

CONSTITUTIONAL INFIRMITY IN WASHINGTON STATE'S SEXUALLY VIOLENT PREDATOR STATUTE

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*The loss of liberty produced by an involuntary commitment is more than a loss of freedom from confinement.*¹

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1. *Vitek v. Jones*, 445 U.S. 480, 492 (1980).

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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-five days. If, however, the *detainee* initiates release proceedings, a judge determines whether probable cause exists and after that finding is entered, no mandatory timeline for release trial binds the court. There is still no remedial action on the horizon to correct this problem. In fact, politicians and victims-rights groups everywhere are patting themselves on the back for a job well done because, really, who cares about sex offenders?

This article will concentrate on the federal constitutionality of

2. See Supreme Court Order Signed 6-10-2011 Granting State v. McCuistion Motions to Stay Pending Reconsideration, *In re Detention of Stout*, No. 01-2-01307-9 (Skagit Cnty. Super. Ct. June 13, 2011) (combining *In re Detention of Stewart*, *In re Detention of Callahan*, *In re Detention of Stout*, *In re Detention Bergen*, and *In re Detention of Dudgeon* for the purposes of the order). Daniel McCuistion is the sixth individual. See *infra* Part III.A.

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).

initiated release and detainee-initiated release for a trial-timeline is a violation of the detainee's fundamental right of access to courts or, in the alternative, fails rational-basis review under the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution.

II. BACKGROUND

In 1990, the Washington State Legislature passed the Statute as a part of the Community Protection Act.¹¹ The Statute contemplates indefinite, involuntary civil commitment for SVPs defined as “any person who has (1) been convicted of or charged with a crime of sexual violence and (2) who suffers from a mental abnormality or personality disorder (3) which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility.”¹²

A. *Factual & Legislative History of Washington Revised Code § 71.09*

In September 1988, Gene Raymond Kane, a recently released felon who had served thirteen years for two previous sexual assaults on adult women, raped and murdered Diane Ballasiotes in a downtown Seattle parking garage.¹³

In May 1989, Earl Shriner, a middle-aged man with an IQ of sixty-seven¹⁴ and a twenty-four-year criminal history including convictions for sexually motivated assault and kidnapping,¹⁵ kidnapped Ryan Alan Hade, a seven-year-old resident of Tacoma, Washington. Shriner raped, stabbed, and crudely severed Hade's penis from his body before leaving him for dead in a park near his home.¹⁶

Four months later, four sexually motivated attacks occurred in

11. 1990 Wash. Sess. Laws 12–114.

12. § 71.09.020(18) (numbers added to show elements of the definition); *see also* 6A Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 365.10 (6th ed.).

13. CHARLES PATRICK EWING, JUSTICE PERVERTED: SEX OFFENDER LAW, PSYCHOLOGY AND PUBLIC POLICY 9 (2011).

14. *Id.*

15. Kate Shatzkin, *Who's Earl Shriner? Anyone Not Know?—Jury Selection May be Difficult*, SEATTLE TIMES (Jan. 22, 1990), <http://community.seattletimes.nwsources.com/archive/?date=19900122&slug=1052154>; *see also* Mike Archibold, *Friends Remember Tacoma Victim of Sex Attack*, SEATTLE TIMES (May 21, 2009), http://seattletimes.com/html/localnews/2009246814_apwaryanhade.html (identifying Hade as the victim).

16. *See* EWING, *supra* note 13, at 9.

Vancouver, Washington.¹⁷ Two brothers were found murdered together, one sodomized and the other strangled.¹⁸ Two months after that, a four-year-old's body was found near a Vancouver lake.¹⁹ Days later, Wesley Dodd was arrested in the midst of an attempt to kidnap the fourth victim, a six-year-old boy, from a Vancouver theatre.²⁰ While in custody, Dodd admitted to the three previous murders.²¹ Dodd, a convicted sex offender, had been actively sexually assaulting boys since he was a teenager.²²

Community outrage grew exponentially following these heinous sexual attacks.²³ Victims-rights groups, with Ida Ballasiotes—the mother of one of the victims—at the fore, began lobbying for decisive action in the Washington Legislature.²⁴ State legislators called for punishment schemes offering a choice of castration in return for a more lenient sentence.²⁵ The legislature acted in 1990 by passing the Sexually Violent Predator Statute (SVP Statute) as a part of the Community Protection Act, enabling indefinite civil commitment for SVPs.²⁶ Between 1990 and 2007, approximately twenty other states passed laws almost identical to Washington's.²⁷

The Statute was initially challenged in Washington State courts through a SVP's²⁸ personal restraint petition—the Washington State equivalent of a habeas petition. The Washington Supreme Court determined that “the overall statutory scheme . . . is constitutional.”²⁹ The same SVP then filed a federal habeas corpus petition, and in

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.* at 10.

