

NO. 38269-5-II

**COURT OF APPEALS FOR DIVISION II
STATE OF WASHINGTON**

In re the Detention of:

SHELDON MARTIN,

Appellant,

v.

STATE OF WASHINGTON,

Respondent.

RESPONDENT'S BRIEF

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I. ISSUE PRESENTED

Whether the trial court properly dismissed the Thurston County sexually violent predator (SVP) petition “without prejudice,” where dismissal did not constitute a final adjudication on the merits.

II. STATEMENT OF THE CASE

A. Procedural History

On March 4, 2003, the Attorney General’s Office filed a petition on behalf of the Thurston County Prosecutor alleging that Sheldon Martin (Martin) is a sexually violent predator as defined by former RCW 71.09.020(16). CP at 4-6.

On October 6, 2004, Martin filed a motion to dismiss the petition. CP at 123-40. He did not request a dismissal with prejudice. *Id.* His motion asserted that the Thurston County Superior Court lacked jurisdiction to do anything other than dismiss the petition, because he had never been convicted of an offense in Thurston County. CP at 130. His motion was orally denied. RP at 23-34 (October 29, 2004).

On February 22, 2005, Martin stipulated to commitment as a sexually violent predator. CP at 25-79. The stipulation provided that he could appeal the trial court’s denial of his “motion to dismiss for lack of jurisdiction[.]” CP at 27.

On June 14, 2006, this Court affirmed the trial court’s order

denying Martin's motion to dismiss. *In re Detention of Martin*, 133 Wn. App. 450, 136 P.3d 789 (2006). This Court found that Martin had moved the trial court to dismiss for lack of jurisdiction, but should have moved for a change of venue. *Id.* at 453.

Martin petitioned for review and the Supreme Court reversed, holding that the RCW 71.09 did not provide authority for the Thurston County Prosecutor to file a petition or request the Attorney General to do so, because Martin had never been convicted of a sexual offense in that county. *In re Detention of Martin*, 163 Wn.2d 501, 516, 182 P.3d 951 (2008). The Supreme Court directed the Thurston County Superior Court to "grant Sheldon Martin's motion to dismiss the State's petition. *Id.*

The Supreme Court did not order that the petition be dismissed with prejudice. *Id.* In regard to where the petition could be properly filed, the court stated: "Which prosecutor could appropriately take such an action we do not decide." *Id.* at 506.

The mandate issued on June 30, 2008. CP at 80-81. When Martin did not note a hearing for dismissal, the State filed a motion to dismiss to bring the matter before the trial court. CP at 106-8. Martin responded on August 4, 2008. CP at 111-19. That same day the trial court entered an order dismissing the State's petition without prejudice. CP at 109-10. Martin timely appealed. CP at 120. This Court denied the State's request

to re-designate the matter as a motion for discretionary review.

B. Factual Background

1. Burglary In The Second Degree With Sexual Motivation, Clark County Cause Number 91-1-01069-2

On October 22, 1991, Martin followed a female patron into a public restroom at a Fred Meyer's Department Store in Vancouver, Washington. After she entered the stall, he pulled his pants down over his thighs, and stared up at the woman, from underneath the bathroom stall. After the woman saw him, Martin grabbed her ankle. She kicked him and then chased him out of the bathroom as he attempted to pull up his pants. It appeared to the woman that Martin was masturbating while he peered at her from under the stall. Fred Meyer's personnel indicated that Martin had been engaging in this type of behavior since the early 1980s. CP at 10-11.¹

Martin was convicted of the crimes of Burglary in the Second Degree with Sexual Motivation and Indecent Exposure in Clark County Superior Court on March 3, 1992. CP at 11. These offenses are not sexually violent offenses as that term is defined in former

¹ Since Martin stipulated to commitment as a Sexually Violent Predator there was no trial, and therefore no testimony regarding the underlying facts of his prior convictions. However, in his stipulation to civil commitment Martin agreed that the Findings of Fact were agreed upon by the parties and were based upon the pleadings filed in this matter, particularly the Certification for Determination of Probable Cause. CP at 27. Therefore, the State relies on the Certification for Determination of Probable Cause to provide the Court with background information useful to understanding this case. CP at 7-17.

RCW 71.09.020(15) and as used in former RCW 71.09.030. Pending sentencing, Martin fled to Oregon where he committed and was convicted of two sexually violent offenses, as described below. *Id.* Martin later was returned to Clark County by the Oregon authorities and, on March 8, 1994, was sentenced to serve thirty months in a Washington State prison at the conclusion of his Oregon incarceration. *Id.*

2. Kidnapping In The Second Degree And Attempted Sexual Abuse In The First Degree, Multnomah County Cause No. 92-04-32087

On April 8, 1992, Martin was seen in the children's clothing section at an Oregon Fred Meyer's department store. CP at 8. Security personnel observed Martin approach a three-year-old girl, take her by the hand, and lead her out of the store and into the parking lot towards his truck. *Id.* Security personnel stopped Martin and he was arrested. *Id.* After Martin was arrested, police searched his truck and recovered a machete, a 6-inch boning knife, a tan shoe containing a bong and a pill container with residue, a towel, a map with markings, a shovel, and a rake. *Id.* Martin eventually admitted that he kidnapped the child and intended to drive her to another location where he could sexually molest her. *Id.*

Martin was convicted on July 22, 1992, of the crimes of Kidnapping in the Second Degree and Attempted Sexual Abuse in the First Degree in Multnomah Superior Court. CP at 9. He was sentenced to

serve one hundred twenty months in prison for these offenses. *Id.*

On February 22, 2005, respondent stipulated to commitment as a sexually violent predator. Martin stipulated that his Oregon conviction for Attempted Sexual Abuse in the First Degree was comparable to Child Molestation in the First or Second Degree under Washington law, and that this conviction constituted a sexually violent offense as that term is defined in RCW 71.09.020(15). CP at 27-29.

III. ARGUMENT

A. **The Trial Court Properly Dismissed The Petition “Without Prejudice” Because The Dismissal Did Not Constitute A Final Adjudication On The Merits**

Martin argues that the trial court should have dismissed the State’s SVP petition with prejudice. He relies on a case where a plaintiff’s complaint was dismissed with prejudice because it failed to state a claim upon which relief could be granted. Here, however, the trial court properly dismissed the SVP petition without prejudice because the claim therein was justiciable once the petition had been filed in the correct county.

In order to prove that a person is an SVP, the State must prove that he:

- 1) Has been convicted of or charged with a crime of sexual violence;
- 2) suffers from a mental abnormality or personality

- disorder; and
- 3) the mental abnormality or personality disorder makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility.

Former RCW 71.09.020(16) (2004). In the trial court below, the State initially proved each of the foregoing elements by entry of Martin's stipulation. *See* CP at 25-79. Martin's successful appeal was based on the fact that the State had filed the petition in a county where he had never been convicted of or charged with a crime of sexual violence. *Martin*, 163 Wn.2d at 516; Former RCW 71.09.030 (2004).² The Thurston County Prosecutor (and the Attorney General acting in his stead), therefore, were without authority to file the petition in Thurston County. *Id.* The Supreme Court left open the option of re-filing the petition in an appropriate county. *Id.* at 506 ("Which prosecutor could appropriately take such an action we do not decide."). The Supreme Court's decision did not address or decide, in any way, the merits of the case.

It has long been the rule in Washington that, where a case has not been decided on its merits, a dismissal without prejudice is proper.

² Former RCW 71.09.030 provided, in pertinent part:

When it appears that: (1) A person who at any time previously has been convicted of a sexually violent offense is about to be released from total confinement...the prosecuting attorney of the county where the person was convicted or charged or the attorney general if requested by the prosecuting attorney may file a petition alleging that the person is a 'sexually violent predator' and stating sufficient facts to support each allegation.

