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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.

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DIVISION ONE
SEP 25 2006

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE GREGORY CANOVA

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

I. UNDER THE RULES OF STATUTORY CONSTRUCTION THE TERM “SAFE TO BE AT LARGE” MUST BE CONSTRUED TO MEAN THAT THE DETAINEE IS NO LONGER A SEXUALLY VIOLENT PREDATOR.1

A. The State is wrong when it asserts that RCW 71.09.090(4) (SB 5582) applies only to the detainee’s evidence. 1

B. The Legislature did not intend to change the substantive standards for the review hearing. 4

C. If the “safe to be at large” standard does not incorporate the initial commitment criteria, it would unconstitutionally expands the scope of the statute by referencing any type of risk. 6

D. Unless the “safe” standard incorporates the initial commitment criteria, the review hearing would be subject to unbridled discretion by experts and/or judges.8

II. DUE PROCESS PROHIBITS THE STATE FROM IMPOSING A RELEASE STANDARD MORE STRINGENT THAN THE INITIAL COMMITMENT STANDARD. 11

A. Procedural due process requires that the review hearing use the same standard as the commitment criteria. 11

B. No case supports the State’s theory that due process allows a heightened release standard to be applied only to the detainee’s evidence. 13

C. The factors articulated in Mathews v. Eldridge, require a trial where the detainee presents evidence that he is no longer an SVP. 19

1. Mr. Ambers’ liberty interest is fundamental. 19

2. The risk of erroneous deprivation of liberty is substantial if the State’s theory is adopted.23

3.	<u>The State exaggerates the impact on the government's interests.</u>	25
III.	MR. AMBERS PRESENTED PROBABLE CAUSE THAT HIS CONDITION HAS CHANGED THROUGH A POSITIVE RESPONSE TO TREATMENT SUCH THAT HE IS NO LONGER A SEXUALLY VIOLENT PREDATOR.	27
IV.	<u>AN UNCONDITIONAL RELEASE TRIAL IS REQUIRED WHEN THE DETAINEE PRESENTS PRIMA FACIE EVIDENCE THAT HE IS NOT A SEXUALLY VIOLENT PREDATOR, REGARDLESS OF ANY CHANGE IN HIS MENTAL CONDITION OR RISK.</u>	34
V.	CONCLUSION.	39

TABLE OF AUTHORITIES

United States Supreme Court

<u>Addington v. Texas</u> , 441 U.S. 418 (1979)	17, 23
<u>Foucha v. Louisiana</u> , 504 U.S. 71 (1992)	17
<u>Greenwood v. U.S.</u> , 350 U.S. 366 (1956)	38
<u>Humphrey v. Cady</u> , 405 U.S. 504 (1972)	9, 20
<u>Kansas v. Hendricks</u> , 521 U.S. 346 (1997)	7, 11
<u>Jones v. United States</u> , 463 U.S. 354 (1983)	17, 38
<u>Marbury v. Madison</u> , 5 U.S. 137 (1803)	19
<u>Mathews v. Eldridge</u> , 424 U.S. 319 (1976)	19
<u>Parham v. J.R.</u> , 442 U.S. 584 (1978)	21-22, 24
<u>Zadvydas v. Ashcroft</u> , 533 U.S. 678 (2001).....	24

U.S. Circuit Court Opinions

<u>Frye v. U.S.</u> , 293 F. 1013 (D.C. Cir. 1923)	3
--	---

Washington State Supreme Court

<u>In re Brooks</u> , 145 Wn.2d 275 (2001).....	18
<u>In re C.W.</u> , 147 Wn.2d 259 (2002).....	11
<u>In re Elmore</u> , __ Wn.App. __, 139 P.3d 1140 (8/8/06).....	4, 37-38
<u>In re Petersen (Petersen I)</u> , 138 Wn.2d 70 (1999).	11, 23
<u>In re Petersen (Petersen II)</u> , 145 Wn.2d 789 (2002)	4, 9, 12, 16, 23, 40
<u>In re Thorell</u> , 149 Wn.2d 724 (2003).	7
<u>In re Turay</u> , 139 Wn.2d 379 (1999)	12
<u>In re Young</u> , 122 Wn.2d 1 (1993)	12
<u>Lake Air, Inc. v. Duffy</u> , 42 Wn.2d 478 (1953).....	33
<u>Smith v. Shannon</u> , 100 Wn.2d 26 (1983).	33
<u>State v. Klein</u> , 156 Wn.2d 102 (2005).....	31-32, 38
<u>Wash. State Labor Council v. Reed</u> , 149 Wn.2d 48 (2003)	19

Washington Court of Appeals

<u>In re Ward</u> , 125 Wn.App. 381 (2005).....	4, 19, 35, 40
<u>In re Young (Young AR)</u> , 120 Wn.App. 753 (2004).....	4, 19, 26, 30-31, 35, 40

Other State Court Opinions

<u>In re Combs</u> , __ N.W.2d __ (WI Ct. App. 2006).....	35-36
<u>People v. Munoz</u> , 129 Cal.App.4 th 421 (2005).....	13, 16-17, 32, 38
<u>In re Pocan</u> , 267 Wis.2d 953, 671 N.W.2d 860 (2003).....	35
<u>In re Schottel</u> , 159 S.W.3d 836 (2005).....	14-16

Statutes

RCW 10.77.010	18
RCW 10.77.020	18
RCW 10.77.200	18
RCW 71.09.010.....	5

RCW 71.09.0406
 RCW 71.09.090..... *passim*

Other Authorities

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)..... 23
 Hanson, K., “What do we know about sex offender risk assessment?” Psychology, Public Policy, and Law, Vol 4, No. ½, 50-72, 55 (1998). 8
Jurors Reject Request to Free 8 Time Rapist, Seattle Times, Aug. 19, 200025

I. UNDER THE RULES OF STATUTORY CONSTRUCTION THE TERM “SAFE TO BE AT LARGE” MUST BE CONSTRUED TO MEAN THAT THE DETAINEE IS NO LONGER A SEXUALLY VIOLENT PREDATOR.