21. *Id.*

22. *Id.*

23. Barry Siegel, *Column One: Locking Up 'Sexual Predators,'* L.A. TIMES (May 10, 1990), http://articles.latimes.com/1990-05-10/news/mn-1433_1_sexual-predator.

24. *Id.*

25. Stuart Scheingold et al., *The Politics of Sexual Psychopathy: Washington State's Sexual Predator Legislation*, 15 U. PUGET SOUND L. REV. 809, 817 (1992).

26. 1990 Wash. Sess. Laws 97–102.

27. EWING, *supra* note 13, at 10 (citing states with similar sexually violent predator statutes, including: Arizona, California, Florida, Iowa, Kansas, Massachusetts, Minnesota, Missouri, Nebraska, New Jersey, North Dakota, Pennsylvania, South Carolina, Virginia, and Wisconsin).

28. This article will refer to individuals detained under WASH. REV. CODE § 71.09 as “SVPs” and to the statute itself as “the Statute.”

29. *In re Young*, 857 P.2d 989, 1018 (Wash. 1993) (finding the Statute is primarily civil rather than criminal and not void for vagueness).

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 in violation of the rules against ex post facto law³³ and double jeopardy.³⁴

This declaration of unconstitutionality was short-lived. In 1997, the constitutionality of SVP statutes reached the United States Supreme Court in *Kansas v. Hendricks*.³⁵ In *Hendricks*, the Court found that the Kansas statute, identical to and passed four years after the Washington statute, was constitutional insofar as it was primarily civil and thus violated neither the prohibition on ex post facto laws nor double jeopardy.³⁶ Hendricks, an admitted pedophile, was the first person committed under Kansas’ 1994 SVP statute.³⁷ Hendricks had been convicted on numerous occasions of indecent exposure, lewd conduct, and child molestation from 1955 to 1984.³⁸ At the time of his initial trial, Hendricks was sixty-years old and had spent roughly half his life in prison or psychiatric institutions.³⁹ Hendricks testified to the jury that he could not control his urge to have sexual contact with children, “sex offender treatment was ‘bullshit,’” and only his death would stop his offenses.⁴⁰

B. Initial Trial and Annual Review

A prosecutor or the attorney general may file a SVP petition

30. *Young v. Weston*, 898 F. Supp. 744 (W.D. Wash. 1995).

31. *Id.* at 749–50.

32. *Id.*

33. *Id.* at 753.

34. *Id.* at 754.

35. *Kansas v. Hendricks*, 521 U.S. 346 (1997).

36. *Id.* at 360–61.

37. EWING, *supra* note 13, at 4.

38. *Id.* at 3–4.

39. *Id.* at 4.

40. *Id.*

under section 71.09.030 of the Washington Revised Code (.030 petition) at any time after a person commits a “qualifying act.”⁴¹ A judge then determines whether probable cause exists to believe the person identified in the .030 petition may be a sexually violent predator. If the judge so finds, the person listed is taken into custody.⁴² Within seventy-two hours, the potential SVP is entitled to be present to contest probable cause in a full hearing.⁴³ No more than forty-five days after confirming probable cause, the court is required to hold a full trial to determine whether the potential SVP actually meets the statutory definition of a sexually violent predator.⁴⁴

At trial, the burden is on the State to prove the person in custody is a sexually violent predator beyond a reasonable doubt.⁴⁵ If the court or jury so finds, the SVP is committed indefinitely. DSHS is required to review each detainee’s status every year and the burden remains on the State to continually show the person in custody remains a SVP.⁴⁶

C. Release Procedures: Washington Revised Code § 71.09.090

If, as a result of the annual review process, DSHS determines that the SVP’s condition has “so changed”⁴⁷ that he or she no longer meets the definition of a SVP, the Secretary of DSHS shall petition the court, and within forty-five days a new trial will occur where the State must again prove the person continues to be a SVP.⁴⁸ The court may order either unconditional discharge or conditional release to a less restrictive alternative if they find the person has ceased to qualify

41. WASH. REV. CODE § 71.09.030(1) (2012) (qualifying situations are: “(a) a person who at any time previously has been convicted of a sexually violent offense is about to be released from total confinement; (b) a person found to have committed a sexually violent offense as a juvenile is about to be released from total confinement; (c) a person who has been charged with a sexually violent offense and who has been determined to be incompetent to stand trial is about to be released, or has been released . . . ; (d) a person who has been found not guilty by reason of insanity of a sexually violent offense is about to be released, or has been released . . . ; (e) a person who at any time previously has been convicted of a sexually violent offense and has since been released from total confinement and has committed a recent, overt act.”).

