CONSTITUTIONAL INFIRMITY IN WASHINGTON STATE'S SEXUALLY VIOLENT PREDATOR STATUTE

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The loss of liberty produced by an involuntary commitment is

I. INTRODUCTION

Between 2005 and 2012, approximately six people sat in Washington State prisons awaiting a release trial to which they were entitled, but could not compel.[2] They sat in Special Commitment Centers—separate wings of Washington State prisons designed to house those the State refers to as "sexually violent predators" (SVPs). These individuals had histories of sex offenses ranging from indecent liberties to rape by forcible compulsion and have served prison sentences for each of the crimes for which they were convicted. Upon their release from prison, or sometime thereafter, a prosecutor filed a petition to indefinitely confine them as SVPs. Once adjudicated a SVP, the detainees' status remains subject to an annual review process. If the Department of Social and Health Services (DSHS) finds probable cause that a detainee has "so changed" that he may not qualify as a SVP, DSHS files a petition with the court, and a release trial is required within forty- -1-2d .3(than)11.5(i5 0 Td[th)11.9(s for wh)11.9(ich)-

chapter 71.09 of the Washington Revised Code and its release procedures (the Statute).[3] After a SVP is detained in a special commitment center, per the procedures outlined later in this article, the State must conduct an annual review—a procedure to which the Washington State Supreme Court and the United States Supreme Court attach constitutional significance.[4] As a result of this annual review, the Secretary of DSHS may petition the court for a new hearing if he finds probable cause to believe the detainee should be released.[5] The court must schedule a full trial within forty-five days of the issuance of the DSHS release petition to determine whether the detainee remains a SVP.[6]

The detainee himself may petition the court for a show cause hearing, independent of DSHS, at which a judge determines whether probable cause for release exists.[7] If a judge so finds, the detainee is entitled to a new trial, identical in procedure to the original trial, where the burden is again on the State to prove beyond a reasonable doubt that the detainee remains a SVP.[8] While detainees seeking release via DSHS under Washington Revised Code Section 71.09.090(1) (DSHS-initiated release) are entitled to a trial within forty-five days, no such mandatory trial-timeline exists for detainees seeking release pursuant to Washington Revised Code Section 71.09.090(2) (detainee-initiated release).[9]

This article will examine the federal constitutional violations surrounding the legislative failure to impose a mandatory trial-timeline after probable cause is found for detainee-initiated release. First, this article will argue that under controlling United States Supreme Court precedent,[10] the legislative failure to afford a mandatory trial-timeline is not narrowly tailored to any compelling governmental interest and is thus a violation of the detainee's fundamental right to liberty under the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Second, this article will argue that the class distinction drawn between DSHS-

3. 1990 Wash. Sess. Laws 12–114.

4. *In re* Personal Restraint of Young, 857 P.2d 989, 1007–08 (Wash. 1993); *accord* Foucha v. Louisiana, 504 U.S. 71, 77 (1992).

5. WASH. REV. CODE § 71.09.090(1) (2012).

6. *Id.*

7. *Id.* § 71.09.090(2)(a).

8. *Id.*

9. *Compare* § 71.09.090(1)(a), *with* § 71.09.090(2).

10. *See* Foucha v. Louisiana, 504 U.S. 71 (1992).

1995, the federal district court for the Western District of Washington determined the Statute was unconstitutional on two grounds.[30] First, the court concluded that the Statute violated substantive due process, as the United States Supreme Court articulated in *Foucha v. Louisiana*, because the legislature used the phrase "mental abnormality or personality disorder" instead of "mental illness."[31] The court determined that there was no scientific definition of the former—that it was a term created to help legitimize using the civil, rather than the more regulated criminal, system to detain SVPs.[32] Second, the court determined the law was primarily criminal and thus

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as a SVP.[49]

The detainee personally may petition the court for release independent of DSHS.[50] If a judge finds probable cause to believe a person has "so changed"[51] that he no longer meets the definition of a sexually violent predator, then the detainee is statutorily entitled to a new trial with the same procedural protections afforded to detainees under DSHS-initiated release, with one glaring exception—there is no mandatory trial-timeline.[52] When the detainee petitions the court for release, he or she is entitled to a new trial, but the court need not meet any statutory deadline for scheduling or conducting the new trial.[53] Thus, the SVP detainee can remain