Lawrence v. Department of Health, 133 Wn. App. 665, 679, 138 P.3d 124 (2006) (citing *Parker v. Theubet*, 1 Wn. App. 285, 291, 461 P.2d 9 (1969)). A dismissal *with* prejudice is appropriate where there has been an adjudication on the merits:

The Supreme Court has held that a dismissal ‘with prejudice’ appropriately follows an adjudication on the merits, while a dismissal ‘without prejudice’ means that the existing rights of the parties are not affected by the dismissal but are as open to legal controversy as if no judgment or dismissal had been entered.

Parker v. Theubet, 1 Wn. App. at 291 (citing *Maib v. Maryland Cas. Co.*, 17 Wn.2d 47, 135 P.2d 71 (1943); *Bates v. Drake*, 28 Wn. 447, 68 P. 961 (1902)). Here, there was no adjudication on the merits of the State’s SVP petition and the trial court properly dismissed it without prejudice.

Martin’s argument is based on analogy to dismissals under CR 12(b)(6). Appellant’s Opening Brief at 5-6. He argues that, because a complaint or petition that fails to state a cognizable claim should be dismissed with prejudice, the State’s SVP petition should also be dismissed without prejudice. Martin’s analogy fails because, here, the Supreme Court did not conclude that the State’s SVP petition failed to state a cognizable claim.

Martin relies primarily on *Foss v. Department of Corrections*, 82 Wn. App. 355, 918 P.2d 521 (1996). In *Foss*, teachers had sought

judicial review of an administrative decision by the Washington Department of Corrections (DOC) that terminated their teaching of prison inmates. 82 Wn. App. at 358. DOC argued under CR 12(b)(6) that the court lacked subject matter jurisdiction because the teachers did not have statutory authority to challenge a DOC decision. *Id.* at 359. This Court reversed the trial court's summary judgment decision in the teacher's favor and dismissed the teacher's petition with prejudice. *Id.* This Court concluded that the teachers did not have statutory authority to challenge the DOC decision. *Id.* at 361. The teachers, therefore, had "no cognizable claim against the DOC[.]" *Id.* at 358. This court noted:

A dismissal for failure to state a claim under CR 12(b)(6) is appropriate only if "it appears beyond doubt that the plaintiff can prove no set of facts, consistent with the complaint, which would entitle the plaintiff to relief."

Id. at 359 (quoting *Bravo v. Dolsen Companies*, 125 Wn.2d 745, 750, 888 P.2d 147 (1995)). This Court therefore concluded that the trial court erred when it denied DOC's CR 12(b)(6) motion. *Id.* at 367.

Foss does not support Martin's argument because a decision granting a CR 12(b)(6) motion "is a disposition on the merits." *Wright v. Colville Tribal Enterprise Corp.*, 159 Wn.2d 108, 118, 147 P.3d 1275 (2006) (Madsen, J., concurring). Because the teachers had no legal grounds for challenging the DOC decision, their petition could not be

revived, under any circumstances. Those are not the circumstances of this case.

Here, the dismissal was not a disposition on the merits of the case. The Supreme Court did not conclude that the State's petition lacked a cognizable claim and left open the option of filing the petition in a proper county. *Martin*, 163 Wn.2d at 506. The trial court would have erred if it had dismissed the SVP petition with prejudice.

The *Martin* decision holds that the State's SVP petition was improper because it was brought in the wrong county. In criminal cases, the remedy for an improper information is dismissal without prejudice to file a proper information. For example, in a case where the state inadvertently omitted a premeditation element in an information charging attempted murder, the jury's guilty verdict was reversed, the information was dismissed without prejudice and the state was permitted to re-file with the proper elements:

We could not express it more clearly. The State has a right to refile a proper information. Dismissal without prejudice has been the consistent remedy imposed for reversible error based on an improper charging document.

State v. Vangerpen, 125 Wn.2d 782, 793, 888 P.2d 1177 (1995); *See also State v. Warfield*, 119 Wn. App. 871, 884, 80 P.3d 625 (2003) (citing *State v. Johnson*, 119 Wn.2d 143, 829 P.2d 1078 (1992)). Here, the

State's petition is an improper pleading because it was filed in the wrong county. The proper remedy is dismissal without prejudice.

The same holds true in other types of dismissals not resulting in an adjudication on the merits. *State v. Carter*, 138 Wn. App. 350, 368, 157 P.3d 420 (2007) (dismissal without prejudice proper where *Knapstad*³ motion is granted); *Lanning v. Poulsbo Rural Tel. Ass'n*, 8 Wn. App. 402, 406-07, 507 P.2d 1218 (1973) (dismissal without prejudice proper where necessary party not joined); *Wachovia SBA Lending, Inc. v. Kraft*, 165 Wn.2d 481, 488, 200 P.3d 683 (2009) (dismissal without prejudice proper for voluntary dismissals under CR 41(a)(1)(B)).

As overwhelming authority holds, where a dismissal does not result in an adjudication on the merits, the dismissal should be without prejudice. Here, the dismissal does not result in an adjudication on the merits and the trial court properly dismissed the petition without prejudice.

B. The Trial Court's Dismissal Order Is Consistent With Martin's Motion To Dismiss

Martin states that he requested the trial court to dismiss the petition with prejudice. Appellant's Opening Brief at 5. He is incorrect. CP at 123-40. He also claims that the trial court granted the state's motion to dismiss and denied his motion. This argument assumes that there was a

³ *State v. Knapstad*, 107 Wn.2d 346, 729 P.2d 48 (1986).

substantive difference between Martin's motion and the State's motion. In fact, there was not. The State filed a motion to dismiss because, after the mandate issued, Martin took no action to bring the matter before the trial court. Since the State's petition could only have been dismissed without prejudice, to say that the trial court granted the State's motion instead of Martin's is to state a difference without a distinction. Under either motion the result would be – and was – exactly the same.

C. The State Can Re-File Its Petition in a County Where Martin has been Convicted of a Sexual Offense

Washington's SVP statute, RCW 71.09, provides that any out-of-state conviction that meets the criteria for a sexually violent offense under Washington law constitutes a sexually violent offense. Former RCW 71.09.020(15)(b) (2004). This provision reflects the Legislature's intent that the public be protected from those who – like Martin – suffer from mental disorders that make them sexually dangerous, but who have committed their predicate offenses in a state other than Washington.

The Legislature has recently amended RCW 71.09 to clarify that petitions for SVP respondents like Martin should be filed in a county where the person has been charged or convicted of a sexual offense or who has committed a recent overt act, as that term is defined by

RCW 71.09.020(12). Laws of 2009, ch. 409 (attached hereto as Appendix 1). SSB 5718 amended RCW 71.09.030, in pertinent part, as follows:

- (2) The petition may be filed by:
 - (a) The prosecuting attorney of a county in which:
 - (i) The person has been charged or convicted with a sexually violent offense;
 - (ii) A recent overt act occurred involving a person covered under subsection (1)(e) of this section; or
 - (iii) The person committed a recent over act, or was charged or convicted of a criminal offense that would qualify as a recent overt act, if the only sexually violent offense charge or conviction occurred in a jurisdiction other than Washington; or
 - (b) The attorney general, if requested by the county prosecuting attorney identified in (a) of this subsection. . . .

Laws of 2009, ch. 409, § 2; Appendix 1 at 5.

The Legislature included both retroactivity and emergency effectiveness provisions in SSB 5718. Laws of 2009, ch. 409, §§ 15-16; Appendix 1 at 23-24. 5. The foregoing amendments took effect when Governor Gregoire signed them into law on May 7, 2009. Appendix 1 at 1.

While the Supreme Court left open the option of filing Martin's SVP petition in another county, the Legislature's has retroactively clarified that Martin's SVP petition can be filed in Clark County, where

Martin was “convicted of a criminal offense that would qualify as a recent overt act[.]”. RCW 71.09.030. There is no legal impediment to pursuing Martin’s civil commitment in that county. The trial court properly dismissed the petition without prejudice.

IV. CONCLUSION

For the foregoing reasons, the trial court’s order dismissing the State’s SVP petition without prejudice should be affirmed.

RESPECTFULLY SUBMITTED this 30th day of June, 2009.

