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Court of Appeals No. 57926-6-I  
Superior Court No. 02-2-07993-8 SEA

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

In re the Detention of

KEVIN AMBERS,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE GREGORY CANOVA

APPELLANT'S OPENING BRIEF

DENNIS P. CARROLL, WSBA# 24410  
The Defender Association  
810 Third Ave., 8th Floor  
Seattle, WA 98104

*[Handwritten signature]*  
JUN 14 2006

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**I. ASSIGNMENT OF ERROR**

Mr. Ambers has actively engaged in sex offender treatment since he was committed as a sexually violent predator pursuant to RCW 71.09 *et seq.* in 1998. At his 2005 review hearing, he presented *prima facie* evidence through his expert's report and declaration that his condition has changed due to a positive response to treatment such that he no longer meets the initial commitment criteria. Nonetheless, the trial court denied his request for an unconditional release trial finding that a "more stringent" standard applies to defense experts. The trial court erred by incorrectly interpreting the recent amendments to the annual review process and denying Mr. Ambers' request for an unconditional release trial pursuant to RCW 71.09.090(2).

**II. ISSUES RELATED TO ASSIGNMENT OF ERROR**

1. Did the Legislature intend to impose an evidentiary burden that is more stringent for the detainee's evidence than the State's evidence at an annual review hearing when it amended the annual review provisions of the Sexually Violent Predator Act (SB 5582) in 2005?

2. Did the Legislature intend to term "safe to be at large" in RCW 71.09.090(4)(b) to mean that the detainee no longer meets the initial commitment criteria where the statute repeatedly refers to the initial

commitment criteria in numerous other sections of the statute that address the relevant issues to be decided at the review hearing?

3. If the Legislature intended the “safe to be at large” standard in RCW 71.09.090(4)(b) to apply only to the detainee’s evidence, must that standard be interpreted consistently with both RCW 71.09.090(4)(a) and RCW 71.09.090(2)(c)(ii), which specifically state that the detainee’s burden at the review hearing is to show probable cause that his condition has changed such he no longer meets the initial commitment criteria?

4. Where the legislative history of SB 5582 specifically refers to the initial commitment criteria as the relevant standard for the review hearing, could the Legislature have possibly intended to impose a different, more stringent standard on the detainee’s evidence at the review hearing?

5. If a detainee presents *prima facie* evidence at an annual review hearing that he is no longer a sexually violent predator due to a positive response to treatment, does due process require that the court order a trial on the merits?

6. If the Legislature intended to impose a burden more stringent than the initial commitment criteria on the defense evidence at an annual review hearing, would such a scheme violate due process?

7. Does due process require a trial on the merits where the detainee presents *prima facie* evidence at an annual review hearing that he is not a sexually violent predator, regardless of any “change” in his condition?

### **III. STATEMENT OF THE CASE**

After a hung jury in his first civil commitment trial in the fall of 1997, Mr. Ambers stipulated to commitment as a sexually violent predator in January 1998. CP 1-181. Since his commitment, he has actively engaged in treatment at the Special Commitment Center. CP 197-208. Since his stipulation in 1998, Mr. Ambers has not had a trial to determine whether his condition has so changed such that he no longer meets the definition of a sexually violent predator. CP 182.

Mr. Ambers requested an annual review hearing where he sought an unconditional release trial because his condition has changed due to a continuing course of treatment such that he no longer meets the criteria of a sexually violent predator. CP 182-279. That hearing was held on January 19, 2006. In support of his request for an unconditional release trial, Mr. Ambers submitted a report and declaration from Dr. Jeffrey Abracen. CP 197-213, 215. After reviewing extensive discovery and meeting with Mr. Ambers, Dr. Abracen concluded that Mr. Ambers’

condition has changed through a continuing course of treatment such that he no longer meets the definition of a sexually violent predator. Id. In particular, Dr. Abracen focused on Mr. Ambers' extensive treatment record and the effect that his long-term treatment at the Special Commitment Center has on his actuarially assessed risk. Id.

Dr. Abracen is a highly regarded and well-published expert in the field of sex offender treatment and supervision. Without question, Dr. Abracen's qualifications to render opinions regarding the diagnosis, treatment, and risk of sex offenders are impeccable. See CP 189-95. Dr. Abracen is the Acting Chief Psychologist for the Central District Parole in Toronto. Id. He also serves as the Clinical Director of the Community Based Sex Offender Treatment Programs for the Correctional Service of Canada. Id. Dr. Abracen has authored approximately 20 peer-reviewed journal articles primarily regarding the assessment, diagnosis, and supervision of sex offenders. Id.

Research suggests that treatment participation reduces the risk of sexual recidivism. Hanson, Morton & Harris, Sex Offender Recidivism Risk, What We Know and What We Need to Know, Ann. N.Y. Acad. Sci. 989: 154-166 (2003); Looman, Abracen, Serin and Marquis, "Psychopathy, Treatment Change and Recidivism in High Risk High Need

Sexual Offenders”, Journal Of Interpersonal Violence, Vol. 20, 549-568, (2005). CP 217-279. In particular, Dr. Abracen’s research has shown that treatment is effective among high-risk offenders and those with high treatment needs. Looman, Abracen and Nicholaichuk, “Recidivism Among Treated Sexual Offenders and Matched Controls”, Journal Of Interpersonal Violence, Vol. 15, No. 3, 279-290 (2000).