42. *Id.* § 71.09.040(1).

43. *Id.* § 71.09.040(2).

44. *Id.* § 71.09.050(1).

45. *Id.* § 71.09.090(3)(c); *see* EWING *supra*, note 13, at 4.

46. § 71.09.070.

47. *Id.* § 71.09.090.

48. *Id.* § 71.09.090(4).

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 in custody indefinitely, even after a judge determines probable cause for release exists.

III. PRINCIPAL CASES

In 2005, the Washington State Legislature amended the section controlling release proceedings to restrict the type of evidence a SVP may present to establish probable cause for release.⁵⁴ Under these amendments, a SVP is restricted to showing either success of psychiatric treatment⁵⁵ or physical incapacity⁵⁶ as evidence of probable cause for release. The legislature intended these restrictions to address the perceived problem in the SVP statutory scheme that allowed SVPs to “age-out” of the designation.⁵⁷ Before 2005, SVPs committed soon after the passage of the Statute presented actuarial evidence that they were no longer dangerous—some relying exclusively on advanced age.⁵⁸ The legislature determined that since “the mental abnormalities and personality disorders of [SVPs] are severe and chronic and do not remit due solely to advancing age or changes in other demographic factors,”⁵⁹ SVPs should not be able to refuse treatment and wait to be released until their risk of recidivism

49. *Id.* § 71.09.070.

50. *Id.* § 71.09.090(2).

51. *Id.* § 71.09.090.

52. *Id.*

53. *See id.* § 71.09.090(2).

54. *Id.* § 71.09.090(4).

55. *Id.* § 71.09.090(4)(a).

56. *Id.* § 71.09.090(4)(b).

57. *Id.* § 71.09.090.

58. *See id.* § 71.09.090(4).

59. *Id.* § 71.09.090.

drops below the SVP threshold⁶⁰ because of their advancing age.⁶¹

A. Daniel McCuiston, Awaiting Release Trial Since 2006

Daniel McCuiston was adjudicated a SVP and committed in 2004. In 2006, McCuiston established probable cause for his release due to his advanced age, and challenged the constitutionality of the 2005 amendments.⁶² McCuiston argued the 2005 evidence restrictions violated substantive due process and impermissibly raised the burden for release.⁶³

The Washington State Supreme Court issued the *McCuiston I*⁶⁴ decision on September 2, 2010, striking down the 2005 amendments on the basis that they violated the requirements of federal substantive due process by “[separating] the annual review inquiry from the ultimate constitutional standard set by *Foucha*.”⁶⁵ The majority decided that the ultimate constitutional standard is whether the detainee meets the statutory definition of sexually violent predator by continuing to be both mentally ill and dangerous.⁶⁶ The court concluded that to allow the State to artificially define and restrict what evidence can be presented at these hearings would be to fundamentally misunderstand the objectivity of the question and the “multitude of ways in which a person might potentially cease to meet the definition of an SVP.”⁶⁷

60. *Id.* § 71.09.020(18) (stating that a SVP is considered dangerous where they are “likely to engage in predatory acts of sexual violence if not confined in a secure facility.”); *see also In re Det. of Mines*, 266 P.3d 242, 250 (2011) (alluding to the fact that an actuarially calculated risk of recidivism less than 50% to weigh in favor of a finding that the person is not “likely to engage in predatory acts of sexual violence” but is not conclusive on that point).

61. § 71.09.090 (“The legislature finds that the mental abnormalities and personality disorders that make a person subject to commitment under chapter 71.09 RCW are severe and chronic and do not remit due solely to advancing age or changes in other demographic factors.”).

62. *In re Det. of McCuiston (McCuiston I)*, 238 P.3d 1147, 1148, ¶ 1 (Wash. 2010), *opinion withdrawn* May 20, 2011.

63. *McCuiston I*, 238 P.3d at 1149, ¶ 5; *see also In re Det. of Ambers*, 158 P.3d 1144 (Wash. 2007).