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Attorneys for Respondent

APPENDIX 1

CERTIFICATION OF ENROLLMENT

SUBSTITUTE SENATE BILL 5718

Chapter 409, Laws of 2009

61st Legislature
2009 Regular Session

SEXUALLY VIOLENT PREDATORS--CIVIL COMMITMENT PROCEDURES

EFFECTIVE DATE: 05/07/09

Passed by the Senate April 22, 2009
YEAS 49 NAYS 0

BRAD OWEN

President of the Senate

Passed by the House April 1, 2009
YEAS 97 NAYS 0

FRANK CHOPP

Speaker of the House of Representatives

Approved May 7, 2009, 3:02 p.m.

CHRISTINE GREGOIRE

Governor of the State of Washington

CERTIFICATE

I, Thomas Hoemann, Secretary of the Senate of the State of Washington, do hereby certify that the attached is **SUBSTITUTE SENATE BILL 5718** as passed by the Senate and the House of Representatives on the dates hereon set forth.

THOMAS HOEMANN

Secretary

FILED

May 8, 2009

**Secretary of State
State of Washington**

SUBSTITUTE SENATE BILL 5718

AS AMENDED BY THE HOUSE

Passed Legislature - 2009 Regular Session

State of Washington

61st Legislature

2009 Regular Session

By Senate Human Services & Corrections (originally sponsored by Senators Regala, Stevens, Holmquist, Hobbs, Carrell, and Hatfield; by request of Attorney General)

READ FIRST TIME 02/25/09.

1 AN ACT Relating to the commitment of sexually violent predators;
2 amending RCW 71.09.020, 71.09.025, 71.09.030, 71.09.040, 71.09.050,
3 71.09.060, 71.09.080, 71.09.090, 71.09.092, 71.09.096, 71.09.098,
4 71.09.112, and 71.09.350; adding a new section to chapter 71.09 RCW;
5 creating a new section; and declaring an emergency.

6 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

7 **Sec. 1.** RCW 71.09.020 and 2006 c 303 s 10 are each amended to read
8 as follows:

9 Unless the context clearly requires otherwise, the definitions in
10 this section apply throughout this chapter.

11 (1) "Department" means the department of social and health
12 services.

13 (2) "Health care facility" means any hospital, hospice care center,
14 licensed or certified health care facility, health maintenance
15 organization regulated under chapter 48.46 RCW, federally qualified
16 health maintenance organization, federally approved renal dialysis
17 center or facility, or federally approved blood bank.

18 (3) "Health care practitioner" means an individual or firm licensed
19 or certified to engage actively in a regulated health profession.

1 (4) "Health care services" means those services provided by health
2 professionals licensed pursuant to RCW 18.120.020(4).

3 (5) "Health profession" means those licensed or regulated
4 professions set forth in RCW 18.120.020(4).

5 (6) "Less restrictive alternative" means court-ordered treatment in
6 a setting less restrictive than total confinement which satisfies the
7 conditions set forth in RCW 71.09.092. A less restrictive alternative
8 may not include placement in the community protection program as
9 pursuant to RCW 71A.12.230.

10 (7) "Likely to engage in predatory acts of sexual violence if not
11 confined in a secure facility" means that the person more probably than
12 not will engage in such acts if released unconditionally from detention
13 on the sexually violent predator petition. Such likelihood must be
14 evidenced by a recent overt act if the person is not totally confined
15 at the time the petition is filed under RCW 71.09.030.

16 (8) "Mental abnormality" means a congenital or acquired condition
17 affecting the emotional or volitional capacity which predisposes the
18 person to the commission of criminal sexual acts in a degree
19 constituting such person a menace to the health and safety of others.

20 (9) "Personality disorder" means an enduring pattern of inner
21 experience and behavior that deviates markedly from the expectations of
22 the individual's culture, is pervasive and inflexible, has onset in
23 adolescence or early adulthood, is stable over time and leads to
24 distress or impairment. Purported evidence of a personality disorder
25 must be supported by testimony of a licensed forensic psychologist or
26 psychiatrist.

27 (10) "Predatory" means acts directed towards: (a) Strangers; (b)
28 individuals with whom a relationship has been established or promoted
29 for the primary purpose of victimization; or (c) persons of casual
30 acquaintance with whom no substantial personal relationship exists.

31 ~~((10))~~ (11) "Prosecuting agency" means the prosecuting attorney
32 of the county where the person was convicted or charged or the attorney
33 general if requested by the prosecuting attorney, as provided in RCW
34 71.09.030.

35 (12) "Recent overt act" means any act ~~((or))~~ threat, or
36 combination thereof that has either caused harm of a sexually violent
37 nature or creates a reasonable apprehension of such harm in the mind of

1 an objective person who knows of the history and mental condition of
2 the person engaging in the act or behaviors.

3 ~~((11))~~ (13) "Risk potential activity" or "risk potential
4 facility" means an activity or facility that provides a higher
5 incidence of risk to the public from persons conditionally released
6 from the special commitment center. Risk potential activities and
7 facilities include: Public and private schools, school bus stops,
8 licensed day care and licensed preschool facilities, public parks,
9 publicly dedicated trails, sports fields, playgrounds, recreational and
10 community centers, churches, synagogues, temples, mosques, public
11 libraries, public and private youth camps, and others identified by the
12 department following the hearings on a potential site required in RCW
13 71.09.315. For purposes of this chapter, "school bus stops" does not
14 include bus stops established primarily for public transit.

15 ~~((12))~~ (14) "Secretary" means the secretary of social and health
16 services or the secretary's designee.

17 ~~((13))~~ (15) "Secure facility" means a residential facility for
18 persons civilly confined under the provisions of this chapter that
19 includes security measures sufficient to protect the community. Such
20 facilities include total confinement facilities, secure community
21 transition facilities, and any residence used as a court-ordered
22 placement under RCW 71.09.096.

23 ~~((14))~~ (16) "Secure community transition facility" means a
24 residential facility for persons civilly committed and conditionally
25 released to a less restrictive alternative under this chapter. A
26 secure community transition facility has supervision and security, and
27 either provides or ensures the provision of sex offender treatment
28 services. Secure community transition facilities include but are not
29 limited to the facility established pursuant to RCW 71.09.250(1)(a)(i)
30 and any community-based facilities established under this chapter and
31 operated by the secretary or under contract with the secretary.

32 ~~((15))~~ (17) "Sexually violent offense" means an act committed on,
33 before, or after July 1, 1990, that is: (a) An act defined in Title 9A
34 RCW as rape in the first degree, rape in the second degree by forcible
35 compulsion, rape of a child in the first or second degree, statutory
36 rape in the first or second degree, indecent liberties by forcible
37 compulsion, indecent liberties against a child under age fourteen,
38 incest against a child under age fourteen, or child molestation in the

1 first or second degree; (b) a felony offense in effect at any time
2 prior to July 1, 1990, that is comparable to a sexually violent offense
3 as defined in (a) of this subsection, or any federal or out-of-state
4 conviction for a felony offense that under the laws of this state would
5 be a sexually violent offense as defined in this subsection; (c) an act
6 of murder in the first or second degree, assault in the first or second
7 degree, assault of a child in the first or second degree, kidnapping in
8 the first or second degree, burglary in the first degree, residential
9 burglary, or unlawful imprisonment, which act, either at the time of
10 sentencing for the offense or subsequently during civil commitment
11 proceedings pursuant to this chapter, has been determined beyond a
12 reasonable doubt to have been sexually motivated, as that term is
13 defined in RCW 9.94A.030; or (d) an act as described in chapter 9A.28
14 RCW, that is an attempt, criminal solicitation, or criminal conspiracy
15 to commit one of the felonies designated in (a), (b), or (c) of this
16 subsection.

17 ~~((+16+))~~ (18) "Sexually violent predator" means any person who has
18 been convicted of or charged with a crime of sexual violence and who
19 suffers from a mental abnormality or personality disorder which makes
20 the person likely to engage in predatory acts of sexual violence if not
21 confined in a secure facility.