In his report, Dr. Abracen pointed to Mr. Ambers’ treatment and studies of populations similar to Mr. Ambers in discussing his assessment. CP 206-07. After reviewing the records and interviewing Mr. Ambers personally, Dr. Abracen concluded with a reasonable degree of scientific certainty that Mr. Ambers’ “risk has been reduced such that he no longer meets the criteria associated with being a sexually violent predator as defined by RCW 71.09.” CP 207. Dr. Abracen unequivocally stated in his declaration:

It is my opinion, to a reasonable degree of scientific certainty that Mr. Ambers’ condition has changed since his commitment in 1998 such that he no longer meets the definition of a sexually violent predator. The change in Mr. Ambers’ condition has been brought about through positive responses to continuing participation in treatment that indicates that he no longer meets the criteria of a sexually violent predator. New developments in actuarial assessments since his commitment further reinforce these opinions.

CP 215.

Despite Mr. Ambers' presentation of this evidence at his annual review hearing, the trial court denied him a full evidentiary trial on the issue of his unconditional release. CP 486-90. The trial court initially found that the State had met its initial *prima facie* burden of proof. CP 487. This was not contested.

The focus of the briefing by the parties was the sufficiency of Dr. Abracen's report and declaration in light of the statutory burden imposed on the detainee under the newly amended statute. The trial court found that the 2005 amendments to the annual review provisions of RCW 71.09.090, SB 5582, placed "additional requirements on a respondent seeking to establish probable cause through his own proof" beyond the requirements imposed on the State's evaluator. CP 487.

Initially, the trial court found that Dr. Abracen was qualified to render the opinions expressed in his report, declaration and depositions because he was licensed to practice in Canada. CP 488. The trial court also determined that Dr. Abracen's report established *prima facie* evidence that Mr. Ambers' condition has changed through a positive response to treatment. CP 488-89.

Finding that the "deciding factor" in the annual review was the statutory interpretation of the remaining risk presented by Mr. Ambers, the

trial court held that when a detainee seeks an unconditional release trial based on his own proof, he must present proof that his risk of reoffending is “well below” the “more likely than not standard” used in the definition of a sexually violent predator. CP 489. The trial court rejected Mr. Ambers’ arguments that were based on statutory construction and due process principles. CP 489.

As a matter of statutory construction, the trial court determined that the Legislature intended to impose a higher burden on the detainee when he seeks unconditional release based on his own proof. CP 486-90. RCW 71.09.090(4)(b)(ii) requires a professional opinion that the detainee is “safe to be at large if unconditionally released from commitment.” However, the term “safe to be at large” is not defined in the Act. The trial court rejected Mr. Ambers’ argument that the Legislature intended the words “safe to be at large” to mean that the person no longer meets the criteria for commitment as a sexually violent predator which, itself, incorporates the “more probable than not” standard.<sup>1</sup> Id.

The trial court then found that due process does not require an

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<sup>1</sup> The “more probable than not” risk standard (greater than 50% likelihood) is incorporated into the definition of a “sexually violent predator” and is therefore a necessary finding for: the initial detention, RCW 71.09.040 and .060; the State’s initial burden at the review hearing, RCW 71.09.090(1) and .070; and at an unconditional release trial that is ordered through the review process, RCW 71.09.090(3)(b). The “more probable than not standard” is also the ultimate determination that the trial court must make at the annual review hearing. See RCW 71.09.090(2)(a)(i).

unconditional release trial when the detainee presents *prima facie* evidence that he no longer meets the criteria for commitment, even if that change is due to treatment participation. CP 489. The trial court held that the Constitution does not preclude the Legislature from imposing a more demanding standard on the defense evidence at an annual review hearing. Id. Therefore, under the trial court’s interpretation, an unconditional release trial is required if the State’s evidence, which typically consists of the Department of Social and Health Services (DSHS) report, finds that the detainee’s condition has changed such that he is no longer a sexually violent predator (e.g. having a risk less than 50%). However, if the detainee challenges a DSHS conclusion of “no change” with his own evidence, his expert must opine that his risk has declined through treatment such that the risk is somewhere “well below” the 50% threshold required for commitment.

Addressing the sufficiency of Mr. Ambers’ evidence, the trial court determined that Dr. Abracen’s report established probable cause that Mr. Ambers’ condition had changed due to a continuing course of treatment such that he no longer met the definition of a sexually predator. CP 490. However, because Dr. Abracen did not address the “more stringent” “safe to be at large” standard, the trial court terminated the proceeding and

denied Mr. Ambers' request for an unconditional release trial. CP 490.

With the agreement of the parties, the trial court certified the issues for appeal pursuant to RAP 2.3(b)(4). CP 497-98. A timely notice of motion for discretionary review followed. CP 491-96. This Court accepted review.

Because Mr. Ambers demonstrated probable cause to believe that his condition had so changed such that he is no longer a sexually violent predator, a trial on the issue should have been ordered. The trial court's failure to order such a trial is error.

#### IV. ARGUMENT

##### A. IN 2005, THE LEGISLATURE INTENDED TO REVERSE THIS COURT'S DECISIONS IN *IN RE YOUNG* AND *IN RE WARD* WHICH ADDRESS THE REVIEW PROCESS IN SEXUALLY VIOLENT PREDATOR CASES.

A person can be civilly committed as a sexually violent predator only if he has a predicate conviction, a mental abnormality or personality disorder, and is "likely to engage in future acts of predatory sexual violence" if unconditionally released from the petition. See RCW 71.09.020(16). Because "likely" is defined, in part, as "more probable than not," the initial commitment requires proof that the person's risk of reoffending is greater than 50%. See RCW 71.09.020(2); In re Brooks, 145 Wn.2d 275, 295-97 (2001) ("Washington's SVP statute is a prediction

of the same level of statistical probability: more likely than not, that is, more than 50 percent.”)