B. Roy Donald Stout, Awaiting Release Trial Since 2009

At the time of the 2005 amendments to the Statute, many SVP detainees were in the same situation as McCuistion. Roy Donald Stout was committed under the Statute in 2003 following a history of sexually motivated crimes between 1982 and 1997.[68]

In 2009, Stout presented evidence that he no longer met the statutory definition of a SVP due to the change in his dangerousness score attributed, in part, to his advanced age.[69] The new calculation—as a result of a change in the base recidivism rate[70] and Stout's increased age[71]—assigned a 13–24.5% risk of recidivism.[72] Thus, Stout petitioned under section 71.09.090(2) for release on the grounds that he no longer qualified as a SVP because he no longer was "likely to engage in predatory acts of sexual violence if not confined."[73] However, since the constitutionality of the 2005 amendments was a material issue in the Stout case and had been pending since 2006, Chief Justice Madsen of the Washington Supreme Court signed an order staying the proceedings in Stout's case, along with six other cases, pending the decision in *McCuistion II*

issue.[75] Stout argued that the Washington Supreme Court had previously read subsections .090(1) and .090(2) to require a forty-five-day trial-timeline,[76] and further argued that due process concerns also required that the Statute be interpreted to include the forty-five-day trial-timeline.[77] In the State's briefs, the only argument advanced to justify the difference in treatment was one of legislative intent—the State argued Stout was not entitled to a forty-five-day trial-timeline because the legislature didn't include one in Washington Revised Code Section 71.09.090(2).[78] At no point did the State offer a justification for the differential treatment.[79]

The *McCuistion I* decision invalidated the 2005 amendments on federal constitutional grounds, but it was withdrawn in May 2011 after oral argument on the State's motion for reconsideration. The oral argument concentrated primarily on whether McCuistion's expert witness satisfied the Statute's "so changed" requirement.[80] The Washington Court of Appeals previously held that a detainee seeking release may be required to demonstrate he has changed, to avoid collateral attacks on the initial order of confinement brought as a release proceeding.[81] Given the content of oral argument, it seemed likely that the court would re-issue their decision, avoiding the substantive issue of the constitutionality of the 2005 amendments and deciding McCuistion could not meet the burden of showing that he had so changed as to warrant release.[82]

In May 2012, the court issued its *McCuistion II* decision.[83] The court determined that McCuistion did not have standing to challenge the evidentiary restrictions because the evidence he presented, which he claimed warranted release, failed to meet the so changed

75. Court's Decision by Letter to the Parties, *In re* Det. of Stout, No. 01-2-01307-9 (Skagit Cnty. Super Ct. July 14, 2010).

76. Respondent's Memorandum Regarding Reconsideration of 45-Day Time for Trial, *In re* Det. of Stout, No. 01-2-01307-9 (Skagit Cnty Super. Ct. Apr. 4, 2011).

77. *Id.*

78. Petitioner's Supplemental Briefing on the RCW 71.09.090(1) 45-Day Requirement 4, *In re* Det. of Stout, No. 01-2-01307-9 (Skagit Cnty. Super. Ct. Feb. 17, 2011).

79. *See id.* at 2–4.

80. Oral Argument at 3:28, State v. David McCuistion, 275 P.3d 1092 (Wash. 2012) (No. 81644-1), *available at* http://www.tvw.org/index.php?option=com_tvwplayer&eventID=2011050041A.

81. *In re* Det. of Reimer, 190 P.3d 74, 84 (Wash. 2008).

82. Oral Argument, *supra* note 80 (stating that justices ask thirteen questions regarding the "so changed" requirement).

