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FILED
COURT OF APPEALS

COVINGTON, WASH. 98231

STATE OF WASHINGTON

BY JM

No. 31769-9-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Appellant,

v.

KEITH W. ELMORE,

Respondent/Cross-Appellant.

BRIEF OF RESPONDENT/CROSS APPELLANT

David H. Schultz
Attorney for Respondent/Cross-Appellant,
Keith W. Elmore

430 N.E. Everett Street
Camas, WA 98607
(360) 834-4611

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(Assignment of Error No. 1, and No. 2).

B. Were the detainee's due process rights violated by the trial court's failure to allow a full evidentiary hearing on the detainee's continued status as a sexually violent predator pursuant to RCW 71.09.090. (Assignment of Error No. 3).

III. STATEMENT OF THE CASE

On February 7, 1995, Elmore was convicted in Clark County Superior Court of kidnaping and assault in the second degree, with sexual motivation. Elmore's conviction, which followed the entry of a plea of guilty, was based upon conduct alleged to have occurred on July 13, 1994. By agreement, the parties stipulated to an exceptional sentence of 60 months total confinement with the Department of Corrections. CP 167-68.

On July 8, 1999, shortly before Elmore's scheduled release from total confinement, the State of Washington filed a petition which asserted that Elmore was a sexually violent predator, as defined by RCW 71.09.020. CP 238, 276. Based upon the petition, the respondent was taken into custody and transported to the Clark County Jail. Following a hearing on October 12, 1999, a Clark County Superior Court Judge found probable cause to believe that Elmore was a sexually violent predator, and directed his detention at the Special Commitment Center, for an evaluation prior to his commitment trial.

Elmore contested the court's determination of probable cause, and its subsequent determination that he was a sexually violent predator. Elmore retained Dr. Richard Wollert to perform an independent evaluation, and to potentially provide expert testimony concerning the issues raised by the State in its commitment petition. Dr. Wollert's testimony was not presented to the court during Elmore's subsequent commitment trial. CP 131-133.

On October 8, 2001, a commitment trial was scheduled before the Clark County Superior Court, the Honorable Judge Roger Bennett presiding. Prior to beginning the trial, Elmore and the State entered into an agreement to present only certain facts to the court, in lieu of live testimony and presentation of other evidence. The parties stipulated to the admissibility of five documents, including the July 26, 2000, evaluation of the respondent by Dr. James Manley, Ph.D. CP 3, 133-34. Elmore did not stipulate that he was a sexually violent predator. He agreed, however, that based upon Exhibits A-E, "the court may find, beyond a reasonable doubt, that he is a sexually violent predator." CP 6, 199-200.

The detainee recognized that the court was free to review the evidence, and draw its own conclusions, and not to accept the stipulation of the parties. If the court accepted the stipulation of the parties concerning the admissibility and sufficiency of certain evidence, Elmore agreed to certain findings of fact

being entered “for the purposes of this stipulation only.” CP 6. Elmore specifically refused to stipulate, and the court did not find, that he suffered from the mental abnormality of sexual sadism. References to this diagnoses were stricken from the Findings of Fact, Conclusions of Law and Order of Commitment presented to the court. CP 6-7.

The trial court reviewed the evidence stipulated to by the parties, and the proposed Findings of Fact, Conclusions of Law and Order of Commitment. Based upon this review, the trial court found that Elmore was a sexually violent predator as defined by RCW 71.09.020, and ordered him committed to the custody of the Department of Social and Health Services, for placement at the Special Commitment Center. The trial court entered the Stipulation to Findings; Findings of Fact; Conclusions of Law; and Order of Commitment as a Sexually Violent Predator on October 8, 2001. CP 3-9.

A detainee committed as a sexually violent predator has the right to an annual review of his mental condition, to determine whether he continues to meet the definition of a sexually violent predator, and additionally to consider whether release to a less restrictive alternative placement is appropriate. Elmore’s first and second annual review hearings were combined, and a show cause hearing before the trial court was conducted on March 17, 2004. At the hearing, the State presented two written reports by Dr. Jason Dunham, an

volitional capacity to the point that she is so predisposed to the commission of criminal sexual acts that she constitutes a menace to the health and safety of others, and her status as to whether she is more likely than not, if she were unconditionally released, to commit or attempt to commit a sexually violent offense against a stranger or casual acquaintance. In view of the fact that she is now 47 years old, and sexual recidivism decreases steadily with age, an analysis of the expected effects of age on an estimated recidivism risk should also be undertaken.

Appendix, p. 6. Wollert concluded that each of these factors, including Elmore's change in age, and substantial progress in treatment, supported his opinion that Elmore was no longer a sexually violent predator. Appendix, p. 11.

On April 15, 2004, the trial court issued its written Ruling on Probable Cause. Judge Bennett found that Elmore had established probable cause to believe that he no longer met the statutory definition of a sexually violent predator, "because he is older now than when he was committed." CP 276-81. But, the trial court expressly refused to allow Dr. Wollert to base his opinion on any of the other changes in Elmore's condition that are identified in Dr. Wollert's report. Judge Bennett specifically prohibited Dr. Wollert from testifying that Elmore had sufficiently progressed in treatment, so that he no longer met the definition of a sexually violent predator. The court found that this opinion could not be described to the trier of fact, because it was inconsistent with the opinion of the Special Commitment Center's staff. CP 278-79.

The judge also ruled that Dr. Wollert's opinions on the changes in Elmore's diagnostic status, and his use of statistical analysis and testing to determine the current likelihood that Elmore would reoffend, could not be presented to the trier of fact. The trial court noted Dr. Wollert's original opinion that Elmore did not meet the definition of a sexually violent predator. Although the stipulation to consideration of certain evidence at the original trial specifically deleted references to sexual sadism, Judge Bennett found that Elmore had "conclusively stipulated" to this diagnosis. CP 280. The trial court read the original stipulation of facts to prohibit Elmore from ever challenging the diagnosis of his mental condition, or from arguing that it was currently incorrect, based upon observations, testing and analysis done after his commitment. CP 280-81.

IV. ARGUMENT OF CROSS APPELLANT

1. When the detainee is prepared to present expert testimony from a qualified witness, which describes several bases for concluding that he no longer meets the definition of a sexually violent predator, the trial court abuses its discretion by summarily preventing a full evidentiary hearing on the issue.

The status of a detainee at the Special Commitment Center must be reviewed annually by the trial court. RCW 71.09.090. The Legislature contemplated that an evidentiary hearing would be conducted on the question of the detainee's present condition if

either: (i) the State has failed to present prima facie evidence that the committed person continues to meet the definition of a sexually violent predator and that no proposed less restrictive alternative is in the best interest of the person and conditions cannot be imposed that would adequately protect the community; or (ii) probable cause exists to believe that the person's condition has so changed that: (A) the person no longer meets the definition of a sexually violent predator; or (B) release to a less restrictive alternative would be in the best interest of the person and conditions can be imposed that would adequately protect the community, . . .

RCW 71.09.090(2)(c). The State "must bear the burden of proof in show cause hearings held pursuant to RCW 71.09.090(2)." *In re Detention of Turay*, 139 Wn.2d 379, 424, 986 P.2d 790 (1999), *In re Detention of Petersen*, 145 Wn.2d 789, 797, 42 P.3d 952 (2002).