The Sexually Violent Predator Act (“the Act”) establishes procedures for the detainee to seek release after he is committed. DSHS must examine the person annually to determine, in part, “whether the committed person currently meets the definition of a sexually violent predator.” RCW 71.09.070. The detainee is also entitled to have his own expert appointed. RCW 71.09.070.

The committed person also has the right to have the trial court review his commitment annually. RCW 71.09.090. The DSHS report required under RCW 71.09.070 is provided to the court. RCW 71.09.090(1). If DSHS determines that the detainee’s condition has so changed that he no longer meets the definition of a sexually violent predator, then a trial must be ordered on that issue.<sup>2</sup> RCW 71.09.090(1). At that trial,<sup>3</sup> the State has the burden of proving that the “person’s

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<sup>2</sup> Realistically, DSHS never finds that a committed person no longer meets the criteria for commitment. See e.g., Doren, D., “Model for Considering Release for Civilly Committed Offenders”, The Sexual Predator: Law and Public Policy, Clinical Practice Vol. III (A Schlank ed., Civic Research Inst. 2006) at p. 6-4 (Washington State has never unconditionally discharged a committed sexually violent predator.) Thus, the only possible means to obtain an unconditional release trial is through the detainee’s expert. Even with a defense expert’s support, unconditional release trials are extremely rare. Counsel is not aware of any unconditional release trials that have taken place since the Sexually Violent Predator Act was passed in 1990. There are no Washington appellate cases addressing an unconditional release trial.

<sup>3</sup> This type of post-commitment trial are often referred to as an “unconditional release trials” or “recommitment trials.”

condition remains such that the person continues to meet the definition of a sexually violent predator.” RCW 71.09.090(3)(b).

If DSHS finds insufficient change, the committed person may challenge that finding and present evidence of his own by exercising his right to an annual review hearing.<sup>4</sup> RCW 71.09.090(2)(a). In such cases, RCW 71.09.090(2)(a)(i) requires the trial court to determine, in part, whether "probable cause exists to warrant a [trial] on whether the person's condition has so changed that . . . **he no longer meets the definition of a sexually violent predator . . .**" (Emphasis added.) RCW 71.09.090(2)(a)(i) applies to evidence produced by both the State and the detainee at the review hearing.

The same standard is articulated in RCW 71.09.090(2)(c)(ii)(A), which states, in part:

If the court at the show cause hearing determines that 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 . . . ; 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 . . .** then the court shall set a [trial] on [the] issue.

(Emphasis added.) Importantly, RCW 71.09.090(2)(c)(ii)(A) specifically references situations where the detainee presents his own evidence at the

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<sup>4</sup> A review hearing is also required if the detainee does not affirmatively waive the hearing. RCW 71.09.090(2)(a).

annual review hearing.

This Court addressed cases where the evidence at an annual review hearing warranted an unconditional release trial in In re Young, 120 Wn.App. 753 (2004), and In re Ward, 125 Wn.App. 381 (2005). In Young, the detainee presented *prima facie* evidence his condition had changed such that he was no longer a sexually violent predator because his risk had declined due to the normal aging process since his commitment. Id. at 763. Based on statutory construction and due process principles, this Court determined that a trial on the issue was necessary, stating:

Because current risk assessment techniques suggest Young is not an SVP, denying him a hearing at this point raises due process concerns. The statute requires a periodic assessment of a person committed under RCW 71.09.070 to determine his/her continued dangerousness to the community and to ensure the person continues to meet the criteria for commitment. If current risk assessment techniques suggest Young is not now an SVP, the only adequate way of determining whether Young still meets the criteria for commitment in light of new diagnostic tools is to give him a new commitment hearing.

(Footnotes omitted.) Id. at 763.

Likewise, in Ward, the detainee presented *prima facie* evidence that he was no longer an SVP because his head injury had resolved and diagnostic techniques had changed. This Court ordered a trial on the issue, stating:

"Current dangerousness is a bedrock principle underlying the [sexually violent predator] commitment statute." The purpose of show cause

hearings is to determine whether a detainee remains mentally ill and a danger to the public. If a detainee provides new evidence establishing probable cause that he is not currently a sexually violent predator, due process requires a trial on the merits, regardless of whether his evidence could have also challenged the basis of his original commitment.

(Citations omitted.) Id. at 386.

The Legislature reacted strongly to the Young and Ward decisions by enacting SB 5582, explicitly rejecting the “age analysis” in Young and the use of new diagnostic techniques in Ward. The Legislature determined that sex offender treatment or physiological changes like paralysis, not changes in “demographic factors,” are the only ways for a detainee to change such that he could obtain an unconditional release trial. CP 307-13 (SB 5582 sec. 1.); RCW 71.09.090(4)(b).<sup>5</sup>

In addition to the “findings” contained in SB 5582, the Legislature added an additional section to the review process, RCW 71.09.090(4), which provides:

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

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<sup>5</sup>Mr. Ambers does not concede that these legislative findings are accurate or constitutional. The legislative intent on the age issue was clear. In contrast, there is no indication that the Legislature intended to impose a new and different standard on the detainee’s evidence at the review hearing.

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

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

(ii) A change in the person's mental condition brought about through positive response to continuing participation in treatment which indicates that the person meets the standard for conditional release to a less restrictive alternative or that the person would be **safe to be at large** if unconditionally released from commitment.

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

(Emphasis added.)

If an unconditional release trial is ordered as a result of the annual review hearing, the fact-finder at such a trial must determine whether the detainee continues to meet the definition of a sexually violent predator.

RCW 71.09.090(3).

There are no appellate cases addressing the proper construction or constitutionality of the SB 5582.