22 ~~((+17+))~~ (19) "Total confinement facility" means a secure facility
23 that provides supervision and sex offender treatment services in a
24 total confinement setting. Total confinement facilities include the
25 special commitment center and any similar facility designated as a
26 total confinement facility by the secretary.

27 **Sec. 2.** RCW 71.09.025 and 2008 c 213 s 11 are each amended to read
28 as follows:

29 (1)(a) When it appears that a person may meet the criteria of a
30 sexually violent predator as defined in RCW 71.09.020 (16), the agency
31 with jurisdiction shall refer the person in writing to the prosecuting
32 attorney of the county ~~((where that person was charged))~~ in which an
33 action under this chapter may be filed pursuant to RCW 71.09.030 and
34 the attorney general, three months prior to:

35 (i) The anticipated release from total confinement of a person who
36 has been convicted of a sexually violent offense;

1 (ii) The anticipated release from total confinement of a person
2 found to have committed a sexually violent offense as a juvenile;

3 (iii) Release of a person who has been charged with a sexually
4 violent offense and who has been determined to be incompetent to stand
5 trial pursuant to RCW 10.77.086(4); or

6 (iv) Release of a person who has been found not guilty by reason of
7 insanity of a sexually violent offense pursuant to RCW 10.77.020(3).

8 (b) The agency shall provide the (~~prosecutor~~) prosecuting agency
9 with all relevant information including but not limited to the
10 following information:

11 (i) A complete copy of the institutional records compiled by the
12 department of corrections relating to the person, and any such out-of-
13 state department of corrections' records, if available;

14 (ii) A complete copy, if applicable, of any file compiled by the
15 indeterminate sentence review board relating to the person;

16 (iii) All records relating to the psychological or psychiatric
17 evaluation and/or treatment of the person;

18 (iv) A current record of all prior arrests and convictions, and
19 full police case reports relating to those arrests and convictions; and

20 (v) A current mental health evaluation or mental health records
21 review.

22 (c) The prosecuting agency has the authority, consistent with RCW
23 72.09.345(3), to obtain all records relating to the person if the
24 prosecuting agency deems such records are necessary to fulfill its
25 duties under this chapter. The prosecuting agency may only disclose
26 such records in the course of performing its duties pursuant to this
27 chapter, unless otherwise authorized by law.

28 (d) The prosecuting agency has the authority to utilize the inquiry
29 judge procedures of chapter 10.27 RCW prior to the filing of any action
30 under this chapter to seek the issuance of compulsory process for the
31 production of any records necessary for a determination of whether to
32 seek the civil commitment of a person under this chapter. Any records
33 obtained pursuant to this process may only be disclosed by the
34 prosecuting agency in the course of performing its duties pursuant to
35 this chapter, or unless otherwise authorized by law.

36 (2) (~~This section applies to acts committed before, on, or after~~
37 ~~March 26, 1992.~~

1 ~~(3)~~) The agency, its employees, and officials shall be immune from
2 liability for any good-faith conduct under this section.

3 ~~((4))~~ (3) As used in this section, "agency with jurisdiction"
4 means that agency with the authority to direct the release of a person
5 serving a sentence or term of confinement and includes the department
6 of corrections, the indeterminate sentence review board, and the
7 department of social and health services.

8 **Sec. 3.** RCW 71.09.030 and 2008 c 213 s 12 are each amended to read
9 as follows:

10 (1) A petition may be filed alleging that a person is a sexually
11 violent predator and stating sufficient facts to support such
12 allegation when it appears that: ~~((1))~~ (a) A person who at any time
13 previously has been convicted of a sexually violent offense is about to
14 be released from total confinement ~~((on, before, or after July 1,~~
15 ~~1990))~~; ~~((2))~~ (b) a person found to have committed a sexually violent
16 offense as a juvenile is about to be released from total confinement
17 ~~((on, before, or after July 1, 1990))~~; ~~((3))~~ (c) a person who has
18 been charged with a sexually violent offense and who has been
19 determined to be incompetent to stand trial is about to be released, or
20 has been released ~~((on, before, or after July 1, 1990))~~, pursuant to
21 RCW 10.77.086(4); ~~((4))~~ (d) a person who has been found not guilty by
22 reason of insanity of a sexually violent offense is about to be
23 released, or has been released ~~((on, before, or after July 1, 1990))~~,
24 pursuant to RCW 10.77.020(3), 10.77.110 (1) or (3), or 10.77.150; or
25 ~~((5))~~ (e) a person who at any time previously has been convicted of
26 a sexually violent offense and has since been released from total
27 confinement and has committed a recent overt act ~~((, and it appears that~~
28 ~~the person may be a sexually violent predator, the prosecuting attorney~~
29 ~~of the county where the person was convicted or charged or the attorney~~
30 ~~general if requested by the prosecuting attorney may file a petition~~
31 ~~alleging that the person is a "sexually violent predator" and stating~~
32 ~~sufficient facts to support such allegation))~~.

33 (2) The petition may be filed by:

34 (a) The prosecuting attorney of a county in which:

35 (i) The person has been charged or convicted with a sexually
36 violent offense;

1 (ii) A recent overt act occurred involving a person covered under
2 subsection (1)(e) of this section; or

3 (iii) The person committed a recent overt act, or was charged or
4 convicted of a criminal offense that would qualify as a recent overt
5 act, if the only sexually violent offense charge or conviction occurred
6 in a jurisdiction other than Washington; or

7 (b) The attorney general, if requested by the county prosecuting
8 attorney identified in (a) of this subsection. If the county
9 prosecuting attorney requests that the attorney general file and
10 prosecute a case under this chapter, then the county shall charge the
11 attorney general only the fees, including filing and jury fees, that
12 would be charged and paid by the county prosecuting attorney, if the
13 county prosecuting attorney retained the case.

14 **Sec. 4.** RCW 71.09.040 and 2001 c 286 s 6 are each amended to read
15 as follows:

16 (1) Upon the filing of a petition under RCW 71.09.030, the judge
17 shall determine whether probable cause exists to believe that the
18 person named in the petition is a sexually violent predator. If such
19 determination is made the judge shall direct that the person be taken
20 into custody.

21 (2) Within seventy-two hours after a person is taken into custody
22 pursuant to subsection (1) of this section, the court shall provide the
23 person with notice of, and an opportunity to appear in person at, a
24 hearing to contest probable cause as to whether the person is a
25 sexually violent predator. In order to assist the person at the
26 hearing, within twenty-four hours of service of the petition, the
27 prosecuting agency shall provide to the person or his or her counsel a
28 copy of all materials provided to the prosecuting agency by the
29 referring agency pursuant to RCW 71.09.025, or obtained by the
30 prosecuting agency pursuant to RCW 71.09.025(1) (c) and (d). At this
31 hearing, the court shall (a) verify the person's identity, and (b)
32 determine whether probable cause exists to believe that the person is
33 a sexually violent predator. At the probable cause hearing, the state
34 may rely upon the petition and certification for determination of
35 probable cause filed pursuant to RCW 71.09.030. The state may
36 supplement this with additional documentary evidence or live testimony.
37 The person may be held in total confinement at the county jail until

1 the trial court renders a decision after the conclusion of the seventy-
2 two hour probable cause hearing. The county shall be entitled to
3 reimbursement for the cost of housing and transporting the person
4 pursuant to rules adopted by the secretary.

5 (3) At the probable cause hearing, the person shall have the
6 following rights in addition to the rights previously specified: (a)
7 To be represented by counsel; (b) to present evidence on his or her
8 behalf; (c) to cross-examine witnesses who testify against him or her;
9 (d) to view and copy all petitions and reports in the court file. The
10 court must permit a witness called by either party to testify by
11 telephone. Because this is a special proceeding, discovery pursuant to
12 the civil rules shall not occur until after the hearing has been held
13 and the court has issued its decision.

14 (4) If the probable cause determination is made, the judge shall
15 direct that the person be transferred to an appropriate facility for an
16 evaluation as to whether the person is a sexually violent predator.
17 The evaluation shall be conducted by a person deemed to be
18 professionally qualified to conduct such an examination pursuant to
19 rules developed by the department of social and health services. In
20 adopting such rules, the department of social and health services shall
21 consult with the department of health and the department of
22 corrections. In no event shall the person be released from confinement
23 prior to trial. A witness called by either party shall be permitted to
24 testify by telephone.