A. The State is wrong when it asserts that RCW 71.09.090(4) (SB 5582) applies only to the detainee’s evidence.

The underlying premise of the State’s response is that the “safe to be at large” standard applies only to the detainee’s proof at the review hearing. Without this fiction, the “safe” standard obviously conflicts with every other provision of the review process unless it is shorthand for “no longer a sexually violent predator.” The plain language of the statute does not support the State’s “defense only” premise. There is nothing in RCW 71.09.090(4) that limits its application to the detainee’s evidence.

RCW 71.09.090(4)(b) references any “trial proceeding under subsection (3).” This section, RCW 71.09.090(3), applies to all recommitment trials, whether they are ordered because: (1) DSHS supports unconditional release when it has determined that the person “no longer meets the definition of a sexually violent predator” under RCW 71.090(1); (2) the State fails to present *prima facie* evidence that the person “continues to meet the definition of a sexually violent predator” pursuant to RCW 71.09.090(2)(a)(i), (2)(b), or (2)(c)(i); or (3) the detainee

presents *prima facie* evidence that he is “no longer a sexually violent predator” under RCW 71.09.090(2)(c)(ii).

The State makes various vague references to the “structure” of the statute to support its theory that RCW 71.09.090(4) applies only to the detainee’s evidence. The State provides no analysis of the supposed “structure” to support its theory. The plain language of the amendment makes it applicable to the standards used by all of the parties: DSHS, the prosecution and the detainee.

Despite the State’s broad pronouncements to the contrary, nothing in the legislative history suggests that the Legislature intended a more onerous risk standard to be applied to the detainee’s evidence. The legislative history, including the prosecutor’s letter, is clear that SB 5582 was intended to target only changes based on age and/or a new diagnosis. Indeed, as discussed in Mr. Ambers’ Opening Brief, the legislative history and the legislative findings contradict the State’s interpretation of the statute because they explicitly declare that the detainee’s burden is to show he is no longer an SVP. See Opening Br. at 22-23; CP 319 (House Bill Report); SB 5582(1) (Findings).

The State also makes blanket assertions that the legislative history supports the “defense only” theory because the Legislature was concerned

about “paid defense experts.”¹ Just as there is nothing in the statute to support the State’s assertion that RCW 71.09.090(4) applies only to the defense, there is nothing in the statute or legislative findings to support a legislative concern about “defense experts” in general. There was testimony regarding theories about age and recidivism that are supposedly not accepted in the scientific community. See State’s Br. at p. 16. However, this was addressed by removing age as a sole determinant of risk. Furthermore, issues regarding novel theories are adequately addressed by exclusion under the Frye² standard and ER 702.

In this case, the State raised no issue regarding the validity of Dr. Abracen’s opinions or the Frye standard. Dr. Abracen’s analysis that Mr. Ambers has ameliorated his risk through treatment was largely unchallenged. Certainly, Dr. Abracen’s excellent credentials make him qualified to reach opinions regarding recidivism and treatment progress. CP 189-95.

Once it is properly understood that SB 5582 applies to all of the evidence at review hearings, the only way to harmonize every review provision in RCW 71.09.090 and .070 is to find that the “safe to be at

¹The State repeatedly suggests that defense experts are untrustworthy because they are paid for their time and work. This absurd suggestion must be rejected because it taints any expert, including the State and DSHS experts, unless the expert is working without any compensation whatsoever.

²Frye v. U.S., 293 F. 1013 (D.C. Cir. 1923).

large” standard means the detainee is no longer a sexually violent predator. Otherwise, the “safe” standard would conflict with the numerous other sections of the statute that explicitly state that the inquiry is whether the detainee is no longer an SVP. See RCW 71.09.090(1), .090(2)(a), .090(2)(c), .090(4)(a), and .070.³

B. The Legislature did not intend to change the substantive standards for the review hearing.

In re Elmore, ___ Wn.App. ___, 139 P.3d 1140 (8/8/06), does not support the State’s theory that the “safe to be at large” standard is different than the “no longer an SVP” standard. Indeed, the Elmore Court repeatedly cites to, and uses, the “no longer an SVP” standard as the relevant standard for evaluating the detainee’s evidence. Id. at 12-17.

The Legislature obviously intended SB 5582 to “clarify” the statute in response to the Young AR and Ward decisions. See SB 5582(1). Prior to SB 5582, the relevant inquiry at the review hearing was whether the detainee is “no longer an SVP,” regardless of which party offered the evidence. See In re Petersen (Petersen II), 145 Wn.2d 789, 798-99 (2002). The State cannot simultaneously argue that SB 5582 “clarified” the

³Even if SB 5582 applies only to the defense, the standards articulated within the amendment itself must be harmonized. RCW 71.09.090(4)(a) refers to the initial commitment criteria and the findings explicitly stating that probable cause exists if the person’s condition has changed such that he “no longer meets the definition of a sexually violent predator.” See SB 5582(1).

existing standard, but also created a new and substantively different standard that applies only to the detainee's evidence.

The State baldly asserts that equating the "safe to be at large" standard with "no longer a sexually violent predator" "leaves the amendment without an amendment." State's Br. at p. 22. Once again, the State ignores the explicitly stated purpose of SB 5582; to encourage treatment participation by limiting the focus of the review hearing to treatment progress or changes in physical condition. In this regard, Mr. Ambers has complied with the amendments.

The State's primary argument is that the Legislature must have intended a different standard because it used different language. Initially, application of this rule ignores the contradictory standards even within SB 5582 because RCW 71.09.090(4)(a) explicitly refers to the initial commitment criteria. Moreover, the Legislature's choice to use different language in the context of the changes resulting from treatment and physical disability makes sense because both focus on changes in risk, rather than a supposed "remission" in the underlying mental abnormality and/or personality disorder. The Legislature clearly presumes that a mental abnormality and/or personality are chronic and lifelong. See SB 5582(1); RCW 71.09.010. Because the person's underlying condition will supposedly not "remit," the focus of the annual review hearing under SB

5582 is on risk alone.⁴ This accounts for the statute's reference to a risk standard rather than the global SVP criteria that include an allegedly chronic and lifelong mental disorder. In this way, the "safe" standard is harmonized with the other review provisions that incorporate the initial commitment criteria. See RCW 71.09.040(a), .090(1), .090(2)(a), .090(2)(c), and .070.