64. This article will refer to the decision issued in 2010 as *McCuiston I* and the final decision, issued after reconsideration in 2012, as *McCuiston II*.

65. *McCuiston I*, 238 P.3d at 1152, ¶ 16.

66. *Foucha v. Louisiana*, 504 U.S. 71, 76 (1992).

67. *McCuiston I*, 238 P.3d at 1152, ¶ 16.

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 McCuiston. 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 rate⁷⁰ and Stout's increased age⁷¹—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 *McCuiston II*.⁷⁴

Stout demanded a new trial but the superior court judge determined the forty-five day requirement was not a constitutional

68. Stout's qualifying sexually motivated crimes included an acquittal for a 1982 attempted rape, an *Alford* plea to third-degree assault for nonconsensual sex with a developmentally disabled woman in 1991, a 1992 conviction for indecent liberties, a telephonic harassment with a sexual motivation charge that was eventually dropped, and a 1997 guilty plea to burglary with a sexual motivation. *In re Det. of Stout*, 150 P.3d 86, 89–91 (Wash. 2007); see also Petitioner's Response to Petition for Order Finding Probable Cause for Trial at 2–7, *In re Det. of Stout*, No. 01-2-01307-9 (Skagit Cnty. Super. Ct. Feb. 4, 2011).

69. See Respondent's Motion ans [sic] Memorandum for Order on Show Cause: Request for Hearing on Unconditional Release 3, *In re Det. of Stout*, No. 01-2-01307-9 (Skagit Cnty. Super. Ct. Jan. 29, 2010) (referencing the psychological report of Dr. Richard Wollert indicating that Mr. Stout no longer qualifies as an SVP).

70. Respondent's Motion ans [sic] Memorandum for Order on Show Cause: Request for Hearing on Unconditional Release: Exhibit A, at 32, *In re Det. of Stout*, No. 01-2-01307-9 (Skagit Cnty. Super. Ct. Jan. 29, 2010) (on file with author) (explaining that base recidivism rates have dropped for all offenses and taking into account these lowered recidivism rates in his actuarial estimate of Mr. Stout's future dangerousness).

71. *Id.* (explaining that recidivism rates are highest for younger offenders and drop dramatically with age).

72. *Id.* at 33.

73. WASH. REV. CODE § 71.09.020(18) (2012).

74. See Supreme Court Order Signed 6-10-2011 Granting St. v. McCuiston Motions to Stay Pending Reconsideration, *In re Det. of Stout*, No. 01-2-01307-9 (Skagit Cnty. Super. Ct. June 13, 2011).

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 *McCuiotion 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 McCuiston'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 McCuiston could not meet the burden of showing that he had so changed as to warrant release.⁸²

In May 2012, the court issued its *McCuiotion II* decision.⁸³ The court determined that McCuiston 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 McCuiston*, 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 McCuiston (McCuiotion II)*, 275 P.3d 1092 (Wash. 2012).

requirement,⁸⁴ which the court had previously upheld.⁸⁵ However, after finding *McCustion* 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. *McCustion 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 *McCustion*, 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 issue so narrowly as to evade application of substantive due process. If every right were defined as narrowly and specifically as the State insists here, it is likely the majority of cases finding substantive due process rights would not exist.

By their nature, fundamental rights are expansive, foundational themes of American jurisprudence.⁹⁸ The type of liberty at issue here is the most fundamental, historically established type of liberty, freedom qua freedom—freedom from personal restraint.⁹⁹ The fact

93. *Foucha*, 504 U.S. at 76–77.

94. *Id.* at 77 (emphasis added).

95. See *McCustion* I, 238 P.3d 1147, 1153, ¶ 17 (Wash. 2010), *opinion withdrawn* May 20, 2011.

96. Brief of Amicus Curiae King County Prosecuting Attorney Daniel T. Satterberg at 2, *In re* Det. of *McCustion*, 275 P.3d 1092 (Wash. 2012) (No. 81644-1).

97. *Best & Co. v. Maxwell*, 311 U.S. 454, 455 (1940).

98. See *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting) (“The full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This ‘liberty’ is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints.”) (quotations in original); see also *Griswold v. Connecticut*, 381 U.S. 479 (1965) (finding a fundamental right to privacy in the “penumbras” created by the Bill of Rights).

99. *Turner v. Rogers*, 131 S. Ct. 2507, 2511 (2011) (quoting *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) (finding that freedom from bodily restraint lies “‘at the core of the liberty protected by the Due Process Clause’”)).