25 **Sec. 5.** RCW 71.09.050 and 1995 c 216 s 5 are each amended to read
26 as follows:

27 (1) Within forty-five days after the completion of any hearing held
28 pursuant to RCW 71.09.040, the court shall conduct a trial to determine
29 whether the person is a sexually violent predator. The trial may be
30 continued upon the request of either party and a showing of good cause,
31 or by the court on its own motion in the due administration of justice,
32 and when the respondent will not be substantially prejudiced. At all
33 stages of the proceedings under this chapter, any person subject to
34 this chapter shall be entitled to the assistance of counsel, and if the
35 person is indigent, the court shall appoint counsel to assist him or
36 her. The person shall be confined in a secure facility for the
37 duration of the trial.

1 (2) Whenever any person is subjected to an examination under this
2 chapter, he or she may retain experts or professional persons to
3 perform an examination on their behalf. When the person wishes to be
4 examined by a qualified expert or professional person of his or her own
5 choice, such examiner shall be permitted to have reasonable access to
6 the person for the purpose of such examination, as well as to all
7 relevant medical and psychological records and reports. In the case of
8 a person who is indigent, the court shall, upon the person's request,
9 assist the person in obtaining an expert or professional person to
10 perform an examination or participate in the trial on the person's
11 behalf.

12 (3) The person, the prosecuting (~~attorney or attorney general~~)
13 agency, or the judge shall have the right to demand that the trial be
14 before a twelve-person jury. If no demand is made, the trial shall be
15 before the court.

16 **Sec. 6.** RCW 71.09.060 and 2008 c 213 s 13 are each amended to read
17 as follows:

18 (1) The court or jury shall determine whether, beyond a reasonable
19 doubt, the person is a sexually violent predator. In determining
20 whether or not the person would be likely to engage in predatory acts
21 of sexual violence if not confined in a secure facility, the fact
22 finder may consider only placement conditions and voluntary treatment
23 options that would exist for the person if unconditionally released
24 from detention on the sexually violent predator petition. The
25 community protection program under RCW 71A.12.230 may not be considered
26 as a placement condition or treatment option available to the person if
27 unconditionally released from detention on a sexually violent predator
28 petition. When the determination is made by a jury, the verdict must
29 be unanimous.

30 If, on the date that the petition is filed, the person was living
31 in the community after release from custody, the state must also prove
32 beyond a reasonable doubt that the person had committed a recent overt
33 act. If the state alleges that the prior sexually violent offense that
34 forms the basis for the petition for commitment was an act that was
35 sexually motivated as provided in RCW 71.09.020(15)(c), the state must
36 prove beyond a reasonable doubt that the alleged sexually violent act
37 was sexually motivated as defined in RCW 9.94A.030.

1 If the court or jury determines that the person is a sexually
2 violent predator, the person shall be committed to the custody of the
3 department of social and health services for placement in a secure
4 facility operated by the department of social and health services for
5 control, care, and treatment until such time as: (a) The person's
6 condition has so changed that the person no longer meets the definition
7 of a sexually violent predator; or (b) conditional release to a less
8 restrictive alternative as set forth in RCW 71.09.092 is in the best
9 interest of the person and conditions can be imposed that would
10 adequately protect the community.

11 If the court or unanimous jury decides that the state has not met
12 its burden of proving that the person is a sexually violent predator,
13 the court shall direct the person's release.

14 If the jury is unable to reach a unanimous verdict, the court shall
15 declare a mistrial and set a retrial within forty-five days of the date
16 of the mistrial unless the prosecuting agency earlier moves to dismiss
17 the petition. The retrial may be continued upon the request of either
18 party accompanied by a showing of good cause, or by the court on its
19 own motion in the due administration of justice provided that the
20 respondent will not be substantially prejudiced. In no event may the
21 person be released from confinement prior to retrial or dismissal of
22 the case.

23 (2) If the person charged with a sexually violent offense has been
24 found incompetent to stand trial, and is about to (~~be~~) be or has
25 been released pursuant to RCW 10.77.086(4), and his or her commitment
26 is sought pursuant to subsection (1) of this section, the court shall
27 first hear evidence and determine whether the person did commit the act
28 or acts charged if the court did not enter a finding prior to dismissal
29 under RCW 10.77.086(4) that the person committed the act or acts
30 charged. The hearing on this issue must comply with all the procedures
31 specified in this section. In addition, the rules of evidence
32 applicable in criminal cases shall apply, and all constitutional rights
33 available to defendants at criminal trials, other than the right not to
34 be tried while incompetent, shall apply. After hearing evidence on
35 this issue, the court shall make specific findings on whether the
36 person did commit the act or acts charged, the extent to which the
37 person's incompetence or developmental disability affected the outcome
38 of the hearing, including its effect on the person's ability to consult

1 with and assist counsel and to testify on his or her own behalf, the
2 extent to which the evidence could be reconstructed without the
3 assistance of the person, and the strength of the prosecution's case.
4 If, after the conclusion of the hearing on this issue, the court finds,
5 beyond a reasonable doubt, that the person did commit the act or acts
6 charged, it shall enter a final order, appealable by the person, on
7 that issue, and may proceed to consider whether the person should be
8 committed pursuant to this section.

9 (3) Except as otherwise provided in this chapter, the state shall
10 comply with RCW 10.77.220 while confining the person ((pursuant to this
11 chapter, except that)). During all court proceedings where the person
12 is present, the person shall be detained in a secure facility. If the
13 proceedings last more than one day, the person may be held in the
14 county jail for the duration of the proceedings, except the person may
15 be returned to the department's custody on weekends and court holidays
16 if the court deems such a transfer feasible. The county shall be
17 entitled to reimbursement for the cost of housing and transporting the
18 person pursuant to rules adopted by the secretary. The department
19 shall not place the person, even temporarily, in a facility on the
20 grounds of any state mental facility or regional habilitation center
21 because these institutions are insufficiently secure for this
22 population.

23 (4) A court has jurisdiction to order a less restrictive
24 alternative placement only after a hearing ordered pursuant to RCW
25 71.09.090 following initial commitment under this section and in accord
26 with the provisions of this chapter.

27 **Sec. 7.** RCW 71.09.080 and 1995 c 216 s 8 are each amended to read
28 as follows:

29 (1) Any person subjected to restricted liberty as a sexually
30 violent predator pursuant to this chapter shall not forfeit any legal
31 right or suffer any legal disability as a consequence of any actions
32 taken or orders made, other than as specifically provided in this
33 chapter, or as otherwise authorized by law.

34 (2) Any person committed pursuant to this chapter has the right to
35 adequate care and individualized treatment. The department of social
36 and health services shall keep records detailing all medical, expert,
37 and professional care and treatment received by a committed person, and

1 shall keep copies of all reports of periodic examinations made pursuant
2 to this chapter. All such records and reports shall be made available
3 upon request only to: The committed person, his or her attorney, the
4 prosecuting attorney, the court, the protection and advocacy agency, or
5 another expert or professional person who, upon proper showing,
6 demonstrates a need for access to such records.

7 (3) At the time a person is taken into custody or transferred into
8 a facility pursuant to a petition under this chapter, the professional
9 person in charge of such facility or his or her designee shall take
10 reasonable precautions to inventory and safeguard the personal property
11 of the persons detained or transferred. A copy of the inventory,
12 signed by the staff member making it, shall be given to the person
13 detained and shall, in addition, be open to inspection to any
14 responsible relative, subject to limitations, if any, specifically
15 imposed by the detained person. For purposes of this subsection,
16 "responsible relative" includes the guardian, conservator, attorney,
17 spouse, parent, adult child, or adult brother or sister of the person.
18 The facility shall not disclose the contents of the inventory to any
19 other person without consent of the patient or order of the court.