The trial court conducts a preliminary screening of the necessity for a full evidentiary hearing, by reviewing both the written submissions of the State and the respondent. The focus is on the present condition of the detainee, including a consideration of evidence from expert witnesses:

Even if the State carries its burden to prove a prima facie case for continued imprisonment, the prisoner may present his own evidence which, if believed, would show (1) the prisoner no longer suffers from a mental abnormality or personality disorder, i.e., the prisoner has "so changed", or (2) if the prisoner still suffers from a mental abnormality or personality disorder, the mental abnormality or personality disorder would not likely cause the prisoner to engage in predatory acts of sexual violence if conditionally released to a less restrictive alternative **or unconditionally discharged. . . . If the prisoner makes either showing, there is probable cause that continued incarceration is not warranted. Former RCW**

71.09.090(2) then mandates the court to set the matter for a full evidentiary hearing.

In re Detention of Petersen, 145 Wn.2d at 798-99 (emphasis supplied). The court should simply determine whether evidence presented by the detainee meets the statutory standard. *In re Detention of Andre Young*, 120 Wn. App. 753, 758, ___ P.3d ___ (2004). When determining probable cause at an annual show cause hearing, a trial court should not weigh evidence. *In re Detention of Petersen*, 145 Wn.2d at 803.

Dual consideration of continued mental problems, and continued dangerousness, is similar to the review process following insanity acquittals. *State v. Reid*, 144 Wn.2d 621, 627, 30 P.3d 465 (2001). The show cause proceeding conducted by the court is not an opportunity for summary determination of the facts by the trial court. As in other civil proceedings, summary determination is only appropriate if the moving party establishes that there is no general issue of material fact, and that the moving party is entitled to judgment as a matter of law. *Ellis v. City of Seattle*, 142 Wn.2d 450, 13 P.3d 1065 (2000). In reviewing whether the detainee has established probable cause, the trial court must consider all facts, “and all reasonable inferences that can be drawn from those facts, in the light most favorable to the non-moving party, . . .” *Barrett v. Freise*, 119 Wn. App. 823, 839, 82 P.3d 1179 (2003). “Because weighing of evidence, balancing of competing expert

credibility, and resolution of conflicting material facts are not appropriate on summary judgment, a trial is necessary to resolve these matters.” *Larson v. Nelson*, 118 Wn. App. 797, 810 (footnote 17), 77 P.3d 671 (2003). At the show cause hearing held in advance of each SVP annual review “courts do not ‘weigh evidence’ to determine probable cause.” *In re Detention of Petersen*, *supra*, at 798.

In this case, Elmore presented the written report of Dr. Wollert, which described his opinion that a number of conditions had changed since the detainee’s commitment, and that Elmore’s further incarceration at the Special Commitment Center was unnecessary. Appendix, p. 1 through 11. These changes were not limited to inevitable increases in Elmore’s age, although Dr. Wollert found that this aging process was statistically significant in measuring the likelihood of recidivism. Dr. Wollert also believed that Elmore’s substantial engagement in, and progress through, treatment, since commitment was important, as well as additional information, obtained after commitment, which related to his diagnoses, his mental condition, and his likelihood of reoffense. Based upon each of these factors, Dr. Wollert concluded that Elmore could be released from confinement, either unconditionally, or to a less restrictive alternative form of confinement.

By prohibiting the presentation of some of Dr. Wollert’s opinions, to

the trial of fact, Judge Bennett made exactly the same mistake as the trial judge in *In re Detention of Andre Young*. CP 276-81. In *Young*, the trial court conducted a preliminary hearing on an annual review of a detainee's status as a sexually violent predator. The trial court weighed the evidence presented by the parties, including the opinions of experts, on a motion for summary judgment. The judge decided to assign weight to some pieces of evidence, and to attach no weight to the opinions of one of the detainee's experts. Through this process, the court concluded that there were no material issues of fact, and granted the State's motion for continued commitment, without an evidentiary hearing. *Young*, 120 Wn.App. at 755-56.

The Court of Appeals reversed the trial court's ruling, and remanded the case for a full evidentiary hearing, pursuant to RCW 71.09.090(2).

An annual show cause hearing is not the proper venue to challenge and weigh the evidence. The State will have an opportunity to challenge Dr. Barbaree's opinion, and the trier of fact will have the opportunity to weigh his opinion against the State's evidence in a proper venue—a new commitment hearing. By discounting Dr. Barbaree's opinion and weighing it against the State's evidence, the trial court substituted judgment for that of Young's expert. Under *Petersen* and *Thorell*, the court may only determine whether the evidence, if believed, is prima facie evidence requiring a new evidentiary hearing.

In re Detention of Young, supra, at 760.

Although Judge Bennett recognized that he was bound by the *Young*

opinion, the court improperly focused on the specific expert testimony offered in that case. The Court of Appeals did not indicate that weighing of evidence and resolution of review hearings on summary judgment was inappropriate only when the opinion was grounded in a change in the detainee's age. The trial court is charged only with determining if probable cause exists, based upon an expert's opinion, and if that opinion could be believed by a rational trier of fact. *Young*, 120 Wn.App at 758-60. Once that determination is made, it is not the trial court's duty, or authority, to pick apart the expert's opinion, and to allow only those factual grounds that the judge feels are credible to be weighed and presented at the evidentiary hearing. Instead, those issues are properly left to cross-examination, and presentation of competing witnesses by the State of Washington. *Young*, 120 Wn.App at 763 (footnote 19).

For example, the trial court in this case ruled that Dr. Wollert would not be allowed to express his opinion that Elmore has sufficiently progressed in treatment, so that he no longer meets the definition of a sexually violent predator. The sole basis for this ruling was the judge's conclusion that Wollert's opinion conflicted with the opinions of SCC staff. CP 276-81. By accepting the opinion of the State's experts concerning Elmore's progress in treatment, "the trial court substituted its judgment for that of [the detainee's] expert." *Young*, 120 Wn.App. at 759-60.

Similarly, Judge Bennett accepted the State's argument that Dr. Wollert could not present his opinion concerning changes in Elmore's diagnostic status, because he would have reached a similar conclusion at the time of Elmore's initial commitment. But this challenge goes to the weight of Dr. Wollert's testimony, not its admissibility. Division I of this Court has recognized that:

A new diagnosis would be another way of proving someone is not still a sexually violent person. . . . [A] new diagnosis focuses on the present. The present diagnosis would be evidence of whether an individual is still a sexually violent person.

In re Detention of Young, supra, at 763 (footnote 20), quoting, *In re Commitment of Pocan*, 2003 WI App. 233 §12, 671 NW 2d 860 (2003).

In its motion for discretionary review, the State basically reasserts all of the arguments it raised in *Young*, predicting that all sexually violent predators would receive automatic evidentiary hearings in full every year; and that they would have no incentive to participate in treatment. Each of these arguments was carefully considered, and rejected by the Court of Appeals in *Young*. In addition, these general policy arguments, which should best be addressed to the Legislature, fail to take into account Elmore's desire to present evidence of his progress in treatment, and changes in his diagnostic status. Although age is one of the factors Elmore wishes to present at the review hearing, it is not the only factor considered by Dr. Wollert.