**B. THE RULES OF STATUTORY CONSTRUCTION REQUIRE THIS COURT TO FIND THAT THE “SAFE TO BE AT LARGE” STANDARD IN RCW 71.09.090(4)(b)(ii) MEANS THAT THE DETAINEE NO LONGER MEETS THE CRITERIA OF A SEXUALLY VIOLENT PREDATOR.**

As discussed above, the trial court determined that the Legislature established a new risk threshold for the detainee’s evidence at the review hearing that is “more stringent” than both the State’s burden and the initial commitment criteria. CP 489. The trial court determined that the allegedly new standard, “safe to be at large,” requires that the detainee have a risk that is “well below” the “more probable than not” initial commitment criteria. CP 489. The trial court’s statutory interpretation ignores the numerous other sections of the statute that specifically and directly incorporate the initial commitment criteria into the review process.

- 1. When read as a whole and all language in the statute is given meaning, RCW 71.09.090(4)(b) must be construed to mean that an unconditional release trial is required when the detainee presents *prima facie* evidence that his condition has changed such that he is no longer a sexually violent predator.**

"A statute must be read as a whole giving effect to all of the language used," and each provision must be harmonized with other provisions to "insure proper construction of every provision." State v. Young, 125 Wn.2d 688, 696, 888 P.2d 142 (1995). Every word, clause,

and sentence of a statute must be given effect; no part should be rendered inoperative. Xieng v. Peoples Nat'l Bank, 120 Wn.2d 512, 529-30 (1993).

RCW 71.09.090(4)(b) must be harmonized with the other provisions of the annual review process so that all the language is consistent and meaningful. The annual review provisions incorporates the definition of a sexually violent predator as the relevant standard no less than eight times:

1. DSHS must evaluate each committed detainee yearly, and in the “annual report shall include consideration of whether the committed person currently **meets the definition of a sexually violent predator . . .**” (Emphasis added.) RCW 71.09.070.
2. An unconditional release trial must be ordered if DSHS determines that “[t]he person no longer **meets the definition of a sexually violent predator . . .**” (Emphasis added.) RCW 71.09.090(1)(a).
3. When a detainee petitions for an annual review hearing despite a negative DSHS report, the trial court “shall set a show cause hearing to determine whether probable cause exists to warrant a hearing on whether the person's condition has so changed that: (i) He or she **no longer meets the definition of a sexually violent predator . . .**” (Emphasis added.) RCW 71.09.090(2)(a). This section specifically applies to situations where the detainee requests a hearing despite a negative DSHS report.
4. At the annual review hearing, the State initially bears the burden of providing *prima facie* evidence that the respondent “**continues to meet the definition of a sexually violent predator.**” (Emphasis added.) RCW 71.09.090(2)(b).
5. Under RCW 71.09.090(2)(c), a trial must be ordered if the state fails to present *prima facie* evidence that the respondent “continues

to meet the definition of a sexually violent predator” or if the respondent presents *prima facie* evidence that he “**no longer meets the definition of a sexually violent predator.**” (Emphasis added.) Here, RCW 71.09.090(2)(c)(ii) specifically refers to situations such as this case where the detainee challenges a negative DSHS report with a report by his own expert.

6. If a trial is ordered, the State bears the burden of proving that the respondent’s “condition remains such that the person **continues to meet the definition of a sexually violent predator.**” (Emphasis added.) RCW 71.09.090(3)(b).

7. The findings of SB 5582 also refer to the initial criteria for commitment when referring to situations where the detainee relies on his own expert at the review hearing to obtain an unconditional release trial. The findings, sec. 1, state, in part, “The legislature also finds that, in some cases, a committed person may appropriately challenge whether he or she **continues to meet the criteria for commitment.** Because of this, the legislature enacted RCW 71.09.070 and 71.09.090, requiring a regular review of a committed person’s status and permitting the person the opportunity to present evidence of a relevant change in condition from the time of the last commitment trial proceeding.” (Emphasis added.) CP 308-09 (SB 5582 sec. 1).

8. Finally, under RCW 71.09.090(4)(a), the newly added section which the State claims imposes a higher standard on the detainee, “[p]robable cause exists to believe that a person's condition has "so changed," under subsection (2) of this section, only when evidence exists, since the person's last commitment trial proceeding, of a substantial change in the person's physical or mental condition such that the person . . . **no longer meets the definition of a sexually violent predator.**” (Emphasis added.) This section specifically applies to section (2), where the detainee requests a hearing despite a negative DSHS report.

Only in RCW 71.09.090(4)(b) does the statute include wording that deviates from the other language specifically referencing the criteria

for a sexually violent predator. RCW 71.09.090(4)(b) states that a trial addressing either an LRA or unconditional release can be ordered only if: (i) the detainee is “unable to reoffend” due to a permanent physiological change such as a paralysis;<sup>6</sup> or (ii) the detainee is “safe to be at large” due to a positive response to treatment. Mr. Ambers sought an unconditional release trial because his condition has changed due to a positive response to treatment. CP 182-279.

In the trial court, the State baldly asserted that RCW 71.09.090(4)(b) applies only to the defense evidence because defense experts in general supposedly cannot be trusted. The trial court accepted this argument, finding that: (1) the Legislature intended to impose a different standard on the defense evidence when a detainee seeks unconditional release over the objection of the State and DSHS; and (2) the different standard, “safe to be at large,” is “more stringent” than the “more probable than not” standard used for the initial commitment decisions, DSHS annual review evidence, and unconditional release trials that would be ordered as a result of the review hearing. CP 486-90. On both points, the trial court erred.