20 (4) Nothing in this chapter prohibits a person presently committed
21 from exercising a right presently available to him or her for the
22 purpose of obtaining release from confinement, including the right to
23 petition for a writ of habeas corpus.

24 (5) No indigent person may be conditionally released or
25 unconditionally discharged under this chapter without suitable
26 clothing, and the secretary shall furnish the person with such sum of
27 money as is required by RCW 72.02.100 for persons without ample funds
28 who are released from correctional institutions. As funds are
29 available, the secretary may provide payment to the indigent persons
30 conditionally released pursuant to this chapter consistent with the
31 optional provisions of RCW 72.02.100 and 72.02.110, and may adopt rules
32 to do so.

33 (6) If a civil commitment petition is dismissed, or a trier of fact
34 determines that a person does not meet civil commitment criteria, the
35 person shall be released within twenty-four hours of service of the
36 release order on the superintendent of the special commitment center,
37 or later by agreement of the person who is the subject of the petition.

1 **Sec. 8.** RCW 71.09.090 and 2005 c 344 s 2 are each amended to read
2 as follows:

3 (1) If the secretary determines that the person's condition has so
4 changed that either: (a) The person no longer meets the definition of
5 a sexually violent predator; or (b) conditional release to a less
6 restrictive alternative is in the best interest of the person and
7 conditions can be imposed that adequately protect the community, the
8 secretary shall authorize the person to petition the court for
9 conditional release to a less restrictive alternative or unconditional
10 discharge. The petition shall be filed with the court and served upon
11 the prosecuting agency responsible for the initial commitment. The
12 court, upon receipt of the petition for conditional release to a less
13 restrictive alternative or unconditional discharge, shall within forty-
14 five days order a hearing.

15 (2)(a) Nothing contained in this chapter shall prohibit the person
16 from otherwise petitioning the court for conditional release to a less
17 restrictive alternative or unconditional discharge without the
18 secretary's approval. The secretary shall provide the committed person
19 with an annual written notice of the person's right to petition the
20 court for conditional release to a less restrictive alternative or
21 unconditional discharge over the secretary's objection. The notice
22 shall contain a waiver of rights. The secretary shall file the notice
23 and waiver form and the annual report with the court. If the person
24 does not affirmatively waive the right to petition, the court shall set
25 a show cause hearing to determine whether probable cause exists to
26 warrant a hearing on whether the person's condition has so changed
27 that: (i) He or she no longer meets the definition of a sexually
28 violent predator; or (ii) conditional release to a proposed less
29 restrictive alternative would be in the best interest of the person and
30 conditions can be imposed that would adequately protect the community.

31 (b) The committed person shall have a right to have an attorney
32 represent him or her at the show cause hearing, which may be conducted
33 solely on the basis of affidavits or declarations, but the person is
34 not entitled to be present at the show cause hearing. At the show
35 cause hearing, the prosecuting attorney or attorney general shall
36 present prima facie evidence establishing that the committed person
37 continues to meet the definition of a sexually violent predator and
38 that a less restrictive alternative is not in the best interest of the

1 person and conditions cannot be imposed that adequately protect the
2 community. In making this showing, the state may rely exclusively upon
3 the annual report prepared pursuant to RCW 71.09.070. The committed
4 person may present responsive affidavits or declarations to which the
5 state may reply.

6 (c) If the court at the show cause hearing determines that either:
7 (i) The state has failed to present prima facie evidence that the
8 committed person continues to meet the definition of a sexually violent
9 predator and that no proposed less restrictive alternative is in the
10 best interest of the person and conditions cannot be imposed that would
11 adequately protect the community; or (ii) probable cause exists to
12 believe that the person's condition has so changed that: (A) The
13 person no longer meets the definition of a sexually violent predator;
14 or (B) release to a proposed less restrictive alternative would be in
15 the best interest of the person and conditions can be imposed that
16 would adequately protect the community, then the court shall set a
17 hearing on either or both issues.

18 (d) If the court has not previously considered the issue of release
19 to a less restrictive alternative, either through a trial on the merits
20 or through the procedures set forth in RCW 71.09.094(1), the court
21 shall consider whether release to a less restrictive alternative would
22 be in the best interests of the person and conditions can be imposed
23 that would adequately protect the community, without considering
24 whether the person's condition has changed. The court may not find
25 probable cause for a trial addressing less restrictive alternatives
26 unless a proposed less restrictive alternative placement meeting the
27 conditions of RCW 71.09.092 is presented to the court at the show cause
28 hearing.

29 (3)(a) At the hearing resulting from subsection (1) or (2) of this
30 section, the committed person shall be entitled to be present and to
31 the benefit of all constitutional protections that were afforded to the
32 person at the initial commitment proceeding. The prosecuting agency
33 (~~or the attorney general if requested by the county~~) shall represent
34 the state and shall have a right to a jury trial and to have the
35 committed person evaluated by experts chosen by the state. The
36 committed person shall also have the right to a jury trial and the
37 right to have experts evaluate him or her on his or her behalf and the

1 court shall appoint an expert if the person is indigent and requests an
2 appointment.

3 (b) If the issue at the hearing is whether the person should be
4 unconditionally discharged, the burden of proof shall be upon the state
5 to prove beyond a reasonable doubt that the committed person's
6 condition remains such that the person continues to meet the definition
7 of a sexually violent predator. Evidence of the prior commitment trial
8 and disposition is admissible. The recommitment proceeding shall
9 otherwise proceed as set forth in RCW 71.09.050 and 71.09.060.

10 (c) If the issue at the hearing is whether the person should be
11 conditionally released to a less restrictive alternative, the burden of
12 proof at the hearing shall be upon the state to prove beyond a
13 reasonable doubt that conditional release to any proposed less
14 restrictive alternative either: (i) Is not in the best interest of the
15 committed person; or (ii) does not include conditions that would
16 adequately protect the community. Evidence of the prior commitment
17 trial and disposition is admissible.

18 (4)(a) Probable cause exists to believe that a person's condition
19 has "so changed," under subsection (2) of this section, only when
20 evidence exists, since the person's last commitment trial, or less
21 restrictive alternative revocation proceeding, of a substantial change
22 in the person's physical or mental condition such that the person
23 either no longer meets the definition of a sexually violent predator or
24 that a conditional release to a less restrictive alternative is in the
25 person's best interest and conditions can be imposed to adequately
26 protect the community.

27 (b) A new trial proceeding under subsection (3) of this section may
28 be ordered, or a trial proceeding may be held, only when there is
29 current evidence from a licensed professional of one of the following
30 and the evidence presents a change in condition since the person's last
31 commitment trial proceeding:

32 (i) An identified physiological change to the person, such as
33 paralysis, stroke, or dementia, that renders the committed person
34 unable to commit a sexually violent act and this change is permanent;
35 or

36 (ii) A change in the person's mental condition brought about
37 through positive response to continuing participation in treatment

1 which indicates that the person meets the standard for conditional
2 release to a less restrictive alternative or that the person would be
3 safe to be at large if unconditionally released from commitment.

4 (c) For purposes of this section, a change in a single demographic
5 factor, without more, does not establish probable cause for a new trial
6 proceeding under subsection (3) of this section. As used in this
7 section, a single demographic factor includes, but is not limited to,
8 a change in the chronological age, marital status, or gender of the
9 committed person.

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

13 **Sec. 9.** RCW 71.09.092 and 1995 c 216 s 10 are each amended to read
14 as follows:

15 Before the court may enter an order directing conditional release
16 to a less restrictive alternative, it must find the following: (1) The
17 person will be treated by a treatment provider who is qualified to
18 provide such treatment in the state of Washington under chapter 18.155
19 RCW; (2) the treatment provider has presented a specific course of
20 treatment and has agreed to assume responsibility for such treatment
21 and will report progress to the court on a regular basis, and will
22 report violations immediately to the court, the prosecutor, the
23 supervising community corrections officer, and the superintendent of
24 the special commitment center; (3) housing exists in Washington that is
25 sufficiently secure to protect the community, and the person or agency
26 providing housing to the conditionally released person has agreed in
27 writing to accept the person, to provide the level of security required
28 by the court, and immediately to report to the court, the prosecutor,
29 the supervising community corrections officer, and the superintendent
30 of the special commitment center if the person leaves the housing to
31 which he or she has been assigned without authorization; (4) the person
32 is willing to comply with the treatment provider and all requirements
33 imposed by the treatment provider and by the court; and (5) the person
34 will be under the supervision of the department of corrections and is
35 willing to comply with supervision requirements imposed by the
36 department of corrections.