Adoption of the State's position would essentially make the statutory review process meaningless. The petitioner essentially wants the Court of Appeals to hold that the detainee can only obtain a full review hearing when the SCC staff believes that he has significantly progressed in treatment, or when the State's experts believe that his diagnostic status has changed. This deference to the petitioner's experts, and automatic rejection of any contrary opinion, is exactly the opposite of the procedure outlined by the Legislature, and upheld by Washington's courts. Further, the State is not entitled to indefinitely detain Elmore. It is allowed to detain him only for so long as he meets the definition of a sexually violent predator. Once he does not, he is entitled to be released. *In re Detention of Petersen, supra*.

This Court should reverse the trial court's ruling, and remand for a full evidentiary hearing, to correct the trial court's obvious error of failing to fully comply with the procedures outlined in the *Young* opinion, and RCW 71.09.090. The Court should remand the case to the trial court with instructions that Elmore is entitled to a full evidentiary hearing on the question of whether he continues to qualify for imprisonment at the Special Commitment Center.

2. The failure to allow a full hearing on the detainee's continued status as a sexually violent predator pursuant to RCW 71.09.090, violates his right to due process of law.

Although the State has an interest in preventing the premature release of a dangerous mentally ill individual, a detainee has a significant liberty interest “in avoiding unnecessary confinement.” *Hickey v. Morris*, 722 F.2d 543, 548 (9th Cir., 1983); *Vitek v. Jones*, 445 U.S. 480, 100 S.Ct. 1254, 63 L.Ed.2d 552 (1980); *In re Personal Restraint of Young*, 122 Wn.2d 1, 26, 857 P.2d 989 (1993); *In re Detention of Albrecht*, 147 Wn.2d 1, 7, 51 P.3d 73 (2002). To be consistent with the requirements of due process, review procedures must assure that “the acquittee may be held so long as he is both mentally ill and dangerous, but no longer.” *Foucha v. Louisiana*, 504 U.S. 71, 77, 112 S.Ct. 1780, 118 L.Ed.2d 437 (1992). The Constitution allows the government to detain an individual based on his mental condition only until he “is no longer a danger to himself or society.” *Jones v. United States*, 463 U.S. 354, 370, 103 S.Ct. 3043, 77 L.Ed.2d 694 (1983).

If followed, Washington statutes provide sufficient procedural safeguards for a detainee seeking review of his confinement following commitment as a sexually violent predator. The statute provides for regular review, on an annual basis, of the current condition and dangerousness of the detainee. The detainee is to be provided with the opportunity for a full evidentiary hearing, the opportunity to depose any of the State’s expert witnesses and conduct such discovery as is permitted by civil rules, and the

opportunity to present his or her own evidence and the right to challenge the State's evidence, upon only a minimal showing of probable cause. *In re Detention of Petersen, supra*. In order for the commitment process to pass constitutional muster, the procedures must be fully followed by the trial court.

In this case, Judge Bennett did not follow the procedures outlined by RCW 71.09.090, as interpreted by the *Petersen, Thorell, and Young* decisions. Instead, the trial court conducted a review of the opinions of the experts of the parties, based solely upon written reports. The trial court then decided which of the experts' opinions would be deemed to be "valid," and could be presented at the evidentiary hearing, based upon the judge's determination of credibility. By its ruling on probable cause, the trial court denied Elmore the opportunity to present evidence or argument in support of his position, to call witnesses on his behalf, and to fully examine the State's witnesses. The hearing, as effectuated by the trial judge in this case, does not satisfy the due process clause of the federal and state constitutions.

When determining whether a particular procedure used by the trial court satisfies due process, appellate courts balance the private interest affected, the risk of erroneous deprivation of that interest, and whether additional procedural requirements would decrease that risk; and the government's interests, and whether additional procedural requirements would

be an unnecessary burden on the State. *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). “Due process is flexible and calls for such procedural protection as a particular situation demands.” *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972). When the Washington Legislature has established the need for an annual evidentiary review, based upon a minimal showing, the State must present some compelling reason for the trial court to disregard this statutory scheme, and to impose more restrictive procedures on the detainee.

No legitimate government interest is protected by the denial of a full annual review of Elmore’s commitment. The statute clearly contemplates that such a review will occur, and that a detainee’s condition may change sufficiently to allow unconditional discharge within a one-year period of time. Further, contrary to the State’s position, a detainee would not be able to present the same evidence and opinions at each review, and thereby obtain a full evidentiary hearing. *In re Detention of Young, supra*, at 764.

Dr. Wollert’s opinion properly focuses upon changes in Elmore’s condition since commitment, and his current status as a sexually violent predator. The procedure used by the trial court in this case to restrict presentation of expert opinion was fundamentally unfair, and denied the detainee due process of law. This Court should reverse the trial court’s ruling,

and remand for a full evidentiary hearing. On remand, the trial court should be instructed to conduct a full evidentiary hearing on each issue presented by the detainee by a qualified expert.

V. RESPONSE TO APPELLANT'S ASSIGNMENT OF ERROR NO. 1

1. Despite the indefinite nature of a commitment under RCW 71.09, the statute entitles a detainee to present expert testimony from a qualified witness at an annual hearing if probable cause exists to believe that a change in condition relating to either the detainee's required mental condition, or present dangerousness.

The State, the petitioner, incorrectly argues that the Superior Court erred in ordering a recommitment trial based on a detainee's showing of expert testimony which would suggest the detainee's mental condition would likely cause the detainee to engage in predatory acts of sexual violence. The Superior Court Judge's legal conclusion of whether the evidence meets the probable cause standard is reviewed de novo. *In re Detention of Petersen, supra*.

The Washington Supreme Court has held the sexually violent predator statute contemplates an indefinite term of commitment, rather than a series of fixed one year terms of continued commitment. *In re the Detention of Petersen*, 138 Wn.2d 70, 81, 980 P.2d 1204 (1999). As addressed in *In re Personal Restraint of Young, supra*, commitment under the sexually violent predator statute should be tailored to the nature and duration of the individual's mental illness. *Young*, 122 Wn.2d at 39.

However, the status of a detainee at the Special Commitment Center must be reviewed annually by the trial court. The Legislature contemplated that an evidentiary hearing would be conducted on the question of the detainee's present condition. RCW 71.09.090(2)(c). Further, the State bears the burden of proof in show cause hearings held pursuant to RCW 71.09.090(2). *In re Detention of Turay*, 139 Wn.2d 379, 424, 986 P.2d 790 (1999); *In re Detention of Petersen*, 145 Wn.2d at 799.