C. If the "safe to be at large" standard does not incorporate the initial commitment criteria, it would unconstitutionally expand the scope of the statute by referencing any type of risk.

The State's theory that the "safe" standard is not tied to the initial commitment criteria would continue a detainee's detention based on a risk of any type of harm, including risks that may not be limited to acts of sexual violence or risks that are unrelated to the underlying "mental abnormality" or personality disorder. RCW 71.09 applies to a small group of offenders who have chronic disorders that are related to a specific kind of risk, predatory sexual violence. See RCW 71.09.010. The statute has withstood substantive due process challenges because it requires that the detainee must have serious difficulty controlling his behavior and there must be a causal link between the person's mental disorder and risk.

⁴ At oral argument, the State asserted that one way for a detainee's evidence to meet the new standard is "a remission in your mental abnormality takes care of the problem." VRP at 32. While Mr. Ambers agrees that this must be a way to revisit the commitment, it is clearly not what the Legislature had in mind.

Kansas v. Hendricks, 521 U.S. 346, 356-60 (1997); In re Thorell, 149 Wn.2d 724, 735-42 (2003).

Only if the “safe” standard means the person is no longer an SVP, does the relationship between the mental disorder and risk remain intact. However, if the State is correct in arguing that “safe to be at large” means “free of any risk,” then the “safe” risk standard is divorced from the sexual violence component of the statute. For example, a detainee could excel in treatment addressing his pedophilia and substantially lower his risk of committing future sexually violent offenses, but he could still not be free of other types of “risk.” Indeed, there would be no limit to the types of “risk” that could be imagined. A small risk of suicide, driving accidents or non-sexual misdemeanor assaults could mean that the person is not “safe to be at large.”

The State may argue that the risk is implicitly limited to sexual violence. However, this contradicts the State’s argument that the statute’s language is unambiguous as there is no such limitation in the statute. To maintain the narrowly tailored purpose of the statute and survive substantive due process scrutiny, the “safe” standard must incorporate the initial commitment criteria.

D. Unless the “safe” standard incorporates the initial commitment criteria, the review hearing would be subject to unbridled discretion by experts and/or judges.

This case illustrates the difficulties in applying the “safe to be at large” standard unless it incorporates the commitment criteria. The State, in its brief, essentially concedes that “safe” would require a detainee to have a 0% chance of recidivism. State’s Br. at p. 22 (“free from risk”). At oral argument, the State acknowledged that it’s impossible to determine that anyone has a 0% chance of reoffending by stating, “First off, I don’t think safe to be at large means zero. It probably means something in the single digits” VRP at p. 32.⁵ During the deposition of Dr. Abracen and in its brief, the State then suggests that “safe” must be the same standard as airline travel. State’s Br. at p. 50. These divergent approaches by the same prosecutor illustrate that the “safe” standard must be tied to the statutorily defined and scientifically accepted commitment criteria.

Reasonable people disagree on the “safety” of many public policy choices and what degree of risk is acceptable. If the “safe” standard is left with no further definition as the State suggests, then there is nothing to

⁵ Most studies indicate that the recidivism rate for sex offenders in general is somewhere around 13%. See Hanson, K., “What do we know about sex offender risk assessment?” *Psychology, Public Policy, and Law*, Vol 4, No. ½, 50-72, 55 (1998). The State’s definition of “safe” would make all sex offenders eligible for continued confinement.

stop an expert from opining that a 35% risk is “safe to be at large.”⁶ Such vague societal opinions would be unchallenged in the context of a review hearing where the threshold is “*prima facie*” evidence.

The State’s “safe” theory requires a societal judgment that is outside the purview of expert testimony. The review hearing is limited in nature, relying only on written materials. Petersen II, 145 Wn.2d at 797-98. The detainee does not have the right to be present at the review hearing. RCW 71.09.090(2)(b). The type of societal judgment required for a “safe to be at large” standard that does not reference the initial commitment criteria is inconsistent with a paper review hearing. Juries are often required to introduce lay and societal judgments. In Humphrey v. Cady, 405 U.S. 504, 509 (1972), the Court stated:

The jury serves the critical function of introducing into the process a lay judgment, reflecting values generally held in the community, concerning the kinds of potential harm that justify the State in confining a person for compulsory treatment.

Likewise, a generalized standard of “safe” would not be the type of determination that could be made at a limited review hearing.

The State’s interpretation of the statute would lead to absurd results. For example, a detainee’s condition could change through treatment such that he is unequivocally no longer an SVP (e.g. risk is well

⁶ Indeed, an expert could opine that a detainee whose risk has declined through treatment, but is still “likely” to reoffend, is now “safe to be at large.”

below the “likely” standard), but he may still have a risk that is slightly above the “the single digits” as the State suggests “safe” means. This detainee could marshal proof beyond a reasonable doubt that he is no longer an SVP; nearly every respected expert in the field could agree that the person is no longer an SVP. However, as long as DSHS submits a report disagreeing with the respected experts in the field, the person would still not be entitled to an unconditional release trial. The State would have met its *prima facie* burden, and the detainee would not have proven that he is “safe.” Thus, even though the detainee could decisively prove that he no longer meets the commitment criteria at trial, he would never be afforded a release trial on the merits.

In conclusion, purely as a matter of statutory construction, the “safe” standard must mean that the detainee no longer meets the initial commitment criteria. To harmonize all of the related sections of the annual review statute, and to keep the review criteria linked to the underlying purpose and duration of the initial commitment, the “safe” standard must incorporate the initial commitment criteria.