1 **Sec. 10.** RCW 71.09.096 and 2001 c 286 s 12 are each amended to
2 read as follows:

3 (1) If the court or jury determines that conditional release to a
4 less restrictive alternative is in the best interest of the person and
5 includes conditions that would adequately protect the community, and
6 the court determines that the minimum conditions set forth in RCW
7 71.09.092 and in this section are met, the court shall enter judgment
8 and direct a conditional release.

9 (2) The court shall impose any additional conditions necessary to
10 ensure compliance with treatment and to protect the community. If the
11 court finds that conditions do not exist that will both ensure the
12 person's compliance with treatment and protect the community, then the
13 person shall be remanded to the custody of the department of social and
14 health services for control, care, and treatment in a secure facility
15 as designated in RCW 71.09.060(1).

16 (3) If the service provider designated by the court to provide
17 inpatient or outpatient treatment or to monitor or supervise any other
18 terms and conditions of a person's placement in a less restrictive
19 alternative is other than the department of social and health services
20 or the department of corrections, then the service provider so
21 designated must agree in writing to provide such treatment, monitoring,
22 or supervision in accord with this section. Any person providing or
23 agreeing to provide treatment, monitoring, or supervision services
24 pursuant to this chapter may be compelled to testify and any privilege
25 with regard to such person's testimony is deemed waived.

26 (4) Prior to authorizing any release to a less restrictive
27 alternative, the court shall impose such conditions upon the person as
28 are necessary to ensure the safety of the community. The court shall
29 order the department of corrections to investigate the less restrictive
30 alternative and recommend any additional conditions to the court.
31 These conditions shall include, but are not limited to the following:
32 Specification of residence, prohibition of contact with potential or
33 past victims, prohibition of alcohol and other drug use, participation
34 in a specific course of inpatient or outpatient treatment that may
35 include monitoring by the use of polygraph and plethysmograph,
36 monitoring through the use of global positioning satellite technology,
37 supervision by a department of corrections community corrections
38 officer, a requirement that the person remain within the state unless

1 the person receives prior authorization by the court, and any other
2 conditions that the court determines are in the best interest of the
3 person or others. A copy of the conditions of release shall be given
4 to the person and to any designated service providers.

5 (5) Any service provider designated to provide inpatient or
6 outpatient treatment shall monthly, or as otherwise directed by the
7 court, submit to the court, to the department of social and health
8 services facility from which the person was released, to the
9 (~~prosecutor of the county in which the person was found to be a~~
10 ~~sexually violent predator~~) prosecuting agency, and to the supervising
11 community corrections officer, a report stating whether the person is
12 complying with the terms and conditions of the conditional release to
13 a less restrictive alternative.

14 (6) Each person released to a less restrictive alternative shall
15 have his or her case reviewed by the court that released him or her no
16 later than one year after such release and annually thereafter until
17 the person is unconditionally discharged. Review may occur in a
18 shorter time or more frequently, if the court, in its discretion on its
19 own motion, or on motion of the person, the secretary, or the
20 prosecuting (~~attorney~~) agency so determines. The sole question to be
21 determined by the court is whether the person shall continue to be
22 conditionally released to a less restrictive alternative. The court in
23 making its determination shall be aided by the periodic reports filed
24 pursuant to subsection (5) of this section and the opinions of the
25 secretary and other experts or professional persons.

26 **Sec. 11.** RCW 71.09.098 and 2006 c 282 s 1 are each amended to read
27 as follows:

28 (~~(1) Any service provider submitting reports pursuant to RCW~~
29 ~~71.09.096(6), the supervising community corrections officer, the~~
30 ~~prosecuting attorney, or the attorney general may petition the court,~~
31 ~~or the court on its own motion may schedule an immediate hearing, for~~
32 ~~the purpose of revoking or modifying the terms of the person's~~
33 ~~conditional release to a less restrictive alternative if the petitioner~~
34 ~~or the court believes the released person is not complying with the~~
35 ~~terms and conditions of his or her release or is in need of additional~~
36 ~~care, monitoring, supervision, or treatment.~~

1 ~~(2) If the prosecuting attorney, the supervising community~~
2 ~~corrections officer, or the court, based upon information received by~~
3 ~~them, reasonably believes that a conditionally released person is not~~
4 ~~complying with the terms and conditions of his or her conditional~~
5 ~~release to a less restrictive alternative, the court or community~~
6 ~~corrections officer may order that the conditionally released person be~~
7 ~~apprehended and taken into custody until such time as a hearing can be~~
8 ~~scheduled to determine the facts and whether or not the person's~~
9 ~~conditional release should be revoked or modified. A law enforcement~~
10 ~~officer, who has responded to a request for assistance from a~~
11 ~~department employee, may apprehend and take into custody the~~
12 ~~conditionally released person if the law enforcement officer reasonably~~
13 ~~believes that the conditionally released person is not complying with~~
14 ~~the terms and conditions of his or her conditional release to a less~~
15 ~~restrictive alternative. The conditionally released person may be~~
16 ~~detained in the county jail or returned to the secure community~~
17 ~~transition facility. The court shall be notified before the close of~~
18 ~~the next judicial day of the person's apprehension. Both the~~
19 ~~prosecuting attorney and the conditionally released person shall have~~
20 ~~the right to request an immediate mental examination of the~~
21 ~~conditionally released person. If the conditionally released person is~~
22 ~~indigent, the court shall, upon request, assist him or her in obtaining~~
23 ~~a qualified expert or professional person to conduct the examination.~~

24 ~~(3) The court, upon receiving notification of the person's~~
25 ~~apprehension, shall promptly schedule a hearing. The issue to be~~
26 ~~determined is whether the state has proven by a preponderance of the~~
27 ~~evidence that the conditionally released person did not comply with the~~
28 ~~terms and conditions of his or her release. Hearsay evidence is~~
29 ~~admissible if the court finds it otherwise reliable. At the hearing,~~
30 ~~the court shall determine whether the person shall continue to be~~
31 ~~conditionally released on the same or modified conditions or whether~~
32 ~~his or her conditional release shall be revoked and he or she shall be~~
33 ~~committed to total confinement, subject to release only in accordance~~
34 ~~with provisions of this chapter.)~~

35 (1) Any service provider submitting reports pursuant to RCW
36 71.09.096(6), the supervising community corrections officer, the
37 prosecuting agency, or the secretary's designee may petition the court
38 for an immediate hearing for the purpose of revoking or modifying the

1 terms of the person's conditional release to a less restrictive
2 alternative if the petitioner believes the released person: (a)
3 Violated or is in violation of the terms and conditions of the court's
4 conditional release order; or (b) is in need of additional care,
5 monitoring, supervision, or treatment.

6 (2) The community corrections officer or the secretary's designee
7 may restrict the person's movement in the community until the petition
8 is determined by the court. The person may be taken into custody if:

9 (a) The supervising community corrections officer, the secretary's
10 designee, or a law enforcement officer reasonably believes the person
11 has violated or is in violation of the court's conditional release
12 order; or

13 (b) The supervising community corrections officer or the
14 secretary's designee reasonably believes that the person is in need of
15 additional care, monitoring, supervision, or treatment because the
16 person presents a danger to himself or herself or others if his or her
17 conditional release under the conditions imposed by the court's release
18 order continues.

19 (3)(a) Persons taken into custody pursuant to subsection (2) of
20 this section shall:

21 (i) Not be released until such time as a hearing is held to
22 determine whether to revoke or modify the person's conditional release
23 order and the court has issued its decision; and

24 (ii) Be held in the county jail, at a secure community transition
25 facility, or at the total confinement facility, at the discretion of
26 the secretary's designee.