The trial court must determine whether "probable cause exists to believe the person's mental abnormality or personality disorder has so changed that the person is not likely to engage in predatory acts of sexual violence if conditionally released to a less restrictive alternative or unconditionally discharge." RCW 71.09.090(2). The show cause inquiry determines whether facts, if believed, exist that warrant a hearing on the merits. *In re Detention of Petersen*, 145 Wn.2d at 796-97. The two statutory ways for a court to determine probable cause exist are (1) by finding a deficiency in the proof submitted by the State, or (2) by sufficiency of proof by the detainee. *In re Detention of Petersen*, 145 Wn.2d at 798. This dual consideration of continued mental problems, and continued dangerousness, is similar to the review process following insanity acquittals. *State v. Reid*, 144 Wn.2d 621, 627, 30 P.3d 465 (2001).

In this case, Elmore, the detainee, presented the written report of Dr. Wollert, which described his opinion that a number of conditions had changed since the detainee's commitment, and that Elmore's further incarceration at the Special Commitment Center was unnecessary. Appendix p. 1-11. The trial court conducted a preliminary hearing on an annual review of Elmore's status as a sexually violent predator. The trial court found the alleged reduction in risk flowing from Elmore's two-year increase in age since commitment was sufficient to establish probable cause to believe Elmore is no longer a sexually violent predator and to order a re-commitment trial. CP 5-6. However, the trial court rejected Elmore's other evidence suggesting a change in condition.

In *Detention of Young*, a trial court weighed the evidence presented by the parties, including the opinions of experts, on a motion for summary judgment, however, the Court of Appeals reversed the trial court's ruling, and remanded the case for a full evidentiary hearing, pursuant to RCW 71.09.090(2). *In re Detention of Young*, 120 Wn.App. 753, __ P.3d __ (2004). An annual show cause hearing is not the proper venue to challenge and weigh the evidence; the court should only determine whether the evidence, if believed, is prima facie evidence requiring a new evidentiary hearing. *Detention of Young*, 120 Wn.App. at 760.

Despite the fact that Judge Bennett recognized that he was bound by the *Detention of Young* opinion, the court improperly focused on the specific expert testimony offered in that case. In *Detention of Young*, the Court of Appeals did not indicate that weighing of evidence and resolution of review hearings on summary judgment was inappropriate only when the opinion was grounded in a change in the detainee's age. The trial court is charged only with determining if probable cause exists, based upon an expert's opinion, if that opinion was believed by a rational trier of fact. Once that determination is made, it is not the trial court's duty, or authority, to pick apart the expert's opinion, and to allow only those factual grounds that the judge feels are credible to be weighed and presented at the evidentiary hearing. *In re Detention of Young*, 120 Wn.App at 763 (footnote 19).

The State suggests the trial court erred because under its analysis, all sexually violent predators would receive automatic evidentiary hearings in full every year; and that they would have no incentive to participate in treatment. As suggested *supra*, this is incorrect analysis of *Detention of Young*. Further, this argument was carefully considered, and properly rejected by the Court of Appeals in *Detention of Young*. In addition, these general policy arguments, which should best be addressed to the Legislature, fail to take into account Elmore's desire to present evidence of relating to progress in treatment, and

changes in diagnostic status.

Age is only one of the factors Elmore wishes to present at the review hearing, and was not the only factor considered by Dr. Wollert. Regardless, Elmore's increase in age results in a decrease of risk to re-offend as measured by the Static-99, an actuary risk assessment tool commonly used to evaluate sexually violent predators. CP 269-70. Proportionally this decreased Elmore's likelihood to re-offend by 46%, from a previous risk of 16% to a current risk of 9%.

Despite trial court's incomplete application of *Young*, the court made the correct determination that probable cause existed, based upon Dr. Wollert's opinion that continued incarceration is not warranted due to the change in the actuary risk assessment, and that Dr. Wollert's opinion could be believed by a rational trier of fact. No error was made.

2. Due process of the law requires that the term "condition," as used in RCW 71.09.090, refer to the detainee's mental abnormality which creates a present dangerousness to the community of the detainee engaging in predatory acts of sexual violence if not confined in a secure facility.

"An individual's liberty interest is important and fundamental." *In Re Personal Restraint of Young*, 122 Wn.2d 1, 26, 857 P.2d 989 (1993). While the State has a legitimate interest in protecting society from the mentally ill, statutes designed to further this protection are "narrowly tailored" to assure that "an individual be both mentally ill and dangerous . . .". *In Re Detention*

of *Albrecht*, 147 Wn.2d 1, 7, 51 P.3d 73 (2002). To be consistent with the requirements of due process, commitment review procedures must assure that “the acquittee may be held so long as he is both mentally ill and dangerous, but no longer.” *Foucha v. Louisiana*, 504 U.S. 71, 77, 112 S.Ct. 1780, 118 L.Ed.2d 437 (1992). With regard to the sexually violent predator statute, confinement “is premised on a finding of the present dangerousness of those subject to commitment.” *In Re Detention of Henrickson*, 140 Wn.2d 686, 692, 2 P.2d 473 (2000); *Foucha v. Louisiana, supra*; *Kansas v. Crane*, 534 U.S. 407, 122 S.Ct. 867, 151 L.Ed.2d 856 (2002).

The Legislature contemplated, that following commitment, an evidentiary hearing would be conducted on the question of the detainee’s present condition. RCW 71.09.090(2)(c). The Legislature established procedures by which a detainee can petition for a conditional release.

RCW 71.09.090. A detainee is entitled to a show cause hearing:

At the show cause hearing, the prosecuting attorney or attorney general shall present prima facie evidence establishing that the committed person continues to meet the definition of a sexually violent predator and that a less restrictive alternative is not in the best interest of the person and conditions cannot be imposed that adequately protect the community. RCW 71.09.090(2)(b).

“Sexually violent predator” is a term of art as used in the statute, and is specifically defined as “any person who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or

personality disorder which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility.” RCW 71.09.020(16). “Mental abnormality” is defined as a “congenital or acquired condition affecting the emotional or volitional capacity which predisposes” the detainee acts of a sexually violent predatory nature. RCW 71.09.020(8).

In these circumstances, to satisfy due process and the statute, the State must provide proof that the detainee “continues to meet the definition of sexually violent predator.” *In Re Personal Restraint of Young*, 122 Wn.2d at 41, *citing, In Re Harris*, 98 Wn.2d 276, 284, 654 P.2d 109 (1982). The condition must suggest that a person remains likely to either use physical force or threats during sex, or to engage in sexual contact with children. RCW 71.09.020(15).

At the show cause hearing, the State must make out a prima facie case to justify continued incarceration by presenting evidence, if so believed, that shows the detainee’s mental abnormality has not “so changed” and the mental abnormality makes the detainee presently dangerous of committing a sexually violent predatory act. *In re Detention of Petersen*, 145 Wn.2d at 798. However, at a show cause hearing, a detainee may also present evidence, if so believed, that they either no longer suffer from a mental abnormality, or the mental abnormality no longer causes a propensity by the detainee to engage in

predatory acts of sexual violence. *Id.*

The State attempts to excuse itself from its burden of proof at a re-commitment hearing by arguing that the term “condition” refers only to the detainee’s mental condition, and has nothing to do with a detainees increase in age. The State argues that despite Dr. Wollert’s opinion that Elmore’s risk to re-offend dropped from 16% to 9%, as measured by one of the commonly used actuarial risk assessment tools due to Elmore’s increase in age, age cannot effect its proposed definition of “condition.” The State’s argument ignores Dr. Wollert’s opinion, that age has significantly effected Elmore’s risk to re-offend. In *Detention of Young*, Young’s expert, Dr. Barbaree, indicated “data clearly shows that risk of re-offense among sex offenders is age related, the risk decreases through the life span.” *Detention of Young*, 120 Wn.App. at 760. The Court of Appeals held “Dr. Barbaree is a qualified expert in applying actuarial risk analysis and studies on age and recidivism, and his opinions and analysis are endorsed in other experts’ scientific literature.” *Id.* The Court of Appeals recognized it is undisputed among sex offender experts that age is an important factor in determining risk of re-offense. *Detention of Young*, 120 Wn.App. at 762.