II. DUE PROCESS PROHIBITS THE STATE FROM IMPOSING A RELEASE STANDARD MORE STRINGENT THAN THE INITIAL COMMITMENT STANDARD.⁷

A. Procedural due process requires that the review hearing use the same standard as the commitment criteria.

Sexually violent predator civil commitments have been upheld only when the commitments are subject to a rigorous review process, ensuring that the commitment lasts only so long as the person's current condition satisfies the initial commitment criteria. For example, in Kansas v. Hendricks, 521 U.S. 346 (1997), the Supreme Court upheld a statute similar to RCW 71.09 as it existed prior to SB 5582, stating:

The maximum amount of time an individual can be incapacitated pursuant to a single judicial proceeding is one year. Sec. 59-29a08. If Kansas seeks to continue the detention beyond that year, a court must once again determine beyond a reasonable doubt that the detainee satisfies the same standards as required for the initial confinement.

(Emphasis added.) 521 U.S. at 364.⁸

⁷A due process analysis is not necessary for the disposition of this case. As discussed above, the rules of statutory construction support a finding that "safe to be at large" is shorthand for "no longer an SVP." The due process issue lends support to the statutory construction analysis because courts should adopt, if possible, a construction of a statute that will uphold its constitutionality. In re C.W., 147 Wn.2d 259, 277 (2002).

⁸In In re Petersen (Petersen I), the Washington Supreme Court made clear that the nature of the initial commitment is indefinite. 138 Wn.2d 70, 79-80 (1999). With that clarification, the point remains the same. There must be a determination that the detainee "satisfies the same standards as required for the initial commitment." Hendricks, supra. Under the State's interpretation of SB 5582, the review determination, at least insofar as the defense proof is concerned, is no longer concerned with the initial commitment standards, but subject to a more restrictive standard.

Citing In re Young, 122 Wn.2d 1 (1993), the State argues that the Washington Supreme Court approved a “less generous” review process. State’s Br. at p. 30. The State is wrong. In Young, the Court explicitly did not address challenges to the review process because the issue was not yet before the Court. 122 Wn.2d at 43 n. 13.

The Court has, however, demanded strict procedural protections for RCW 71.09 review hearings. In In re Turay, 139 Wn.2d 379, 424 (1999), the Court addressed the due process limitations in the review process for RCW 71.09 cases, finding that the State bears the burden of proof at the review hearing. Later, in Petersen II, 149 Wn.2d at 795-99, the Court reaffirmed its holding that the burden of proof is on the State, and a trial on the merits is warranted when the detainee presents *prima facie* evidence that he no longer meets the initial commitment criteria.

The State makes much of the “indefinite” nature of an initial RCW 71.09 commitment in support of its arguments. This issue is neither contested nor helpful to the State. An indefinite commitment is not presumed to be forever (e.g. “lifetime”) as the State implies. Unlike a determinant commitment, an indefinite commitment requires a meaningful review process.

The State also argues that Mr. Ambers is making a “collateral attack” on the initial commitment, or attempting to “overturn” the initial

commitment. The State misrepresents Mr. Ambers' position. Mr. Ambers primarily argues that he is no longer an SVP due to changes from treatment progress. The focus of the review hearing is the detainee's "current condition." The issues are not the same as the initial commitment; thus, *res judicata* does not apply. For example, in People v. Munoz, 129 Cal.App.4th 421 (2005), the court addressed an SVP recommitment trial where the jury was informed of the prior commitment finding. The Court stated:

The prior [SVP] finding has no *res judicata* effect with regard to the issues of the defendant's mental condition or dangerousness since, as noted above, it dealt with a different issue, i.e., whether the defendant then had a *currently* diagnosed mental disorder rendering him dangerous.

Id. at 431.

Mr. Ambers is not contesting the initial commitment. Even if a recommitment trial is ordered, the issue is whether he "remains" an SVP. See RCW 71.09.090(3)(b). The State's attempt to phrase the issue as an attempt to overturn a prior adjudication is misleading and must be rejected.

B. No case supports the State's theory that due process allows a heightened release standard to be applied only to the detainee's evidence.

The State cites no case that supports its theory that the constitution would permit continued detention if the detainee shows he no longer

meets the initial commitment criteria. The only case that actually addresses the issue before this Court is In re Schottel, 159 S.W.3d 836 (2005), which construed the Missouri statute in a constitutional manner by finding that the “will not reoffend” review standard must be shorthand for the initial commitment standard. As such, Schottel squarely supports Mr. Ambers’ construction of the statute. The State’s attempts to distinguish Schottel are disingenuous.

First, the State argues that Schottel didn’t have legislative findings “disproving a statutory interpretation that allowed release trials based on a mere disagreement with the annual review.” State’s Br. at p. 24 n. 12. However, the State misstates the legislative findings accompanying SB 5582. The legislative findings accompanying SB 5582 actually state:

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**.

(Emphasis added.) CP 308-09 (SB 5582 sec. 1). The legislative history also unambiguously contradicts the State’s theory.⁹ Both the legislative findings and the legislative history support the interpretation advanced by Mr. Ambers and adopted by the court in Schottel.

⁹The House Bill Report states, in part, that a recommitment trial is required “when the detainee shows” “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 State attempts to distinguish Schottel by arguing that Missouri commitments “are not indefinite.” While the State accurately quotes the case, the supposed distinction made by the State is a gross mischaracterization of the Missouri statute. Immediately after stating that a “person is not committed indefinitely,” the Schottel court describes a review process that is very similar to RCW 71.09.090. Id. at 839. The State argues that the review process in Missouri is “more akin to an annual recommitment proceeding.” State’s Br. at 24 n. 12. This is wrong. In Missouri, if the facility recommends release, a trial is ordered on the issue. RSMo sec. 632.501. This is similar to RCW 71.09.090(1). If the detainee seeks release over the director’s objection, a probable cause hearing is held similar to RCW 71.09.090(2). See id; RSMo sec. 632.498.