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<sup>6</sup> While this case does not directly address the “unable to [reoffend]” due to paralysis standard in RCW 71.09.090(4)(b)(i), the same issues of statutory construction apply with equal force.

- a. RCW 71.09.090(4)(b) applies to any probable cause determination at the annual review hearing, not just the defense evidence.

Apart from the due process problems associated with more stringent standards for the defense than the State, the trial court's finding that the statute imposes a different, "more stringent" standard on the detainee's evidence has no basis in the plain language of the statute.

By its own terms, RCW 71.09.090(4)(b) applies to any trial ordered as a result of the annual review process because it refers to "a new trial proceeding under subsection (3) of [RCW 71.09.090]."<sup>7</sup> RCW 71.09.090(3) describes **all** trials that are ordered as a result of the annual review process, including cases where finds that the detainee "no longer meets the definition of a sexually violent predator," RCW 71.09.090(1) and when the detainee prevails with his own proof at the review hearing. RCW 71.09.090(2). There is nothing in the plain language of RCW 71.09.090(4)(b) that purports to limit its application to only the detainee's evidence. Therefore, RCW 71.09.090(4)(b) applies to the DSHS report, the State's evidence, and the detainee who challenges the DSHS report with his own evidence.

Because RCW 71.09.090(4)(b) applies to all probable cause

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<sup>7</sup> RCW 71.09.090(3) provides, in part, "At the hearings resulting from subsection (1) and (2) of this section . . ."

determinations that would result in a trial, regardless of who presents the evidence, the “safe to be at large” standard must be the same as the criteria for commitment as a sexually violent predator. As previously outlined, the statute makes numerous references to the initial commitment criteria as the relevant standard for the DSHS examination and the State’s initial burden at the annual review hearing. See supra Section (B)(1); RCW 71.09.070, RCW 71.09.090(1), RCW 71.09.090(2)(a), and RCW 71.09.090(2)(c). Each of these sections state that the relevant inquiry is whether the detainee’s condition has changed such that he no longer meets the definition of a sexually violent predator, a term explicitly defined in the statute. If the “safe to be at large” language in RCW 71.09.090(4)(b) is different and “more stringent” than the initial commitment criteria, then the numerous other sections referencing the initial commitment criteria would directly contradict the supposedly new standard. The only way to harmonize all of these provisions is to interpret the “safe to be at large” standard is to find that it is identical to the criteria for a longer a sexually violent predator. If a detainee’s condition has changed such that they are no longer a sexually violent predator, then they must be “safe to be at large.” Because the Legislature did not change any of the other language in the annual review process, it clearly intended that a person is “safe to be

at large” when he no longer meets the criteria for a sexually violent predator. Therefore, as a matter of statutory construction, this Court must find that “safe to be at large” means the person no longer meets the initial criteria of a sexually violent predator.

- b. Even assuming *arguendo*, RCW 71.09.090(4)(b) and the “safe to be at large” language apply only to the detainee’s evidence, that standard still must be construed to be consistent with the definition of a sexually violent predator in order to harmonize all of the language in RCW 71.09.090(2) and RCW 71.09.090(4)(a).

RCW 71.09.090(2)(a) specifically states the relevant standard for the annual review where the detainee challenges the DSHS report by presenting evidence from his own expert. RCW 71.09.090(2)(c)(ii) requires that a trial be ordered **if the detainee** presents *prima facie* evidence that he “**no longer meets the definition of a sexually violent predator.**” (Emphasis added.)<sup>8</sup> For the statute to be coherent, the “safe to be at large” standard must be construed to mean that the detainee no longer meets “the definition of a sexually violent predator” consistent with RCW 71.09.090(2)(c)(ii). This is the only way that RCW 71.09.090(2)(c)(ii) and RCW 71.09.090(4)(b) can be reconciled.

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<sup>8</sup> RCW 71.09.090(2)(a) also states that the trial court “shall set a show cause hearing to determine whether probable cause exists to warrant a hearing on whether the person’s condition has so changed that: (i) He or she **no longer meets the definition of a sexually violent predator . . .**” (Emphasis added.)

RCW 71.09.090(4)(a) also references situations in which the detainee requests a hearing over the objection of DSHS, stating that probable cause exists when a person's condition has changed such that he "no longer meets the definition of a sexually violent predator." (Emphasis added.) Furthermore, the findings in sec. 1 of SB 5582 also make clear that a detainee may present evidence of change such that he no longer meets the "criteria for commitment." CP 308-09. The trial court's finding that the detainee must present evidence meeting a more stringent standard than the initial commitment criteria renders both RCW 71.09.090(4)(a) and the legislative findings superfluous and contradictory. Even if the analysis is limited to just SB 5582, the only way to harmonize all of the provisions of the newly added section is to find the "safe to be at large" language to mean that the person's risk has fallen below the initial commitment criteria.

**2. The legislative history of SB 5582 confirms that the Legislature intended the term "safe to be at large" to be shorthand for the initial commitment criteria.**

If a statute is deemed ambiguous, a court may resort to legislative history in order to ascertain the meaning of the statute. Berrocal v. Fernandez, 155 Wn.2d 585, 600 (2005).

Below, the State argued that the Legislative history supported its

argument. The State is wrong. The Legislative history plainly supports a finding that the “safe to be at large” standard is shorthand for the definition of a sexually violent predator.

The Final Bill Report summarizes the changes to the review process in the following manner:

A showing that a person has “so changed” requires a showing that, since the person’s last commitment proceeding, there has been substantial change in the committed person’s physical or mental condition that indicates either the person **no longer meets the commitment standard** or that [release to an LRA is appropriate.]