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 disability as a consequence of any action taken or orders made, other than as specifically provided in this chapter, or as otherwise authorized by law."); see also *Washington v. Harper*, 494 U.S. 210, 227 (1990) (holding that involuntary treatment is only constitutional where the prisoner is a danger to himself or others and treatment is in the prisoner's medical interest).

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 narrowly tailored.

In *Foucha*, the United States Supreme Court considered the constitutional sufficiency of the State of Louisiana's release procedures for insanity acquitees.¹¹⁰ The State had a practice of detaining insanity acquitees until the acquitees could prove, by clear and convincing evidence, that they were not dangerous.¹¹¹ The United States Supreme Court held that states have a compelling

107. *In re Young*, 857 P.2d 989, 1007-08 (Wash. 1993); accord *Foucha*, 504 U.S. at 77.

108. *Young*, 857 P.2d at 1004.

109. *Id.* at 1007-08; accord *Foucha*, 504 U.S. at 77.

110. *Foucha*, 504 U.S. at 71.

111. *Id.* at 82.

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 release under 71.09.090(1) and those seeking detainee-initiated release under 71.09.090(2).¹¹⁶ In a DSHS-initiated release proceeding, DSHS' petition serves as a finding of probable cause that the detainee is no longer mentally ill or dangerous, and its filing triggers a forty-five day hearing requirement.¹¹⁷ But in a detainee-initiated release, the detainee submits a petition directly to the supervising judge who determines whether probable cause exists.¹¹⁸ If the Judge finds probable cause for release, the detainee is statutorily entitled to a trial, but there is no

112. *Id.* at 83.

113. *Young*, 857 P.2d at 1000–01.

114. John Q. La Fond, *Washington's Sexually Violent Predator Law: A Deliberate Misuse of the Therapeutic State for Social Control*, 15 U. PUGET SOUND L. REV. 655, 702 (1992); see also *Young v. Weston*, 898 F. Supp. 744 (1995); Robert C. Boruchowitz, *Sexual Predator Law—The Nightmare in the Halls of Justice*, 15 U. PUGET SOUND L. REV. 827 (1992).

115. See *Young*, 857 P.2d at 1018 (holding the overall statutory scheme constitutional and finding that the basic statutory scheme did not implicate substantive due process concerns).

116. WASH. REV. CODE § 71.09.090 (2012).

117. *Id.* § 71.09.090(1).

118. *Id.* § 71.09.090(2).

mandatory timeline with which the state must comply.¹¹⁹

E. The Distinction Drawn Between DSHS-Initiated Release and Detainee-Initiated Release Does Not Survive Strict Scrutiny

Federal Equal Protection Clause doctrine recognizes several rights that are fundamental for equal protection purposes and trigger strict scrutiny review. The rights considered fundamental for equal protection purposes are voting,¹²⁰ access to courts,¹²¹ and interstate migration.¹²² In civil proceedings, access to courts is generally not fundamental for the purposes of equal protection.¹²³ But, where a civil proceeding is “quasi-criminal” in nature, a defendant’s fundamental right to equal access of the court system is implicated and strict scrutiny is applied.¹²⁴ While both the Washington State Supreme Court and the United States Supreme Court have determined that sexually violent predator laws are civil in nature and thus do not violate the prohibitions on ex post facto law or double jeopardy,¹²⁵ the Statute is quasi-criminal.¹²⁶ Civil commitment proceedings have been categorized as quasi-criminal.¹²⁷

The United States Supreme Court has determined that actions to terminate a person’s parental rights are quasi-criminal in nature.¹²⁸ In this context, the quasi-criminality is still recognized even though the objective of the proceeding is not to punish the parent, but to reflect the court’s determination that the parent is no longer acting in the best interest of the child and allow the court to act for the child’s

119. *Id.* § 71.09.090(2).

120. *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 666 (1966); *see also Reynolds v. Sims*, 377 U.S. 533, 556 (1964).

121. *Griffin v. Illinois*, 351 U.S. 12, 16–17 (1956) (striking down a monetary condition on a criminal’s right of appeal); *see also M.L.B. v. S.L.J.*, 519 U.S. 102 (1996) (holding an appeal of termination of parental rights was quasi-criminal and invalidating a records fee required to access the court); *Boddie v. Connecticut*, 401 U.S. 371 (1971) (holding a fee required to institute a divorce action violated a person’s fundamental right to marriage).