The State argues that the Missouri statute went beyond “safe to be at large” to require a showing that the person “will not engage in acts of sexual violence.” This is disingenuous because the State later concedes that the dictionary definition of “safe to be at large” standard means “free from risk.” State’s Br. at p. 22. There is no distinction between zero risk and “free from risk.”

While the State of Washington is not bound by the Missouri prosecutor’s concession that the rules of statutory construction and due process require that the review standard be the same as the initial

commitment standard, the concession made in Schottel illustrates the novelty of the State's arguments.

The State cites sexually violent predator commitment cases from other jurisdictions, arguing that SVP detainees have limited rights for review hearings. See State's Br. at pp. 29-44 (citing SVP cases from Wisconsin, Missouri, North Dakota and Iowa). None of these cases support the State's conclusion that a standard for release that is higher than the commitment criteria may be imposed on the detainee at the review hearings. All of the SVP statutes in these states have review hearings for unconditional release that are very similar to the Washington scheme upheld in Petersen II, supra.¹⁰ The limited review hearings approved by Petersen II are not challenged here. Furthermore, in each of those other states, a recommitment trial is required when there is some showing by the detainee that he no longer meets the initial commitment criteria. See supra n. 10.

In People v. Munoz, 129 Cal.App.4th 421 (2005), the California court addressed the constitutional requirement for a periodic determination that the person currently meets the initial commitment criteria, stating:

¹⁰See Iowa code sec. 229A.8(1) (A recommitment trial is necessary "when facts exist to warrant a hearing to determine whether a committed person no longer suffers from a mental abnormality which makes the person likely to engage in predatory acts....."); N.D.C.C sec. 25-03.3-17(2) and 25-03.3-18; RSMo sec. 632.498; WI sec. 980.09(2)(a), (b) (Recommitment trial required when detainee shows that facts exist that he is no longer an SVP.)

This requirement for what is essentially a new determination of SVP status every two years arises from the logical and constitutional requirement that any SVP commitment be based on a *currently* diagnosed mental disorder which makes it likely the person will engage in sexually violent criminal behavior. . . .

Id. at 430. While the California statute at issue required a new commitment trial every two years, the due process analysis is applicable to Washington's review process. The review hearing must focus on the original commitment criteria because detention can only last so long as the person meets the initial criteria for commitment.

The insanity cases cited by the State do not support imposing a standard on the detainee that is more demanding than the initial commitment standard. Insanity cases are not analogous to RCW 71.09 commitments. An insanity acquittee has advanced insanity as a defense and proven that his criminal act was a product of mental illness. Jones v. United States, 463 U.S. 354, 367-68 (1983); Foucha v. Louisiana, 504 U.S. 71,109, 114 (1992) (Thomas, J., dissenting). Distinguishing Addington v. Texas, 441 U.S. 418 (1979), a case involving the burden of proof for civil commitment cases, the Court determined that it is constitutional for insanity acquittees "to share equally with society the risk of error." Jones, 463 U.S. at 367. In Addington, the Court stressed the risk of error must be born by the State in civil commitment cases. 441 U.S. at 427.

Moreover, an insanity commitment can be definite; it is limited to the statutory maximum for the crime. See RCW 10.77.020(3). Once the maximum sentence expires, the State must seek commitment under traditional civil commitment laws to continue confinement.

Washington courts have already determined that the State bears the burden of proof at RCW 71.09.090 review hearings. See Petersen II, supra. While insanity commitments place the burden for obtaining release on the detainee, it does not change the release standard once a person is committed. Compare RCW 10.77.010(4) with RCW 10.77.200(2) (Same standard for commitment and unconditional release.)

No case approves of a more onerous factual standard applied to just one party. While various commitment schemes may allocate the burden of proof differently, none change the substantive standards for one party.¹¹ Insanity commitments at least give the detainee an opportunity to contest continued confinement under the same standards. If an RCW 71.09 detainee were treated similarly to insanity detainees, he would be released if he proved by a preponderance of the evidence that he no longer met the commitment criteria. Under the State's theory, such an RCW

¹¹ It is important to distinguish between issues such as the standard of proof in SVP cases (e.g. prima facie evidence or preponderance) from the commitment criteria. See In re Brooks, 145 Wn.2d 275, 293-98 (2001) (Distinguishing the burden of proof, e.g. beyond a reasonable doubt, from the facts to be proven to justify commitment, e.g. likely to reoffend.), reversed on other grounds, In re Thorell, 149 Wn.2d 724 (2003).

71.09 detainee would not even obtain a trial on the merits because he did not prove that he satisfies the more stringent “safe” standard.

The State argues that the Court’s decisions in Young AR and Ward have been “legislatively superseded.”¹² The Legislature, however, cannot “supersede” the Court’s determination of what due process requires. Marbury v. Madison, 5 U.S. 137 (1803); Wash. State Labor Council v. Reed, 149 Wn.2d 48, 62 (2003) (“The ultimate power to construe . . . the constitution . . . belongs to the judiciary. This is so even when the interpretation . . . is contrary to the view of the constitution taken by another branch.”) If SB 5582 imposes a release standard on the detainee that exceeds the initial commitment criteria, it violates the due process requirements outlined in Young AR and Ward, and it must be found unconstitutional.

C. The factors articulated in Mathews v. Eldridge,¹³ require a trial where the detainee presents evidence that he is no longer an SVP.

1. Mr. Ambers’ liberty interest is fundamental.

The first factor, “the private interest that will be affected by the official action” is not “mixed” as the State argues. Civil commitment

¹²The State also complains about the length of the due process analysis in Young AR and Ward. State’s Br. at p. 43. A more lengthy analysis was not required by the Court because the basic principle is so well established: if there is evidence that the person no longer meets the initial commitment criteria, then a full evidentiary hearing is required.

¹³ 424 U.S. 319 (1976).

involves a “massive deprivation of liberty.” Humphrey v. Cady, 405 U.S. 504, 509 (1972). Any other interests for the detainee must be secondary to his liberty interests.