The State argues that Elmore’s mental condition but not age or aging, was contemplated by the statute, and thus Elmore’s condition only includes Sexual

Sadism, Gender Identity Disorder, and Personality Disorder Not Otherwise Specified with Antisocial and Dependent Traits. CP 189, 220, 250. The State bases its argument on a definition of “condition”: a state of health, or illness; ailment. Webster’s New World Dictionary at 290 (3rd Ed. 1997). The State then extrapolates that the definitions of “age” prevent “age” from being a “condition.” This circular and false syllogism should be rejected by this Court.

To comply with due process, at a commitment review hearing, the attorney general cannot be excused from presenting prima facie evidence that establishes the detainee continues to meet the definition of a sexually violent predator and that a less restrictive alternative is not in the best interest of the person and conditions cannot be imposed that adequately protect the community. RCW 71.09.090(2)(b); *Foucha v. Louisiana*, 504 U.S. 71, 77, 112 S.Ct. 1780, 118 L.Ed.2d 437 (1992). The State bears the burden of establishing the existence of a mental abnormality or personality disorder which makes the detainee presently likely to engage in predatory acts of sexual violence if not confined in a secure facility. *In re Detention of Turay*, 139 Wn.2d at 379; *In re Detention of Petersen*, 145 Wn.2d at 796. If the mental abnormality and present dangerousness is effected by age, the State’s burden does not change. *Detention of Young*, 120 Wn.App. at 760.

The fact that other vehicles for a sexually violent predator detainee exist to seek review, neither excuses the State of its burden to establish the

existence of a detainee's present dangerousness, nor eliminates the detainee's due process right to be determined to be presently dangerousness under the statute for commitment to continue. Further, the State fails to cite law that would permit the court to take this action.

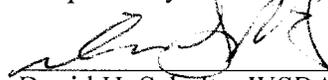
Due process requires that commitment review procedures permit a detainee to be held only so long as he or she is both mentally ill and dangerous, but no longer. The State's argument ignores both the construction and interpretations of the sexually violent predator statute and constitutional analysis addressed *supra*. If the State does not feel the expert testimony presented by the detainee that aging has effected the propensity of the detainee to re-offend, the State is free to challenge the credibility of the expert's opinion at trial. No error occurred.

VI. CONCLUSION

For the reasons stated above, the portion of the trial court's ruling that Elmore's evidentiary hearing be limited should be reversed, and the portion of the trial court's ruling ordering a recommitment hearing should be affirmed. The case should be remanded for a full evidentiary hearing.

DATED this 31st day of March, 2005.

Respectfully submitted,



David H. Schultz, WSBA #33796, of
Knapp, O'Dell & MacPherson,
Attorney for Respondent/Cross-Appellant.



RICHARD WOLLERT, Ph.D.
Licensed Clinical Psychologist
1220 S.W. Morrison, Suite 930
Portland, Oregon 97205
360.737.7712 / 503.757.7712

November 17, 2003

Mr. Robert A. Lewis
Attorney at Law
Knapp, O'Dell, Lewis & MacPherson
430 NE Everett St.
Camas, WA 98607

Dear Mr. Lewis:

Thank you for asking me to evaluate Ms. Rebecca Elmore, formerly known as Mr. Keith Elmore, who stipulated to being committed to the SCC in 1999 as a sexually violent predator, for the purpose of determining whether a) her condition has so changed that she no longer meets the definition of being a sexually violent predator or b) a conditional release to a less restrictive alternative would be in her best interests and such a release could be imposed under conditions that adequately protect the community. As you know, I evaluated Ms. Elmore's eligibility for commitment prior to her stipulation, and have recently interviewed her again. I have also read the file materials that have been sent to me since her placement at the SCC, and compiled them into a summary of Ms. Elmore's performance in that program. Although I believe the summary I have developed is reasonably comprehensive, it should be noted that a number of reports, progress notes, and polygraph exams were missing from the file and remained unavailable even after they were requested.

As the first step in responding to your questions, Ms. Elmore's case history will be summarized for the purpose of identifying important vectors of change. After this, the extent to which Ms. Elmore has changed on each of these vectors will be reviewed. The conclusions that are apparent from this review will then be presented. Since the subject has a long history of identifying with the female gender, and recently changed her name to reflect this identity, I have referred to her as a female throughout the report.

Case History

The life histories in Ms. Elmore's file indicate that she was born on 6/12/56 and grew up in a stable and religious family that included her mother, father, and younger sister.

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Although she characterized her mother as critical and domineering, and as having an explosive temper, she had a good relationship with her. She also felt very close to her father on some occasions, yet could be scornful of what she considered his passivity. Neither parent had substance abuse problems, and neither abused her sexually or physically. They allowed Ms. Elmore and her sister Diana to watch x-rated movies with them, however, and Ms. Elmore's step-grandfather apparently "goosed" Ms. Elmore on occasion and molested Diana when she was three years old.

When Ms. Elmore was a teenager she completed high school without getting into any trouble but dated only a few girls in high school and had limited social contacts. She also experienced frequent migraine headaches and occasional small seizures, and consulted with a psychologist when she was 17 years old after becoming depressed and feeling suicidal. During the course of treatment it was discovered that she had been cross-dressing for sometime and that occasionally she masturbated while cross-dressing. By this time she had also been shaving her body for a number of years.

As a young adult she began drinking moderately. Although she told an examiner in 1995 that she had been intoxicated twice and experimented with marijuana once, she maintained that she had never used other street drugs, blacked-out, or been in trouble as a result of drinking.

Completing two years of college coursework in machine tool technology, she consistently worked as a machinist. Leaving her parents home when she was 23 years old, she lived with her sister for five years between the ages of 23 to 32. During one period her parents and she started a small business but it failed. Towards the end of this time she underwent an intensive neurological assessment at Stanford Medical School which concluded that what were thought to have been seizures were actually "complex migraine headaches".