27 (b) The court shall be notified before the close of the next
28 judicial day that the person has been taken into custody and shall
29 promptly schedule a hearing.

30 (4) Before any hearing to revoke or modify the person's conditional
31 release order, both the prosecuting agency and the released person
32 shall have the right to request an immediate mental examination of the
33 released person. If the conditionally released person is indigent, the
34 court shall, upon request, assist him or her in obtaining a qualified
35 expert or professional person to conduct the examination.

36 (5) At any hearing to revoke or modify the conditional release
37 order:

1 (a) The prosecuting agency shall represent the state, including
2 determining whether to proceed with revocation or modification of the
3 conditional release order;

4 (b) Hearsay evidence is admissible if the court finds that it is
5 otherwise reliable; and

6 (c) The state shall bear the burden of proving by a preponderance
7 of the evidence that the person has violated or is in violation of the
8 court's conditional release order or that the person is in need of
9 additional care, monitoring, supervision, or treatment.

10 (6)(a) If the court determines that the state has met its burden
11 referenced in subsection (5)(c) of this section, and the issue before
12 the court is revocation of the court's conditional release order, the
13 court shall consider the evidence presented by the parties and the
14 following factors relevant to whether continuing the person's
15 conditional release is in the person's best interests or adequate to
16 protect the community:

17 (i) The nature of the condition that was violated by the person or
18 that the person was in violation of in the context of the person's
19 criminal history and underlying mental conditions;

20 (ii) The degree to which the violation was intentional or grossly
21 negligent;

22 (iii) The ability and willingness of the released person to
23 strictly comply with the conditional release order;

24 (iv) The degree of progress made by the person in community-based
25 treatment; and

26 (v) The risk to the public or particular persons if the conditional
27 release continues under the conditional release order that was
28 violated.

29 (b) Any factor alone, or in combination, shall support the court's
30 determination to revoke the conditional release order.

31 (7) If the court determines the state has met its burden referenced
32 in subsection (5)(c) of this section, and the issue before the court is
33 modification of the court's conditional release order, the court shall
34 modify the conditional release order by adding conditions if the court
35 determines that the person is in need of additional care, monitoring,
36 supervision, or treatment. The court has authority to modify its
37 conditional release order by substituting a new treatment provider,

1 requiring new housing for the person, or imposing such additional
2 supervision conditions as the court deems appropriate.

3 (8) A person whose conditional release has been revoked shall be
4 remanded to the custody of the secretary for control, care, and
5 treatment in a total confinement facility as designated in RCW
6 71.09.060(1). The person is thereafter eligible for conditional
7 release only in accord with the provisions of RCW 71.09.090 and related
8 statutes.

9 NEW SECTION. Sec. 12. A new section is added to chapter 71.09 RCW
10 to read as follows:

11 The department of social and health services shall provide to the
12 prosecuting agency a copy of all reports made by the department to law
13 enforcement in which a person detained or committed under this chapter
14 is named or listed as a suspect, witness, or victim, as well as a copy
15 of all reports received from law enforcement.

16 **Sec. 13.** RCW 71.09.112 and 2002 c 19 s 1 are each amended to read
17 as follows:

18 A person subject to court order under the provisions of this
19 chapter who is thereafter convicted of a criminal offense remains under
20 the jurisdiction of the department and shall be returned to the custody
21 of the department following: (1) Completion of the criminal sentence;
22 or (2) release from confinement in a state, federal, or local
23 correctional facility(~~(, and shall be returned to the custody of the~~
24 ~~department)~~). Any conditional release order shall be immediately
25 revoked upon conviction for a criminal offense.

26 This section does not apply to persons subject to a court order
27 under the provisions of this chapter who are thereafter sentenced to
28 life without the possibility of release.

29 **Sec. 14.** RCW 71.09.350 and 2004 c 38 s 14 are each amended to read
30 as follows:

31 (1) Examinations and treatment of sexually violent predators who
32 are conditionally released to a less restrictive alternative under this
33 chapter shall be conducted only by certified sex offender treatment
34 providers or certified affiliate sex offender treatment providers under
35 chapter 18.155 RCW unless the court or the department of social and

1 health services finds that: (a) The (~~court-ordered less restrictive~~
2 ~~alternative placement is located in another state; (b) the~~) treatment
3 provider is employed by the department; or (~~(e)~~) (b)(i) all certified
4 sex offender treatment providers or certified affiliate sex offender
5 treatment providers become unavailable to provide treatment within a
6 reasonable geographic distance of the person's home, as determined in
7 rules adopted by the department of social and health services; and (ii)
8 the evaluation and treatment plan comply with the rules adopted by the
9 department of social and health services.

10 A treatment provider approved by the department of social and
11 health services under (~~(e)~~) (b) of this subsection, who is not
12 certified by the department of health, shall consult with a certified
13 sex offender treatment provider during the person's period of treatment
14 to ensure compliance with the rules adopted by the department of
15 health. The frequency and content of the consultation shall be based
16 on the recommendation of the certified sex offender treatment provider.

17 (2) A treatment provider, whether or not he or she is employed or
18 approved by the department of social and health services under
19 subsection (1) of this section or otherwise certified, may not perform
20 or provide treatment of sexually violent predators under this section
21 if the treatment provider has been:

22 (a) Convicted of a sex offense, as defined in RCW 9.94A.030;

23 (b) Convicted in any other jurisdiction of an offense that under
24 the laws of this state would be classified as a sex offense as defined
25 in RCW 9.94A.030; or

26 (c) Suspended or otherwise restricted from practicing any health
27 care profession by competent authority in any state, federal, or
28 foreign jurisdiction.

29 (3) Nothing in this section prohibits a qualified expert from
30 examining or evaluating a sexually violent predator who has been
31 conditionally released for purposes of presenting an opinion in court
32 proceedings.

33 NEW SECTION. **Sec. 15.** This act applies to all persons currently
34 committed or awaiting commitment under chapter 71.09 RCW either on,
35 before, or after the effective date of this act, whether confined in a
36 secure facility or on conditional release.

1 NEW SECTION. **Sec. 16.** This act is necessary for the immediate
2 preservation of the public peace, health, or safety, or support of the
3 state government and its existing public institutions, and takes effect
4 immediately.

5 NEW SECTION. **Sec. 17.** If any provision of this act or its
6 application to any person or circumstance is held invalid, the
7 remainder of the act or the application of the provision to other
8 persons or circumstances is not affected.

Passed by the Senate April 22, 2009.

Passed by the House April 1, 2009.

Approved by the Governor May 7, 2009.

Filed in Office of Secretary of State May 8, 2009.

NO. 38269-5-II

WASHINGTON STATE COURT OF APPEALS, DIVISION II

DECLARATION OF SERVICE

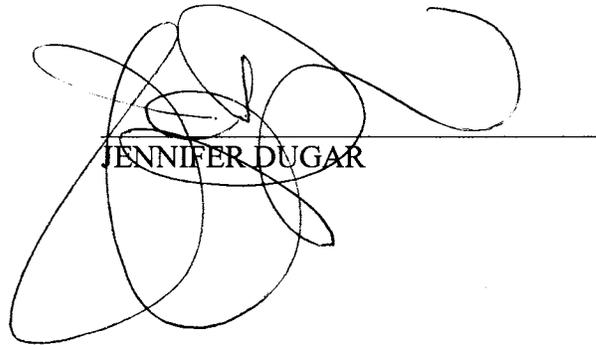
I, Jennifer Dugar, declare as follows:

On this 30th day of June, 2009, I deposited in the United States mail true and correct cop(ies) of Respondent's Brief and Declaration Of Service, postage affixed, addressed as follows:

Lila Silverstein
1511 Third Avenue, Suite 701
Seattle, WA 98101

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 30th day of June, 2009, at Seattle, Washington.


JENNIFER DUGAR

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DIVISION II
09 JUL -2 PM 12:22
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2009 JUN 30 PM 5:00