The State argues that Mr. Ambers has an interest in treatment. However, Mr. Ambers’ interest in obtaining treatment has already been achieved. While the State’s argument that “continued treatment is a benefit” might be applicable for a new detainee who has not participated in treatment, such an argument does not apply to Mr. Ambers who has been involved in treatment for the last 11 years at the SCC and his petition for unconditional release is based on treatment progress.

The State’s assertion that Mr. Ambers has chosen to seek unconditional release rather than confronting issues surrounding the LRA revocation is without analysis.¹⁴ State’s Br. at 40 n. 18. Seeking unconditional release does not mean that Mr. Ambers no longer participates in treatment or that he has no plans to seek treatment in the community. The State’s analysis incorrectly assumes that anyone who seeks unconditional release is not properly invested in treatment. By making this argument, the State seeks to disparage a detainee simply because he asserts his statutory and constitutional rights; as if the assertion

¹⁴ Mr. Ambers’ LRA was eventually revoked because his treatment provider terminated him. CP 616-17. The other allegations cited by the State were not agreed upon.

of such rights proves that the detainee is not entitled to the relief he requests.¹⁵ This reasoning must be rejected.

Citing Parham v. J.R., 442 U.S. 584 (1978), the State argues that Mr. Ambers' interests are mixed, thus, justifying less stringent judicial review of the commitment. The State neglects to mention that the Court stated, on two separate occasions, it was not addressing the adequacy of the review provisions of the Georgia statute, stating:

[W]e have no basis for determining whether the review procedures of the various hospitals are adequate to provide the process called for or what process might be required if a child contests his confinement by requesting release.

(Emphasis added.) Id. at 617; id. at 607 n. 15.

Additionally, Parham involved commitment of children by their parents. Thus, the due process analysis is very different than an RCW 71.09 proceeding. In Parham, the private interests that are affected by the State action included both the liberty interest of the child and the rights of the parents to commit their child to a hospital. 442 U.S. at 600 (The child's interests are "inextricably linked with the parents' interests.") The Court stated:

In defining the respective rights and prerogatives of the child and parent in the voluntary

¹⁵ The same is true of the State's argument that trials are an "interruption" of treatment.

commitment setting, we conclude that our precedents permit the parents to retain a substantial, if not the dominant, role in the decision, absent a finding of neglect or abuse, and that the traditional presumption that the parents act in the best interests of their child should apply.

Id. at 604. Thus, the private interests considered by the Court (e.g. parental authority, burdens imposed on parents by adversarial system, burden imposed on child/parent relationship by adversarial system) were very different than this case in which the liberty interest of the detainee is paramount.

The Georgia scheme reviewed in Parham was also very different than commitments under RCW 71.09. The child's civil commitment could be revoked, at any time, by the parents of the child. Id. at 591, citing sec. 88-503.3(a) (1975). Commitments under the Georgia statute included frequent reviews and were very limited in duration. See id. at 591-95 (Reviews were either weekly or monthly and average commitments were 71 – 456 days.) The Court also noted that the social stigma of commitment under the Georgia statute is “not equated with the community response resulting from being labeled by the state as . . . mentally ill and possibly dangerous.” Id. at 600. The analysis of the first due process prong, private interests, is therefore very different under RCW 71.09 which confines detainees for life, with only annual reviews, and puts upon

those detained the most derogatory term in the legal lexicon, “sexually violent predator.”

2. The risk of erroneous deprivation of liberty is substantial if the State’s theory is adopted.

The U.S. Supreme Court has determined that, with civil commitment statutes, the risk of error must be born by the State. Addington, 441 U.S. at 427. The State’s theory shifts the risk entirely upon the detainee because the DSHS recommendation would be the sole basis for a detainee to obtain an unconditional release trial. The State’s burden at the review hearing is very low; it only has to present *prima facie* evidence of “no change.” Petersen II, 145 Wn.2d at 798. The detainee has limited rights during the review process, including: no right to counsel at the DSHS examination,¹⁶ no right to be present at the actual hearing, RCW 71.09.090(2)(b), and no right to cross examine the State’s evidence at the review hearing. Id. If the detainee’s burden is to show that he is “free from risk” then the review process is a sham because it’s impossible to assert that anyone is “free from risk.” DSHS does not recommend unconditional release based on treatment progress.¹⁷ The

¹⁶ See In re Petersen (Petersen I), 138 Wn.2d 70, 92-93 (1999).

¹⁷ In Mr. Ambers’ Opening Brief, he cited a book chapter that indicates that DSHS has never recommended unconditional release for a detainee. 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. Without citation, the State’s responds that DSHS has made “several”

State's analysis puts DSHS in complete control over who qualifies for an unconditional release trial.

The State cites several cases that address civil commitment schemes for other, non-SVP, populations that provide only administrative reviews. See e.g. Parham, supra. These cases must be read in light of more recent Supreme Court precedent. In Zadvydas v. Ashcroft, 533 U.S. 678 (2001), the Court stated:

This Court has suggested, however, that the Constitution may well preclude granting an administrative body the unreviewable authority to make determinations implicating fundamental rights.

Id. at 692.

While RCW 71.09 detainees are entitled to a “judicial review” of their commitment, the judicial review matters little if the substantive standard for the detainee is “free from harm” and the State only has to show *prima facie* evidence of “no change.” The “free from harm” standard truly makes the review process an administrative review because the DSHS report becomes the sole means by which a detainee would obtain an unconditional release trial.

Moreover, an “administrative review” process would not allow the opposing party, the prosecutor, to contest the administrative decisions.

release recommendations but that DSHS more typically recommends conditional release. Even if DSHS has suddenly made unconditional release recommendations in the last year, they must be few, and certainly only due to a detainee's physical incapacity (e.g. stroke) and not as a result of the detainee's treatment participation.