When she was 32 years old Ms. Elmore married her wife Judy after dating her for a year. Judy was 37 years old at the time and had 4 children from a previous marriage who ranged in age from 13 to 18 years old. Although Ms. Elmore has described their sexual relationship as adequate, she also indicated that she was passive and non-expressive towards Judy. On one occasion while she was asleep she choked Judy in their bed, after which she consulted with a psychologist who helped her understand that difficulties in expressing anger towards Judy over what she saw as her demanding and critical personality were associated with this behavior. At some point in her marriage she disclosed to Judy that she shaved her body and in 1994 she told her while she was engaging in cunnilingus with her that she fantasized about eating Judy's limbs. In subsequent interviews Ms. Elmore acknowledged that she kept alcohol in her dresser because she knew her wife disapproved of drinking. She also acknowledged keeping a knife there in case Judy ever indicated that she was agreeable to voluntarily giving up her life so that she might be eaten. It is doubtful, however, that Ms. Elmore could have acted out her fantasies were Judy to agree, as she has admitted that she has "never cleaned anything more than a fish ... watched the butchering of an animal ... or considered how

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much the implementation of her fantasies" – given all of the pain and gore this would entail – "differed from just thinking about them". In 6/94 Judy separated from her.

Ms. Elmore apparently had a history of engaging in consensual relations with adult women prior to the offense which led to her current commitment. She had never hired a prostitute, had sex with a male partner, been to a topless bar, or called a telephone sex line. She also denied having any pedophilic or sadistic fantasies, or ever engaging in acts of bestiality, exhibitionism, frottage, pedophilia, or voyeurism. Her use of pornography was limited, as was her contact with arcades that sell sexually explicit materials.

Prior to her being arrested for the crime leading to her commitment, Ms. Elmore had no previous arrests or convictions for any type of sexual offense, and had never been a person of interest or suspect in any other sex offense case. She also did not have any previous arrests or convictions for any type of nonsexual offense. No other incidents of physically aggressive behavior involving Ms. Elmore have been reported other than her offense and the choking incident. She also does not have a history of suicide attempts or florid psychotic episodes, and has never been hospitalized as a result of having a psychiatric illness. After the choking incident she began taking Prozac, which blocked her fantasies of eating her wife, but did not continue with this regimen for very long. Although her wife obtained a restraining order against her in 7/94, she did not violate any of the conditions of this order. She also apparently did not violate any other community supervision conditions.

In the years immediately preceding her offense, Ms. Elmore suffered many stressful experiences. These included the death of her father in 6/92, the death of her mother in 2/94, the destruction of her house in a fire in 3/94, being laid off from work in 4/94, separating from her wife in 5/94, being faced with divorce proceedings in 6/94, and being advised by her pastor to seek a new church congregation in 7/94. She also started a new job and moved into a new apartment in 7/94. In 11/96 she told her therapist that she "formed the intent to offend" after Judy told her that "she wanted no further contact with her".

Ms. Elmore was convicted of second degree kidnapping with sexual motivation and second degree assault with sexual motivation after Lolene Clark, a former co-worker, reported that Ms. Elmore assaulted her on 7/13/94 in Ms. Elmore's apartment and told her to take she clothes off. According to the incident report and PSI, Ms. Elmore called Ms. Clark beforehand and told her that she had some gifts for her husband. When they met at a convenience store near the apartment, Ms. Elmore told Ms. Clark that she should park at the store and they should walk to the apartment because there weren't any parking spots there. Enroute to the apartment Ms. Elmore asked her if she told anyone about the visit and Ms. Clark indicated that she had talked with two co-workers about it. After they entered her apartment, Ms. Elmore seated Ms. Clark in her living room and told her she had a surprise for her, but that she had to close her eyes. Then she put a rope around her neck and pulled up on it so that there was a "momentary restriction of breathing". Before

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she did so, however, Ms. Clark grabbed the rope and was able to "pull ... to help keep the rope from strangling her too much". When Ms. Elmore told her to take her clothes off, she refused to do so and pled with her to stop. Ms. Elmore responded that she was going to get the rope tighter. Ms. Clark pointed out that others knew where she was, to which Ms. Elmore replied that it would take them awhile to figure out what had happened to her because she had parked at the store. After this Ms. Clark said she wouldn't tell anybody if she were released. Ms. Elmore commented that "I kind of have to (continue what I'm doing) now". Finally, Ms. Clark told her that there was no reason to "ruin everything", that she had babies, and that she had always thought of Ms. Elmore as a gentle person. After this Ms. Elmore began to release her grip on the rope and took it off Ms. Clark's neck. She also apparently did not strike her, threaten her verbally in a direct way, tell her she wanted to rape or kill her, touch her breasts or vagina, or assault her with a weapon other than the rope. When Ms. Elmore went into the kitchen to get the gifts she had promised Ms. Clark, Ms. Clark fled the apartment and returned to work. When officers later searched the apartment they found pieces of rope and the presents as well. They also found women's wigs, underwear, and clothing that apparently belonged to Ms. Elmore.

Subsequent to her arrest, Ms. Elmore was evaluated by a psychologist. Although she indicated at that time that she did not have any desire to become a woman, she reported experimenting with the application of make-up.

Ms. Elmore was incarcerated from 2/95 to 11/99. Positive references regarding her adjustment were frequently included in her classification referrals, including observations that indicated she received good to excellent work reports, needed little supervision, and got along well with staff and inmates. In a report dated 3/27/96, she was commended for her "willingness to program as fully as she is able" after it was noted that she had been participating in individual counseling, was involved in the Man to Man program, and had completed courses on anger management, stress control, and self-esteem. None of Ms. Elmore's classification referrals contained any negative references to her adjustment. She was also infraction-free throughout her incarceration.

On 3/3/95 Ms. Elmore was evaluated for admission to the Sex Offender Treatment Program (SOTP) at the Twin Rivers Correctional Center (TRCC) and in 3/96 she began participating. In 8/96 a psychologist who evaluated her concluded that she was able to control her behavior in a clinical setting and diagnosed her as suffering from paraphilia (nos), adjustment disorder with anxiety or depression, and dependent personality disorder. At a staff meeting near this time it was also generally agreed that her behavior in this setting was goal-oriented rather than "compulsive". In connection with treatment Ms. Elmore completed a "full disclosure" of her offense and discussed her fantasies, interpersonal style, resentment towards her wife, and transsexual issues. Her responses to a plethysmographic exam also led the examiner to conclude that "it appears Ms. Elmore can intervene with her sexual arousal in the lab setting". Implementing a behavioral change program was challenging, however, because Ms. Elmore displayed a passive style that made it necessary "for people to pull information from her" and tended to "go in the

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direction of whatever theory is presented to her". Staff were also concerned that she had not disclosed her offence to her support system in the community. Nonetheless, notes from 1/97 indicated that "we anticipate that (she) will complete treatment near the beginning of the next quarter". On 7/10/97, the chair of the End of Sentence Review Committee expressed "significant concerns over Ms. Elmore's upcoming release from prison". On 7/31/97 Ms. Elmore was terminated from the TRCC sex offender treatment program because she was not making enough progress in the area of "behavioral changes". The therapists who wrote her treatment summary noted, however, that the program would re-admit her if there were "enough time". After completing their treatment summary, Ms. Elmore's treatment team sent a clarification of their stance on the issue of Ms. Elmore's custody level to the End of Sentence Review Committee. In this clarification they noted that "the best way of ensuring Ms. Elmore's safety in the community is to provide a structured release, including reduced security level". In December 1998 she completed a 36 hour "Victim Awareness Educational Program" that was offered by the TRCC.