83. *In re* Det. of McCuistion (*McCuistion II*), 275 P.3d 1092 (Wash. 2012).

requirement,[84] which the court had previously upheld.[85] However, after finding McCuistion had no standing, the court upheld the restrictions on the merits—finding that they were reasonable.[86]

Without a mandatory trial-timeline imposed either by the courts or written into the Statute, all the legislature has to do to frustrate a detainee's release proceeding is make some statutory change, constitutionally valid or not, upon which a person's entitlement to release would rest. Then, while the first parties battle over the merits of the statutory changes in court, current detainees may be detained in excess of the State's authority. This could be avoided by the imposition of a mandatory timeline to conform the procedures for detainee-initiated release to those for DSHS-initiated release.

IV. ANALYSIS

A. The Washington Legislature's Failure to Include a Mandatory Hearing Timeline Under .090(2) Violates Substantive Due Process Under Foucha

In *Foucha*, the United States Supreme Court determined that a person committed under an involuntary civil commitment statute has a fundamental liberty interest at stake.[87] It is the nature of the interest affected, not the procedures governing the effect, which determines whether substantive due process applies.[88] Where the nature of the interest is fundamental, substantive due process applies.[89] Civil commitment statutes infringe on a person's fundamental liberty interest and are thus subject to strict scrutiny.[90] Strict scrutiny requires the government demonstrate the action taken or law enacted is necessary to achieve a compelling government interest.[91]

All statutory schemes contemplating indefinite, involuntary civil commitment rest on precarious constitutional ground.[92] Due to the

84. *Id.* at 1106.

85. *See In re* Det. of Reimer, 190 P.3d 74 (Wash. 2008).

86. *McCuistion II*, 275 P.3d at 1106.

87. Foucha v. Louisiana, 504 U.S. 71, 75–79 (1992) (citing Addington v. Texas, 441 U.S. 418 (1979)).

88. *See Foucha*, 504 U.S. at 80.

89. *See id.*

90. *See id.* at 75–81.

91. *Id.* at 81.

92. *See id.* at 79; *accord* Addington v. Texas, 441 U.S. 418 (1979) (holding civil commitment statutes impinge a person's fundamental liberty interest).

serious and fundamental nature of the interest at stake in civil commitment proceedings, the United States Supreme Court has determined that the mental illness and dangerousness requirements for civil commitment are ongoing.[93] Thus, the state may hold a person under these statutes only so long as they continue to remain "both mentally ill *and* dangerous, but *no longer*."[94] To satisfy the requirements of due process, the Statute should not be able to rely on procedures outside the scheme to cure any constitutional defects.[95]

In *McCuistion*, the State of Washington, supported by several amici curiae, argued the Statute should be analyzed under procedural due process rather than substantive due process on the ground that there is no historical, and thus no fundamental, right to "a new trial based solely on the opinion of a defense-hired expert."[96] But just like "[t]he commerce clause forbids discrimination, whether forthright or ingenious,"[97] substantive due process and the rights of citizens protected by it are not subject to State semantics. The State may not define the right at sT7w 14.27c(the)7uion, fr7ab Tc 0.308.6(7(c28he S 0 e)-longo ev.9(e)7

that the legislature has framed this particular statute as a civil scheme rather than a criminal one is irrelevant for the purposes of protecting liberty. A person's liberty is equally affected, insofar as they are equally restrained, when they are detained pursuant to a criminal or a civil statute. In fact, the United States Supreme Court has held that a person's liberty is more attenuated when he is committed to a psychiatric institution than when he is criminally incarcerated.[100] Since liberty is one of the most important and fundamental rights protected by the Due Process Clause of the United States Constitution, and the Statute deprives a person of his or her liberty in the truest sense of the word, the Statute must pass strict scrutiny.[101]

B. The State Has a Compelling Interest in Protecting the Public From People That Are Currently Both Mentally Ill and Dangerous

The State can only demonstrate a compelling interest in protecting the public from those people that are both mentally ill *and* dangerous.[102] The requirement that each SVP be mentally ill and dangerous is ongoing.[103] As soon as a SVP is no longer mentally ill or no longer dangerous, the State's authority to hold them disappears.[104]

Many argue that the State's interest in providing treatment may serve as a compelling interest in support of the Statute. This argument is not persuasive. The State cannot demonstrate a compelling interest in providing for the "very long term"[105] needs of sex offenders because the State cannot generally force psychological or pharmacological treatment on patients, even committed individuals, without their consent.[106] Thus, the inclusion of this

100. *Foucha*, 504 U.S. at 78–79 (citing Vitek v. Jones, 445 U.S. 480, 492 (1980) ("The loss of liberty produced by an involuntary commitment is more than a loss of freedom from confinement.")).

