, when Parsons indicated his desire to waive his right to be present, the State objected. 2/29/12RP 3. It insisted that it would be prejudiced by Parsons' failure to appear in court when victims testified about Parsons' conduct during the 1980s. Id.

The State claimed that if Parsons waived his presence, he must be barred from attending any portion of the trial. 2/29/12RP 3. He could not change his mind. Id. The court ruled that Parsons "has a right to be here for the trial," but agreed that once he waived that right, he would not be allowed to change his mind. 2/29/12RP 4.

The court directed Parsons:

If you now waive your right to be present during trial, that is a waiver effective for the rest of the trial. You can't then come back tomorrow and say, oh, I've changed my mind. I want to be here. Do you understand that?

2/29/12RP 4. Parsons said he understood. Id.

The court also noted that it could be prejudicial to Parsons for the jury not to see him in the courtroom. 12/29/12RP 4-5. The court did

not endorse the State's claim that Parsons' absence would prejudice its case, even though the State asserted that, "[f]or him to return on his own terms for his testimony I believe is prejudicial to the State. I think it's objectionable that he be permitted to pick and choose when he is going to be in the courtroom." 2/29/12RP 3-5. While there did not appear to be reasonable harm to the State if Parsons returned to hear the testimony, the court agreed that once Parsons waived his right to appear at trial, he could not return. 2/29/12RP 3-4. Abiding by this requirement, Parsons did not return to the trial court for any portion of the trial other than when called as a witness by the State, pursuant to the restrictions the court placed on Parsons' right to be present. CP 20-38.

Courts must indulge every presumption against waiver of the right to be present at trial in a criminal case. State v. Garza, 150 Wn.2d 360, 368, 77 P.3d 347 (2003). The same principles protect the accused person's right to be present at a civil commitment trial.

The presumption against waiver bars a court from imposing a per se rule that unreasonably denies an accused person the right to change his mind without any basis to do so. Parsons was not a behavioral problem or disruptive in court. The judge did not identify any reason that Parsons could not change his mind as the case

proceeded. It was manifestly unreasonable for the court to treat Parsons' waiver of his right to be present as an absolute prohibition to him attending any portion of the trial.

In Garza, the court reversed a conviction based on the trial judge's erroneous preliminary finding that the defendant had voluntarily absented himself by failing to appear for trial. 150 Wn.2d at 371. The judge had resumed trial in Garza's absence when he was five minutes late after being warned not to be late, but later the judge learned that Garza had been arrested on an unrelated matter. Id. at 364. The Supreme Court focused on the initial ruling by the trial judge to conduct trial in Garza's absence without accurately assessing whether Garza voluntarily waived his right to be present. Id. at 367, 371. The court ruled that even if Garza should or could have done more to alert the judge that he was unable to attend the proceedings, "it would not cure the judge's abuse of discretion in the *preliminary* determination of voluntary absence." Id.

In Parsons' case, the judge made a similar preliminary and fatal determination preventing Parsons from voluntarily determining whether he wanted to be present at trial. The judge definitively ruled that Parsons could not attend his trial if he asked to be excused for a portion

of it. 2/29/12RP 4. This approach is contrary to the right to due process inherent in a contested civil commitment proceeding. Parsons had the fundamental right to take part in the proceedings and the State had no legitimate interest in preventing Parsons from being personally present. The risk of erroneous deprivation of Parsons' right to liberty that flows from his lack of participation at trial and consultation with his lawyers during trial outweighs any interest the government might have in an absolute bar to a detained person being present during his commitment trial.

c. The court's unreasonable restrictions on Parsons' right to be present at trial denied him a critical role in the proceedings and constitute a structural error.

In a criminal case, the fundamental right to be present at trial demands that the court declare a mistrial where the defendant is not voluntarily absent. Garza, 150 Wn.2d at 367. The court does not weigh whether the testimony the defendant missed was crucial to the case. Id. at 370. Because Parsons had not validly waived his right to be present, with an accurate understanding of his right to appear during the proceedings, he cannot be penalized for missing a portion of the proceedings. See Garza, 150 Wn.2d at 370. The improper and unreasonable restrictions placed on Parsons' right to be present during

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

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IN RE THE DETENTION OF	)	
	)	
	)	
CLAY PARSONS,	)	NO. 68579-1-I
	)	
	)	
APPELLANT.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, DECLARE THAT ON THE 21<sup>ST</sup> DAY OF DECEMBER, 2012, 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:

[X] TRICIA BOERGER ATTORNEY AT LAW OFFICE OF THE ATTORNEY GENERAL 800 FIFTH AVENUE, SUITE 2000 SEATTLE, WA 98104-3188	(X)	U.S. MAIL
	( )	HAND DELIVERY
	( )	_____

[X] CLAY PARSONS SPECIAL COMMITMENT CENTER PO BOX 88600 STEILACOOM, WA 98388	(X)	U.S. MAIL
	( )	HAND DELIVERY
	( )	_____

**SIGNED** IN SEATTLE, WASHINGTON THIS 21<sup>ST</sup> DAY OF DECEMBER, 2012.

X \_\_\_\_\_ *[Signature]*

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