Under RCW 71.09.090(1), a DSHS recommendation does not automatically result in an unconditional or conditional release; it simply results in a trial on the issue. The State, or local prosecutor, can oppose the release at trial. This authority to contest DSHS cannot be underestimated as it still can defeat a DSHS recommendation. See e.g. *Jurors Reject Request to Free 8 Time Rapist*, Seattle Times, Aug. 19, 2000. (Prosecutor successfully opposed at trial a less restrictive alternative recommended by DSHS.)¹⁸

3. The State exaggerates the impact on the government's interests.

The State's interest in protecting society is served by the recommitment trial. Mr. Ambers does not ask this Court for outright release; he seeks an opportunity to have a jury decide the issue on its merits. The State argues that community safety is endangered because it could lose recommitment trials. The State's scare tactics notwithstanding, a review process that incorporates the initial criteria will not result in the "erroneous release" of RCW 71.09 detainees. There is no reason to believe

¹⁸ The prosecutor can also exert a virtual veto over the management of an LRA. In King County, the State has successfully argued that once an LRA is implemented, the trial court may not lessen the conditions over the prosecutor's objections even if DSHS and DOC support the relaxed conditions.

that the State will “erroneously” lose SVP trials.¹⁹ Instead, the State’s theory would result in the continued erroneous detention of people who no longer meet the commitment criteria.

The State greatly exaggerates potential administrative costs. The State argues that recommitment trials would be obtained “with relative ease” and the detainee would be able to obtain a “new trial” “every year.” State’s Br. at pp. 40-42. This argument distorts the issues in this case. Mr. Ambers’ petition for an unconditional release trial is based on his years of treatment. Even under the Court’s analysis in Young AR, where the Court ordered a recommitment trial based on advancing age instead of treatment, the Court rejected the possibility of “yearly” trials because there must be significant change since the last SVP determination. Young AR, 120 Wn.App. at 764.

Since the Sexually Violent Predator Act was passed in 1990, there have been no unconditional release trials. No Washington appellate opinion addresses an unconditional release trial because none have taken place. Thus, the governmental interest in keeping administrative costs down is greatly exaggerated. Furthermore, any such costs pale in comparison to the strong liberty interest of the detainee, and the costs born

¹⁹ Unlike criminal cases, the State can appeal an adverse SVP verdict. Also, if a detainee is unconditionally released, the person could be detained under a new RCW 71.09 petition if he commits a recent overt act in the community.

by society when detainees are incarcerated after they no longer meet the initial commitment criteria.

III. MR. AMBERS PRESENTED PROBABLE CAUSE THAT HIS CONDITION HAS CHANGED THROUGH A POSITIVE RESPONSE TO TREATMENT SUCH THAT HE IS NO LONGER A SEXUALLY VIOLENT PREDATOR.

The trial court properly determined that Dr. Abracen's report and declaration were *prima facie* evidence that Mr. Ambers' condition has changed through a positive response to treatment such that he is no longer an SVP. CP 488-90 (No. 6 and 9). If this Court determines that the "safe to be at large" standard is shorthand for "no longer an SVP," then this Court must reverse and remand for an unconditional release trial.

The trial court properly found that Dr. Abracen sufficiently identified treatment progress as the means by which Mr. Ambers' risk has been ameliorated. CP 488-89 (Conclusion No. 6). The trial court rejected the State's arguments that Dr. Abracen did not identify a treatment-based change. CP 488-89; VRP at 37-38.

The State claims that the only change identified by Dr. Abracen is the risk assessment method. State's Br. at p. 47. This statement by Dr. Abracen is taken out of context. In context, the exchange took place over several pages where the State asked questions regarding the actuarial risk part of the risk assessment. The trial court properly placed Dr. Abracen's

statements in the context of a lengthy discussion regarding one part of his assessment that included actuarial tools and other dynamic factors. CP 488-89; VRP 36-38. The end of the deposition discussion in question is set forth below.

Q So there has been no change in Mr. Ambers' risk?

A No. But Mr. Ambers' risk has been reduced since that time as a result of having been involved in treatment for quite a number of years.

Q But --

A And certainly there are a number of treatment reports which speak to the fact that his risk has been reduced and he has addressed a number of risk factors. That being said, of course he still -- there are examples of lapses in his behavior. So leaving aside the actuarial instruments, I think there have in fact been changes in Mr. Ambers' behavior such that his risk has been reduced further than is specifically indicated by those measures. And again, I think that if you look at my scoring of the Stable, much of that information for both better and worse is included.

Q You see him as always having been below 50 percent in risk, right?

A Based on the current technology, yes.

....

Q So you cannot point to a date after 1998 when Mr. Ambers engaged in a continuing course of treatment such that he went below 50 percent, but was previously above 50 percent?

A Again, based on our assessment of risk or -- you know, using the current technologies, I don't think that, using these technologies, he was ever above the 50 percent threshold, again, simply looking at the actuarials.

Q So the relevant change here is not really in Mr. Ambers. The relevant change is in the types of risk assessment instruments --

A That's not entirely true. There has been change in Mr. Ambers.

Q I need to finish my question.

A Okay.

Q We're talking about the relevant change, which is when he went from being over 50 percent to under 50 percent, has to do with the methods of risk assessment, not with Mr. Ambers' treatment specifically, correct?

A Yes, correct. Again, we're specifically looking at the actuarial assessments here.

(Emphasis added.) CP 465 (Deposition at pp. 58-61). As noted in the deposition and his report, Dr. Abracen used other, non-actuarial, factors in assessing Mr. Ambers' risk, including treatment progress and the Stable 2000, a measure of dynamic risk factors. See e.g. CP 466 (Dep. 63:12 – 64:3); CP 197-213, 215 (Dr. Abracen's Report and Declaration). Dr. Abracen's deposition must be viewed in light of his report where he unequivocally stated that Mr. Ambers' condition has changed because of treatment such that he is no longer a sexually violent predator. See CP 207, 215.

During follow-up questioning, Dr. Abracen made clear, as he did in his report, that he took the commitment finding in 1998 for granted, CP 467 (Dep. 66:14-16), and he stated that the 1998 commitment decision was “a very reasonable decision” “based on the technology that existed at the time.” Id. (Dep. 67:8-9).

The State argues that Dr. Abracen's opinion should be disregarded because he “disagrees” with the prior commitment. This is neither true

nor relevant. Dr. Abracen agreed that Mr. Ambers was properly committed using techniques available at the time. Id.