122. *Shapiro v. Thompson*, 394 U.S. 618, 641–42 (1969); *see also Saenz v. Roe*, 526 U.S. 489 (1999).

123. *See M.L.B.*, 519 U.S. at 114–16.

124. *Id.*

125. *Kansas v. Hendricks*, 521 U.S. 346, 371 (1997); *In re Pers. Restraint of Young*, 857 P.2d 989 (Wash. 1993).

126. *See In re Det. of Thorell*, 72 P.3d 708, 720 (2003) (finding the quantum of evidence in an SVP trial is properly weighed against a criminal standard).

127. GARY B. MELTON ET AL., *PSYCHOLOGICAL EVALUATIONS FOR THE COURTS: A HANDBOOK FOR MENTAL HEALTH PROFESSIONALS AND LAWYERS* 38 (2007).

128. *M.L.B.*, 519 U.S. at 124–25.

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* factors¹³² 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 involuntarily committing those that society deems dangerous enough to warrant it.

F. The Decision to Differentiate Between .090(1) and .090(2) Detainees Would Fail Even Rational Basis Review Because the Omission of a Trial-Timeline in .090(2) Bears No Rational Relationship to the Class Distinction Drawn Under Brooks

“Equal protection does not require that all persons be dealt with identically, but it does require that a distinction made have some relevance to the purpose for which the classification is made.”¹³⁹ Where a distinction bears no rational relationship to the class distinction drawn, it fails even rational basis review.¹⁴⁰

In *In re Detention of Brooks*, the Washington State Supreme Court considered an equal protection claim alleging impermissible disparate treatment for consideration of less restrictive alternatives to confinement between those committed under Washington's regular civil commitment statute and those committed under the Statute.¹⁴¹ Under Washington's traditional civil commitment statute,¹⁴² the courts were required to consider placing the person in a less restrictive alternative than commitment at the time of the original trial, but the new Statute contained no such requirement.¹⁴³ The court found the disparate treatment at issue bore no rational relationship to

139. *Baxtrom v. Herold*, 383 U.S. 107, 111 (1966).

140. *Ry. Express Agency, Inc. v. New York*, 336 U.S. 106, 109 (1949).

141. *In re Det. of Brooks*, 36 P.3d 1043 (Wash. 2001), *overruled by In re Det. of Thorell*, 72 P.3d 708 (Wash. 2003) (holding that under the deferential rational basis test there is a rational basis for the different treatment, relying heavily on legislative changes integrating the less restrictive analysis into the greater standard).

142. WASH. REV. CODE § 71.05 (2012).

143. *Brooks*, 36 P.3d at 1041.

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*, the court overturned its decision in *Brooks*, emphasizing the deferential nature of the rational basis test, the difficulty of applying the rule articulated in *Brooks*, and relying heavily on the fact that the Statute itself provides for the functional equivalent of least restrictive alternatives at the outset.¹⁴⁶ This reliance on the clarified statutory language, while technically an overruling of the *Brooks* holding, should not be considered to overrule the spirit of *Brooks* since the court in *Thorell* said that the issue of least restrictive alternatives consideration in the Statute is not implicated where the definition itself takes into consideration this analysis.

Here, the legislature created a distinction between SVPs who petition for release on their own and those SVPs for whom DSHS petitions for release.¹⁴⁷ This distinction, differentiating between classes of people detained under the same statutory scheme in affording procedural protections, is more arbitrary than differentiating between different statutory commitment procedures for the purpose of assigning procedural protection. This distinction is arbitrary because, even if the court finds a reason to treat those whom DSHS determines should be released differently than those who pursue release proceedings on their own, by the time the proposed timeline would kick in the two classes are functionally equivalent and thus similarly situated for the purposes of equal protection. In the DSHS-initiated release proceedings, the DSHS petition serves as probable cause to believe the detainee no longer meets the definition of a SVP.¹⁴⁸ In detainee-initiated release proceedings, the detainee's petition goes to a superior court judge who determines whether there is probable

144. *Id.* at 1044.

145. *Id.*

146. *In re Det. of Thorell*, 72 P.3d at 722–23 (finding the definition of “secure facility” in section 71.09.096 of the Washington Revised Code covers facilities of varying levels of restrictiveness which are functionally equivalent to the least restrictive alternatives outlined in chapter 71.05).

147. Compare WASH. REV. CODE § 71.09.090(2) (2012), with WASH. REV. CODE § 71.09.090(1) (2012).

148. *Id.* § 71.09.090.

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).