101. *See Griswold*, 381 U.S. at 497–99 (holding liberty interests are fundamental for the purpose of substantive due process analysis and subjecting government action that impinges on liberty to strict scrutiny).

102. *See Foucha*, 504 U.S. at 76–77 (emphasis added).

103. *Id.* at 77.

104. *Id.* at 77.

105. WASH. REV. CODE § 71.09.010 (2012).

106. *Id.* § 71.09.080(1) ("[A SVP] shall not forfeit any legal right or suffer any legal

interest in the State's explanation of its compelling interests is disingenuous; strict scrutiny requires that the means chosen narrowly serve the compelling interest, which presupposes the means are actually able to affect the compelling interest. Because the Statute does not confer any additional authority on the State to compel treatment, continued detention bears no effectual relationship to treatment. Without this effectual relationship, further detention cannot meet the narrow tailoring requirement strict scrutiny imposes. Further, even if the State could demonstrate a compelling interest in providing treatment for SVPs, the failure to include a trial-timeline for detainee-initiated release bears no relationship whatsoever to this interest. Thus, the only possible compelling interest the State can articulate in this arena is in protecting the public from these dangerous offenders.

C. The Statute Is Not Narrowly Tailored Because the State Can Keep Detainees Indefinitely Detained With No Statutory Consequences

Both the United States Supreme Court and the Washington State Supreme Court have unambiguously and repeatedly assigned constitutional significance to the annual review and release processes articulated in the Statute.[107] The Statute is narrowly tailored to the government's compelling interest in committing those that are both mentally ill and dangerous only where it precisely reflects the "nature and duration of the mental illness"[108] and detainees are kept detained only so long as they are both mentally ill and dangerous.[109] The fact that it is possible for a SVP detainee to establish probable cause for release independent of DSHS and be held indefinitely pending the scheduling and execution of the trial renders the entire scheme not

interest in protecting the public from those that are currently both mentally ill and dangerous.[112]

In *Young*, the Washington State Supreme Court determined that the Statute, as a whole, was narrowly tailored to serve the State's compelling interest in treating sex offenders and protecting the public from these violent criminals because it precisely reflected the nature and duration of a person's mental illness and dangerousness.[113] The attacks on the Statute in *Young* were general. The petitioners were looking to the court for a blanket statement of unconstitutionality—an outcome many in the legal community thought likely.[114] In response to these general attacks, the court gave a general answer—purporting to consider the Statute as a whole.[115] However, the court did not consider all aspects of the Statute, like the failure of the legislature to provide all detainees a timely release trial. The Statute cannot be narrowly tailored without such a mechanism.

D. The Lack of a Trial-Timeline For Detainee-Initiated Release Is a Violation of a Detainees' Fundamental Right of Access to the Court System

Regarding the trial-timeline, the Statute differentiates between those seeking DSHS-initiated

benefit.[129] Similarly, the stated purpose of the Statute is not to punish SVPs, but to protect the public.[130]

Further support for the assertion that the Statute should be considered, at the very least, *quasi*-criminal appears in *Young v. Weston*.[131] In *Weston*, the court restated the nonexhaustive *Mendoza-Martinez* factors[132] for determining whether the Statute is primarily criminal or civil.[133] The court determined that the Statute indisputably involves an affirmative restraint, which has historically been regarded as promoting the traditional aims of punishment, and applies only to criminal behavior. Accordingly, the court concluded that the Statute was primarily criminal rather than civil.[134] Although the United States Supreme Court effectively overruled this particular finding two years later in *Kansas v. Hendricks*,[135] the spirit of this analysis shows the logical impossibility of failing to consider the Statute at least *quasi*-criminal.