(Emphasis added.) CP 314. The summary explicitly refers back to the definition of a sexually violent predator.

The House Bill Report is even clearer because it refers to cases where the detainee submits his own evidence to challenge the DSHS report. It states:

Probable cause that a detainee’s condition has “so changed” such that he or she no longer meets the definition of a sexually violent predator, is established **when a detainee shows** that, since his or her last commitment proceeding, there has been a *substantial change in his or her physical or mental condition* that indicates either: (a) **that the person no longer meets the commitment standard . . . .**

(Bold emphasis added. Italics in original.) CP 319.

The legislative history flatly contradicts the trial court’s determination that the term “safe to be at large” was intended to be a

different and more stringent standard than the criteria for commitment. Indeed, the legislative history compels a finding that the “safe to be at large” standard is shorthand for the definition of a sexually violent predator.<sup>9</sup>

**3. To be constitutional, the “safe to be at large” standard must be construed as shorthand for a determination that the person no longer meets the commitment criteria.**

The trial court’s finding that the detainee is held to a standard of proving that his risk is “well below” the criteria for commitment not only violates the rules of statutory construction, it also renders the review process unconstitutional.

Where a statute is susceptible to an interpretation that may render it unconstitutional, courts should adopt, if possible, a construction that will uphold its constitutionality. In re C.W., 147 Wn.2d 259, 277 (2002).

Due process requires that civil commitment must end when the detainee no longer meets the original basis for commitment. O’Connor v. Donaldson, 422 U.S. 563, 574-75, 95 S.Ct. 2486 (1975). In O’Connor, the Court stated:

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<sup>9</sup> The prosecutor in this case attached his own letter to the legislature in support of SB 5582 as supposed evidence of legislative intent. CP 322-23. Initially, such a letter cannot be considered evidence of legislative intent. Nonetheless, the prosecutor’s own letter detailing his understanding of the purpose and meaning behind SB 5582 fails to mention any intent to impose a more demanding standard of risk when the detainee seeks a release trial. Id. The prosecutor notes the “core notion” of SB 5582 is that age should

Nor is it enough that Donaldson's original confinement was founded upon a constitutionally adequate basis, if in fact it was, because even if his involuntary confinement was initially permissible, it could not constitutionally continue after that basis no longer existed.

(Citations omitted.) Id.

In Young, 122 Wn.App. 753 (2004), and Ward, 125 Wn.App. 381 (2005), this Court affirmed the constitutional principle that a person can only be detained so long as they meet the initial criteria for commitment. In Young, this Court stated, “Because current risk assessment techniques suggest Young is not an SVP, denying him a hearing at this point raises due process concerns.” 120 Wn.App. at 763. In Ward, this Court stated, “If a detainee provides new evidence establishing probable cause that he is not currently a sexually violent predator, due process requires a trial on the merits . . . “ 125 Wn.App. at 386; see also People v. Collins, 110 Cal.App.4<sup>th</sup> 340, 346 (2003) (“SVPA is designed to ensure a committed person does not remain confined any longer than he or she qualifies as an sexually violent predator.”)

The Missouri Supreme Court in In re Schottel, 159 S.W.3d 836 (2005), addressed virtually the same issues of statutory construction and due process raised in this case. There, the Court found that the terms “safe to be at large” and “will not engage in acts of sexual violence” are merely

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not be the single relevant variable for the SVP population. Id.

shorthand ways of saying the person no longer meets the initial commitment criteria which incorporates the “more likely than not” standard. Id. at 841. To hold otherwise, the Court stated, would render the statute unconstitutional. Id. at 842.

The Court in Schottel found that the Washington and Missouri review statutes were “very similar” and relied on the Washington Supreme Court’s opinion in In re Petersen, 145 Wn.2d 789 (2002), in articulating the relevant burdens at the annual review hearing. Id. at 844-45. Missouri defines a “sexually violent predator” in the same manner as Washington’s Act, requiring that the person be “more likely than not” to reoffend. Id. at 843; RSMo 632.480.5. The Missouri statute, like RCW 71.09.090(2), allows the detainee to request an annual review despite a negative report from the institution. Id. at 839. If the detainee requests the hearing over the objection of the institution, the trial court must determine whether there is probable cause to believe that the person’s condition has so changed that he “is safe to be at large and will not engage in acts of sexual violence if discharged.” (Emphasis added.) Id. at 839.

In Schottel, the detainee argued that the entire commitment scheme must be stricken because the review provision violated due process by placing upon him a more demanding risk threshold at the review hearing

(e.g. “safe to be at large” and “will not [reoffend]”) than the “more likely than not” standard used for both the initial commitment and future release trials. Id. at 841. The Court rejected the detainee’s interpretation of the statute and construed the “safe to be at large” standard to be a “shorthand way of referring to the requirement that the [detainee] must make a preliminary showing that he is not likely to engage in further acts of sexual violence, without restating the longer and more awkward description of an SVP . . . “ Id. at 842. Indeed, even the Missouri Attorney General’s office rejected the “more stringent standard” construction found by the trial court in this case. The Missouri court, quoting directly from the Missouri Attorney General’s brief, stated:

The legislature used slightly different language in 632.498 to express that level of risk -- probable cause the person will not offend -- but clearly did not intend to establish a different level of risk.

....

To suggest that the legislature intended to create such a variety of risk levels when it used the terms probable cause to believe the person "will not" and "likely" strains credulity -- and is an obvious attempt to interpret the statute in a way that makes it unconstitutional.

Id. at 842. In Schottel, both the prosecution and the court agreed that it would be unconstitutional to impose a more stringent standard at the annual review hearing.