Ms. Elmore was transferred to the Special Commitment Center in 10/99. On her initial treatment plan she was diagnosed as suffering from sexual sadism, gender identity disorder, delusional disorder, and personality disorder, nos (without further specification). Although her first several treatment plans did not delineate ultimate goals that needed to be achieved in the course of treatment, her treatment plan for the first trimester of 2000 indicated that "client is to eliminate inappropriate sexual behavior, practice relapse prevention, learn how to control emotions, and develop victim empathy in order to be considered for discharge planning".

In November of 2000 I completed an evaluation of Ms. Elmore to assess her eligibility for commitment as a sexually violent predator. During her interview she showed behavioral evidence of a) being able to empathize with the victim by offering a number of hypotheses as to the negative impact of her behavior on Ms. Clark and b) using relapse prevention techniques by observing that she had learned to use distraction and thought-stopping techniques so that she did not have any fantasies about eating someone else that lasted more than a couple of seconds. Regarding her future behavior, I found that her risk of recidivism, as measured by tests that are used to predict sexual or violent recidivism, was very low and that she suffered from schizoaffective disorder, a diagnosis that is specifically associated with a reduced risk of violence.

Although a trial was scheduled to determine Ms. Elmore's commitment status, she stipulated to being committed. Viewed within the context of Washington statutes, this was tantamount to agreeing with the state's attorneys that - at the time of her commitment - she a) suffered from a mental abnormality that affected her emotional or volitional capacity to the point that she was so predisposed to the commission of criminal sexual acts that constituted a menace to the health and safety of others and b) that she was more likely than not, if she were unconditionally released, to commit or attempt to commit a sexually violent offense against a stranger or casual acquaintance.

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Assessment of Change

The foregoing history points up many factors on which Ms. Elmore may have changed since she was detained at the SCC. Among these are the following: progress on the completion of specific treatment milestones and overall treatment progress, diagnostic status, her status as to whether she currently suffers from a mental abnormality that affects her emotional or volitional capacity to the point that she is so predisposed to the commission of criminal sexual acts that she constitutes a menace to the health and safety of others, and her status as to whether she is more likely than not, if she were unconditionally released, to commit or attempt to commit a sexually violent offense against a stranger or casual acquaintance. In view of the fact that she is now 47 years old, and sexual recidivism decreases steadily with age, an analysis of the expected effects of age on estimated recidivism risk should also be undertaken. Ms. Elmore's status with respect to each of these vectors of change is considered in the following sections.

Treatment Progress

Ms. Elmore's treatment progress was evaluated by compiling the attached 9-column chronological chart on the basis of information from her clinical file, her interview statements, and other sources. Although her involvement has sometimes been affected by differences with staff regarding the focus of treatment - she wants to examine both gender identity and relapse prevention issues, while staff want her to concentrate on relapse prevention issues - the entries in columns three through five indicate that she has consistently participated in good faith in group and 1:1 treatment, has completed a large number of projects and courses, and has a good understanding of sex offender treatment concepts). Regarding her institutional adjustment and personality functioning, the entries in columns six and seven indicate that she interacts with others co-operatively and respectfully, is compliant with rules and has received only one behavior management report (for smoking in her room), is trusted with the least restrictive privilege level attainable, and carries out her job competently. Regarding program advancement, she has completed all of the coursework to finish "Phase 3", and a polygraph on 8/02 confirmed the brief nature of her inappropriate fantasies. Although she did not pass a polygraph that asked about her level of arousal at the time of her offense, this test was not available among the materials I received and it was therefore impossible to analyze the content of the questions or find out whether she scored in the deceptive or uninterpretable range. At the present time she only needs to pass a polygraph and take a plethysmograph to be advanced to Phase 4.

In my experience, outpatient sex offender treatment based on weekly sessions is usually completed within 2 to 4 years. In light of the wide range of projects Ms. Elmore has completed, the extent to which she has met the specific release criteria listed in the second paragraph of page 5, her previous 15-month participation in the SOTP at Twin Rivers, and the length and intensity of her treatment experience at the SCC, I believe it

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would be appropriate to regard her as having finished residential treatment. This holds important implications in that Hanson and his colleagues found that the sexual recidivism rates for those who had completed a sex offender treatment program approximated 10% while the rates for those who did not were above 17%.

Diagnostic Status

As noted in the case history, treatment documents that were prepared shortly after Ms. Elmore was placed at the SCC indicated that she met the criteria associated with sexual sadism, gender identity disorder, delusional disorder, and personality disorder, nos (without further specification). Data that has subsequently been collected from the SCC clinical file and other sources, however, points to the conclusion that some of these diagnoses are either no longer applicable or need to be qualified.

Regarding the diagnosis of personality disorder, for example, all evaluators agree that Ms. Elmore does not meet the full criteria for any of the 10 specific personality disorders included in the fourth edition (TR version) of the Diagnostic and Statistical Manual of Mental Disorders of the American Psychiatric Association (2000). To be diagnosed as falling in the eleventh, and last, category of "personality disorder – not otherwise specified" he would have to exhibit a "pervasive" and "enduring" (p. 689) pattern of behavior, starting in adolescence, characterized by "features of several Personality Disorders" (p. 687). This pattern would also have to "deviate markedly" from what would be expected on the basis of his cultural circumstances (p. 689) and "involve clinically significant impairment" (p. 687). Since Ms. Elmore has not pervasively and repetitively displayed features of several personality disorders, the diagnosis of personality disorder (nos) is not applicable.

Regarding the diagnoses of sexual sadism, it would be inaccurate to diagnosis Ms. Elmore as suffering from sexual sadism for several reasons.

1. She does not meet the diagnostic criteria set forth by the American Psychiatric Association (1994) in that a) her fantasies – as she experiences them - do not revolve around inflicting pain and suffering on others; and b) she never becomes sexually excited at the prospect of carrying out any of her transformation fantasies.
2. Groth has discussed the phenomenon of sexual sadism using a case history approach (1985, pp. 44-57). There is no meaningful parallel between Ms. Elmore's case history profile and the histories presented by Groth. In particular, the following characteristics were observable in the histories of sexual sadists discussed by Groth: aggression was eroticized, torture and explicitly abusive acts were performed, sexual areas of the victims became a focus for inflicting injury, victims were typically strangers, assaults were associated with a "frenzied" escalation of sexual excitement, sadomasochistic pornography was of interest, and recurrent instances of cruelty were

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abnormality affects her emotional or volitional capacity to the point that she is so predisposed to the commission of criminal sexual acts that she constitutes a menace to the health and safety of others.

Status With Respect to Being Unlikely to Sexually Reoffend if Unconditionally Released

Ms. Elmore's commitment eligibility was originally evaluated through the administration of three actuarial instruments called the RRASOR, Static-99, and VRAG. Since then, additional evidence has accumulated in support of the conclusions that a) actuarial prediction is more accurate than clinical judgment in forensic settings (Grove et al., 2000, pp. 24), and b) when adequate actuarial formulas are available, the use of clinical judgment is inadvisable because "research suggests that formal inclusion of the clinician's input does not enhance accuracy ... of the actuarial formula and that ... subjective attempts at adjustment can easily do more harm than good (Dawes, Faust, & Meehl, 1989; Grove & Meehl, 1996, p. 313; Quinsey, Harris, Rice, & Cormier, 1998, p. 171). In addition, the relevance of the VRAG for SVP commitment hearings has been questioned on the grounds that the test predicts violent recidivism, not sexual recidivism, and the developers of the test have taken the position that they "would not use the VRAG ... to make a numerical estimate of the lifetime likelihood of a person being arrested for a new sex offense" (Vern Quinsey, e-mail dated 2/7/03).