In DSHS-initiated release, the trial-timeline applies after DSHS petitions the court for a trial.[136] Since DSHS has at this point done a full annual review as required in section 71.09.070, the petition serves as probable cause that the detainee likely no longer qualifies as a SVP.[137] Under detainee-initiated release proceedings, the detainee petitions the court to find probable cause warranting a new trial.[138]

The trial-timeline proposed herein would not apply until after a judge determines probable cause for a new trial exists. Detainees seeking detainee-initiated release are similarly situated to those seeking DSHS-initiated release *after* a judge determines probable

129. DONALD T. KRAMER, LEGAL RIGHTS OF CHILDREN § 28:2 (2d ed. 2005).

130. WASH. REV. CODE ANN. § 71.09.010 (2012).

131. Young v. Weston, 898 F. Supp. 744, 752 (W.D. Wash. 1995), *aff'd in part, rev'd in part*, 176 F.3d 1196 (9th Cir. 1999), *rev'd sub nom.* Seling v. Young, 531 U.S. 250 (2001).

132. Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168–69 (1963) (articulating the following seven non-exhaustive factors: "(1) whether the sanction involves an affirmative disability or restraint, (2) whether it has historically been regarded as a punishment, (3) whether it comes into play only on a finding of scienter, (4) whether its operation will promote the traditional aims of punishment-retribution and deterrence, (5) whether the behavior to which it applies is already a crime, (6) whether an alternative purpose to which it may rationally be connected is assignable for it, and (7) whether it appears excessive in relation to the alternative purpose assigned.") (numbers added).

133. *Young*, 898 F. Supp. at 752.

134. *Id.*

135. 521 U.S. 346 (1997).

136. WASH. REV. CODE § 71.09.090(1) (2012).

137. *Id.* § 71.09.090.

138. *Id.* § 71.09.090(2).

cause exists. If the mandatory trial-timeline were imposed after the detainee's petition was filed but before probable cause is found, the imposition of that timeline would likely create an unreasonable burden on the State. It would carry with it the potential that SVP detainees could dictate the court's schedule with duplicative and meritless requests for trial, thereby disrupting the business of those courts. However, the timeline proposed herein would not apply until after a judge determines probable cause, and thus the probable cause hearing—at which the detainee is not entitled to appear—would act as a filter. Any incidental expense incurred in scheduling a trial under the proposed plan is required in a free society as a necessary cost of

any policy objectives.[144] The court agreed with Brooks, holding that consideration of less restrictive alternatives is required under the Statute, just like it is required in traditional civil commitment schemes.[145]

Two years later, in *In re Detention of Thorell*

cause to believe the detainee is entitled to a new trial.[149] While the Statute imposes a forty-five-day trial-timeline after DSHS's petition, no such timeline is imposed on the court where the detainee petitions for release and a judge determines probable cause for release exists.

V. CONCLUSION & RECOMMENDATIONS

As the Statute exists now, it is possible, if not probable, for a SVP detainee who has successfully established probable cause for release to languish indefinitely in detention pending trial. Without a mandatory release trial-timeline, a detainee that has shown probable cause to believe he or she no longer qualifies as a SVP cannot compel the trial to which he or she is entitled. Therefore, the Statute is not narrowly tailored to the State's compelling interest in protecting the public from those that are currently both mentally ill and dangerous. Without the imposition of a mandatory trial timeline across all release procedures, the scheme does not precisely reflect the nature and duration of the mental illness and dangerousness as required under *Foucha*.

Additionally, the lack of a uniform trial-timeline violates the Equal Protection Clause because it withholds a detainee's fundamental right to access the courts based on the method by which they are pursuing release or, in the alternative, draws a class distinction between two groups of people that are similarly situated for the trial-timeline, and for which no rational basis exists. Federal substantive due process and equal protection jurisprudence require the imposition of a uniform, mandatory trial-timeline on the release proceedings governed by section 71.09.090 of the Washington Revised Statutes.

149. *Id.* § 71.09.090(2).