SB 5582 is not the only instance where the Washington Act uses different shorthand terms that have the same meaning. For example, the definition of a “mental abnormality” requires, in part, that the condition makes the “person a menace to the health and safety of others.” RCW 71.09.020(8). This risk standard is later clarified by the rest of the definition of a sexually violent predator which incorporates the “more probable than not” standard in RCW 71.09.020(7). Other instances of the use of different terms that have the same meaning include the various means by which the Legislature refers to sexually violent offenses. See e.g. RCW 71.09.020(16) (“acts of sexual violence”), .020(16) (“crime of sexual violence”), .020(15) (“sexually violent offense”), .020(10) (“harm of a sexually violent nature”). While using different language, all of these terms refer to an act that qualifies as a sexually violent offense under RCW 71.09.020(15).

In this case, the trial court’s finding that a committed sexually violent predator cannot obtain a release trial unless he presents evidence that his risk is “well below” the initial commitment standard is both unconstitutional and untenable. If a detainee is no longer a sexually violent predator, there is no basis to continue confinement.

If the term “safe to be at large” is a new and more stringent

standard, the statute gives experts and judges no guidance on its meaning. If undefined, it would be a subjective standard dependent on the predilections of a particular evaluator or trial judge. What is “safe” for some might be “unsafe” for others. If the “safe to be at large” standard is not purely subjective, then it would require a showing of absolutely no risk. Such a standard is impossible. It would be a violation of ethics for an expert to conclude that a person is “unable” to reoffend. See Association for the Treatment of Sexual Abusers Professional Code of Ethics, 24 (“Members shall not make statements that a client is . . . no longer at any risk to reoffend.”) (Emphasis in original.) This interpretation would render the review process a sham.

This Court should follow the well-reasoned analysis set forth by the Missouri Attorney General and the Schottel Court and interpret the amendments in a manner that harmonizes all of the references to the definition of a sexually violent predator throughout RCW 71.09.090 and RCW 71.09.070. That analysis preserves the constitutionality of the amendments. The rules of statutory construction, the legislative history and due process require a finding that the “safe to be at large” standard means that the person no longer meets the definition of a sexually violent predator. If this Court determines that the Legislature intended to impose

a more demanding risk determination at the review hearing, this Court must strike the 2005 amendments as unconstitutional.

C. **BECAUSE MR. AMBERS PRESENTED *PRIMA FACIE* EVIDENCE THAT HIS CONDITION HAS CHANGED SUCH THAT HE IS NO LONGER A SEXUALLY VIOLENT PREDATOR, A TRIAL ON THAT ISSUE MUST BE ORDERED.**

Below, the trial court determined that Dr. Abracen concluded that Mr. Ambers' condition has changed due to a positive response to continuing participation in treatment. CP 488-89. The trial court also found *prima facie* evidence that Mr. Ambers' risk has changed such that it is below the "more probable than not" standard. CP 489-90. Thus, the trial court conceded that Mr. Ambers would be entitled to an unconditional release trial if the initial commitment criteria were the relevant standards. CP 490. But, the trial court denied the request for an unconditional release trial because Dr. Abracen did not address what the trial court perceived to be "the more stringent" "safe to be at large" standard. CP 490. Because the "safe to be at large standard" is shorthand for a determination that the person no longer meets the criteria for commitment, this Court must reverse the trial court and remand for an unconditional release trial pursuant to RCW 71.09.090(3).

**D. AN UNCONDITIONAL RELEASE TRIAL IS REQUIRED WHEN THE DETAINEE PRESENTS *PRIMA FACIE* EVIDENCE THAT HS IS NOT A SEXUALLY VIOLENT PREDATOR, REGARDLESS OF ANY CHANGE IN HIS MENTAL CONDITION OR RISK.**<sup>10</sup>

As discussed above, the statute provides two ways a person may obtain a release trial pursuant to the annual review process: if the State fails to present *prima facie* evidence that the detainee's condition has not changed, or if the detainee affirmatively presents *prima facie* evidence of a change in his condition. RCW 71.09.090; In re Petersen, 145 Wn.2d at 798-99. However, due process and this Court's opinions in Young and Ward require a third manner in which a trial can be ordered as a result of the annual review process: if a detainee is able to present *prima facie* evidence that he currently does not meet the criteria for commitment, regardless of the whether his condition has changed. Young, 120 Wn.App. at 763 ("Because current risk assessment techniques suggest Young is not an SVP, denying him a hearing at this point raises due process concerns."); Ward, 125 Wn.App. at 386 ("If a detainee provides new evidence establishing probable cause that he is not currently a sexually violent predator, due process requires a trial on the merits . . . ")

Due process and RCW 71.09.070, therefore, require periodic assessments to determine whether the person currently meets the criteria

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<sup>10</sup> Given the trial court's finding that the evidence presented by Mr. Ambers was *prima facie* evidence that his condition has changed due to treatment such that he is no longer a sexually violent predator, this issue need not be reached in this case. It is raised here in the abundance of caution because the State argued below that Dr. Abracen's opinion did not address a change in Mr. Ambers' condition due to treatment. The trial court rejected that argument.

for commitment, regardless of any changes in the person's mental condition. This assessment must rely on the current science, not outdated science. If the detainee can present *prima facie* evidence that new developments in the scientific literature show that he is not a sexually violent predator, then a trial on that issue must be ordered.