These developments indicate that risk predictions of sexual violence should be based on an approach that revolves around the administration of actuarial tests other than the VRAG to commitment candidates followed by a purely actuarial interpretation of the results. The VRAG still remains useful, however, for predicting violent recidivism, which includes both violent and sexual recidivism. Therefore, if a commitment candidate's risk of violent recidivism does not exceed 50% on the VRAG, it is impossible that his/her chances of sexual recidivism will be greater than 50%.

The results of scoring Ms. Elmore on the referenced actuarial tests have not changed since the date they were administered. They are as follows:

1. On the RRASOR, Ms. Elmore's risk of sexual recidivism was rated as a level 1. As a result she would be classified as a "likely success" in terms of not recidivating. From data collected on a group of 2,500 incesters, molesters, rapists, and sexual sadists from many different prisons, Hanson (1997) estimated that only 11% of those inmates with a score of 1 would be charged with a new sex offense over a 15-year period. He also reported that the 5-year sex offense rearrest rate for those with a score of 1 was 8%.
2. On the Static-99, Ms. Elmore's risk of sexual recidivism was rated as a level 2. As a result she would be classified as a "likely success" in terms of not recidivating. Sampling a group of 1,200 incesters, molesters, rapists, and sexual sadists from

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different prisons, Hanson and Thornton (1998) found that 16% of those inmates with a score of 2 were convicted of a new sex offense over a 15-year period.

3. On the VRAG, Ms. Elmore's risk of violent recidivism was rated as a level 2. Sampling a group of "mentally disordered offenders", Quinsey and his colleagues (Harris, Rice, & Quinsey, 1993) found that 10% of those inmates with a score of 2 were charged with a new violent offense over a 10-year period. This result was later duplicated by Rice and Harris (1997) with a sample of "mentally disordered sex offenders" - those who are "almost always (diagnosed with) pedophilia or sexual sadism" (Quinsey et al., 1998, p. 78). Since only about half of this group's violent crimes were of a sexual nature, the VRAG results also point up the low sexual recidivism risk that Ms. Elmore represents.

The PCL-R (Hare, 1991), which is a measure of what is often thought of as the "criminal personality", was also administered. On this test Ms. Elmore received a score of 5. For the sake of comparison it is useful to point out that about 98% of those who are incarcerated or are male forensic patients receive higher scores. Therefore, using the PCL-R actuarially, Ms. Elmore would be classified as a "likely success" in the sense that she would probably not commit another violent crime. Like the foregoing predictions, this prediction is also supported by empirical research. Among a group of offenders who were treated for 2 years at a maximum security psychiatric institution, Rice, Harris, and Cormier (1992) found that 77% who had scores of 25 or more committed a new violent crime within 10 years of their release, compared to 21% of those with scores of less than 25. In another study, Rice, Harris, & Quinsey (1990) found that the average PCL-R score for rapists who sexually recidivated within 46 months of being released - the group that probably included most sexual sadists - was about 22. Among those who didn't recidivate, however, the average score was 16. Ms. Elmore's score falls considerably below the average scores of both of these groups, again pointing up her low risk level.

These results point to the conclusion that Ms. Elmore is ineligible for continued commitment because it is a virtual certainty that her actuarially-determined recidivism risk does not exceed the relevant standard of 50%. Quite the contrary, it is not even close to this standard.

Corrections for the Effects of Age-related Recidivism Risk

In 2001 and 2003, different investigators reported that the recidivism risk for those whose convictions were similar to Ms. Elmore's decreased by about 4% per year. This means that a downward adjustment in Ms. Elmore's actuarial risk estimates should be made that accounts for the 13-year difference between Ms. Elmore's current age (47) and the average age (34) of subjects in the Static-99 developmental sample who received the same score for age (0) on this instrument as Ms. Elmore. When this is done, the best current estimate of Ms. Elmore's sexual recidivism risk approximates 9% (i.e., (1.00 -

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.04)¹³ x .16 = .09). This estimate, which falls well below the commitment standard, will continue to decrease every year.

Conclusions

The foregoing sections indicate that Ms. Elmore's status on various dimensions should be considered to have changed a great deal since she was detained and civilly committed. Taken together, these changes converge on the conclusion that her risk of sexual recidivism no longer falls above the commitment standard. In contrast, the records I reviewed did not suggest the operation of factors that were reflective of an increased recidivism risk. I am therefore of the opinion that Ms. Elmore has so changed that she no longer meets the definition of a sexually violent predator.

Regarding your second question, the data I reviewed while compiling this report indicated that Ms. Elmore has received maximum benefit from inpatient treatment, that she is extremely respectful towards others and compliant with rules, that her offense is not attributable to a mental abnormality, that she has an appropriate support system, and that she is employable and a competent worker. During my initial evaluation, I also scored her on the Level of Services Inventory - Revised Version (LSI-R, Andrews & Bonta, 1995), which has been developed for the purpose of predicting how offenders might do on supervision and placement at a halfway-house. On this test Ms. Elmore received a score of 9. Bonta & Motiuk (1985) found that 93% of incarcerated offenders released to halfway houses who had scores of less than 11 were successful in completing their residencies. In contrast, this was the case for 63% of those who had scores of 12 or more. Using the LSI-R actuarially, Mr. Elmore would be classified as "highly likely to succeed" in a residential placement. Taken together, these conclusions indicate that a conditional release to a less restrictive alternative would be in Ms. Elmore's best interests and that conditions can be imposed that adequately protect the community.

Should it prove impossible to secure a viable community placement, it would be appropriate to consider her for the less restrictive placement that was recently been sited on McNeil Island.

I hope that you find this information helpful.

Sincerely

Richard Wollert

Richard Wollert, Ph.D.
Licensed Oregon Clinical Psychologist
Certified Washington Sex Offender Treatment Provider

XHIBIT
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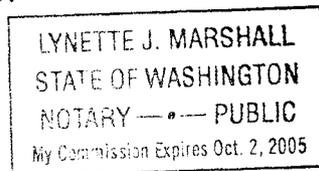
On March 31, 2005, I directed true and correct copies of the Brief of Respondent/Cross Appellant, together with this Affidavit of Mailing, to the following parties by depositing with the U.S. Post Office, Camas, Washington, a postage-prepaid envelope containing same addressed as follows:

Todd Bowers
Assistant Attorney General
900 4th Avenue, #2000
Seattle, WA 98164-1002

Rebecca M. Elmore,
ID No. 490113
Special Commitment Center
P.O. Box 88600
Steilacoom, WA 98388-0646



SUBSCRIBED AND SWORN to before me this 31st day of March, 2005.



Notary Public in and for the State of
Washington, residing at Camas.
My appointment expires: 10-2-05.