In Wisconsin, which has a sexually violent predator law with similar review provisions as the Washington Act, courts have held that a defense opinion that the detainee never met the initial commitment criteria when viewed in light of a new diagnostic tool or actuarial instrument, should be cause for a trial on that issue. In re Pocan, 267 Wis.2d 953, 671 N.W.2d 860 (2003).<sup>11</sup> In Pocan, the prosecution argued that treatment progress is the only manner in which a committed sexually violent predator can show that he no longer meets the commitment criteria. The Court rejected this argument, stating:

We agree that progress in treatment is one way of showing that a person is not still a sexually violent person. However, we conclude that is not the only way. A new diagnosis would be another way of proving someone is not still a sexually violent person. A new diagnosis need not attack the original finding that an individual was a sexually violent person. Rather, a new diagnosis focuses on the present. The present diagnosis would be evidence of whether an individual is still a sexually violent person.

The circuit court found Pocan to be a sexually violent person when it committed him in 1998. He now argues new diagnostic tools show that he is not a sexually violent person. If the court finds Pocan is not sexually violent now, that means he is not still a sexually violent person.

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<sup>11</sup> Pocan was cited with approval by this Court in Young. See 120 Wn.App. at 763 n. 20.

Id. at 863.

The “change in mental condition” provisions in RCW 71.09.090 create a presumption that the person remains a sexually violent predator. Such a presumption of continued mental illness and dangerousness, based on past diagnoses and findings, is not favored. See State v. Sommerville, 86 Wn.App. 700, 710-11 (1997); Levine v. Torvik, 986 F.2d 1506 (1993). If it can be shown that the previous finding of dangerousness is questionable due to advancements in scientific research, a presumption of continued danger is not warranted.

In Sommerville, the defendant was found not guilty by reason of insanity after he killed his wife and raped his stepdaughter. He was committed to Eastern State Hospital under RCW 10.77. When his case was initially reviewed by the hospital, it determined that he did not exhibit the symptoms of a mental disorder. Id. at 703-04. At his review hearing pursuant to RCW 10.77.140,<sup>12</sup> the hospital experts testified that the defendant had a diagnosed mental illness but it was “in remission,” even though he had not exhibited any symptoms for many years. The trial court denied the request for conditional release finding substantial evidence of a continued mental disorder. The Court reversed, stating:

The trial court's reasoning reaches the same inevitable conclusion: Because Timothy Sommerville once exhibited

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<sup>12</sup> RCW 10.77.140 requires semiannual reports to the court much like RCW 71.09.070. The review hearings for the criminally insane under RCW 10.77.150 address the ultimate merits of the petition for release, unlike the review hearings under RCW 71.09.090, which only act as a mechanism to set the case for trial on the issues.

symptoms of a mental disorder, he will always be deemed "mentally ill" regardless of his lack of symptoms because the disease may be in "periodic remission." An insanity acquittal will support an inference of continuing mental illness, but that inference does not last indefinitely. United States v. Bilyk, 29 F.3d 459, 462 (1994). Otherwise, the periodic reports and subsequent hearings mandated by RCW 10.77 would be purposeless, as would the directive that the State must release the insanity acquittee when the basis for holding him or her in the psychiatric facility disappears. The evidence indicates Mr. Sommerville has not shown symptoms of any mental disorder since 1985. The court's finding that Mr. Sommerville is currently suffering from a mental disorder is not supported by substantial evidence.

Id. at 710-11.

Here, too, the "change in condition" requirements in the review process for RCW 71.09 detainees, which severely limit the manner in which a detainee can challenge his current commitment status, creates an irrefutable presumption that the detainee is still an SVP unless the detainee makes treatment progress or has a stroke. Such a presumption is not constitutional.

The State will argue that there must be some finality to the initial commitment decision. These concerns regarding judicial economy are met by placing the burden on the detainee to show that the science has changed such that he is not a sexually violent predator, regardless of changes in his mental condition. The judicial economy concerns must also be weighed against the detainee's strong liberty interest. Humphrey v. Cady, 405 U.S. 504, 509, 92 S. Ct. 1048, 31 L. Ed. 2d 394 (1972) (Civil commitment is "a massive curtailment of liberty"). If the science has changed, courts cannot turn a blind eye to the real possibility that the

detainee does not currently meet the criteria for commitment.

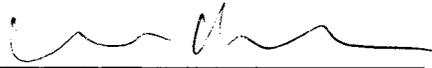
Public safety is not jeopardized when a trial is ordered because the detainee is not immediately released. Instead, the detainee remains incarcerated until a trial on the merits is held where the State has a full and fair opportunity to justify continued confinement. RCW 71.09.090(3). This cannot be understated. All of the issues raised herein address only the means by which a committed detainee can obtain a further hearing as a result of the annual review process. Public safety is not endangered by giving a detainee the opportunity to have a jury determine whether he meets the criteria for commitment. To argue otherwise is hyperbole.

#### V. CONCLUSION

The trial court erred when it denied Mr. Ambers' request for a trial to determine whether his condition has changed such that he is no longer a sexually violent predator. The trial court interpreted the statute in a manner that contradicts the rules of statutory construction, the legislative history, and the due process principles articulated by this Court in Young, 120 Wn.App. at 763, and Ward, 125 Wn.App. 386. The "safe to be at large" standard in RCW 71.09.090(4)(b) must be harmonized with the other provisions of RCW 71.09.070, .090(1), .090(2) and .090(4)(a) which identify the initial commitment criteria as the relevant standard for the review hearing. The only way to harmonize the various provisions is to find that the "safe to be at large" standard is shorthand for a finding that the detainee's condition has changed such that he no longer meets the

initial commitment criteria. Therefore, this Court should reverse and remand for an unconditional release trial under RCW 71.09.090(3)(b).

RESPECTFULLY SUBMITTED this 13th day of June, 2006.



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Dennis Carroll, WSBA# 24410  
Attorney for Petitioner, Kevin Ambers