The Court in Young AR rejected the same arguments raised by the State. First, the Court stated:

We reject the State's argument that because Dr. Barbaree's actuarial age study implicitly suggests Young was never an SVP at all, his assessment is conclusory. First, Dr. Barbaree did not state that Young was never an SVP. Nor does he state he would have rendered that opinion in 1991. Rather, he presumes Young was an SVP in 1991 and clearly states in his report that Young no longer meets that definition because of his advanced age.

Id. at 762. Like the expert in Young AR, Dr. Abracen clearly states in his report that Mr. Ambers no longer meets the definition of an SVP because of his treatment progress. CP 207, 215. Just as in Young AR, this presumes Mr. Ambers was an SVP at the time of commitment.

The Court also determined that the expert's current opinion about the validity of the past SVP determination is not relevant. The Court stated, "What new scientific studies do or do not show about Young's risk to reoffend in 1991 is not relevant to the ultimate question . . ." Id. at 763. Dr. Abracen's opinion on the propriety of the initial commitment is simply not relevant. There is nothing in the statute that requires the detainee's expert to make a separate determination that he agrees that the initial commitment was correct using the latest scientific evidence. At best, any

supposed “disagreement” would go to the weight of his testimony on the “change in condition” issue. However, such “weighing of the evidence” is prohibited at the review hearing.

As in Young AR, the State’s preoccupation with the detainee’s expert’s current opinion regarding the initial commitment is misleading. The proper focus at the hearing, and in the reports, must be on the detainee’s changes through treatment. Opinions about the validity of past commitment decisions simply highlight the fact that psychology is an evolving science. An expert cannot make an independent determination of what he would have concluded eight years ago. Should he use the current scientific criteria and methods, or only the knowledge that was available at the time of commitment? Should he assume the detainee’s risk at the time of commitment was extremely high (e.g. 95% risk of reoffense), or something lower but still meeting the “likely” standard (e.g. 51%)? Or, as the State asked in the deposition, must the expert determine the precise “day” that the detainee’s risk declined sufficiently to be “safe” or “unlikely” to reoffend? See e.g. CP 465 (Dep. 61:6-8).

In State v. Klein, 156 Wn.2d 102 (2005), an insanity acquittee argued that she should be released once she recovered from the originally diagnosed condition that prompted her commitment, even though she continued to suffer from a mental disease or defect. Id. at 119. The Court

rejected this argument because it “would require difficult, if not impossible, comparisons between the original and present conditions of an acquittee.” Id. at 120. Citing the evolving nature of psychology, the Court stated that the “feasibility of such comparisons is doubtful.” Id.

Similarly, in Munoz, the court stated:

The logical and constitutional necessity for an independent finding of a current mental disorder rendering the defendant dangerous arises not simply from the serious consequences that result from the finding but from the variability of such disorders and their effect on predictions of behavior.

(Emphasis added.) 129 Cal.App.4th at 430. The evolving standards and science of risk assessment, therefore, make comparisons between a person’s past and current conditions of little value.

The State’s argument that the detainee’s expert must independently confirm the validity of the initial commitment would not only be impossible, but it would lead to absurd results in cases where there are legitimate changes in the science. An expert could find that a detainee has made profound progress in treatment and reduced his risk drastically such that the detainee’s current risk is somewhere near a 1% risk of recidivism. If that expert, however, determined that the detainee’s risk at the time of commitment was 49%, the State would insist that the expert’s opinion be disregarded because the expert “disagrees” with the initial commitment.

An analysis, such as the State's, that approves of such a result should not be followed.

For the first time, the State argues that the relevant period of change to be addressed is from May 27, 2003, to the 2006 annual review hearing. Because the State failed to raise this issue before the trial court, it is waived. Failure to raise an issue before the trial court precludes a party from raising it on appeal. Smith v. Shannon, 100 Wn.2d 26, 37 (1983). This rule affords the trial court an opportunity to rule correctly upon a matter before it can be presented on appeal. Lake Air, Inc. v. Duffy, 42 Wn.2d 478, 482 (1953). Unlike an alternative legal theory, the new timeframe issue raised by the State is factual in nature and, if raised below, would have allowed Mr. Ambers to more fully develop the record.

Furthermore, the State conceded at the review hearing that the relevant time period dated back to 1998. See CP 290:12; VRP 12:19-20 (“Dr. Abracen’s opinion doesn’t show change from 1998 to 2006.”). Thus, the State waived this issue on appeal.²⁰

²⁰ Even if not waived, the State’s argument must fail on the facts. A close examination of the 5/27/03 Stipulation and Order for Conditional Release shows there is no finding that Mr. Ambers agreed that he was not eligible for unconditional release. Mr. Ambers stipulated that his 1998 commitment was valid under current caselaw. See CP 586-601 (Stipulation #1.) There was not a judicial determination that Mr. Ambers was an SVP at the time of the 2003 stipulation. At best, the 2003 stipulation contains introductory language that Mr. Ambers is an SVP, but there are no findings on that issue. Mr. Ambers simply agreed to waive his unconditional release trial in exchange for an agreed LRA. This can hardly be seen as a “full consideration” of the issue called for in Young AR. See 120 Wn.App. at 764.

The State agrees that Dr. Abracen “saw changes in Mr. Ambers over the course of the commitment” due to treatment participation. State’s Br. at p. 46. The changes in Mr. Ambers’ behavioral patterns were undeniable. He obviously went from an untreated offender when he came to the SCC to the point where DSHS recommended an LRA. However, the State discounts this progress as “not the type of ‘substantial change’ that rendered him ‘no longer’ a sexually violent predator.” State’s Br. at p. 46. Apart from the State’s implicit endorsement of the correct “no longer an SVP” standard, the State’s blanket assertion that Mr. Ambers’ changes were not the sufficient “type” of change to meet criteria for a trial goes to the weight of the evidence.

This Court must affirm the trial court’s finding that Mr. Ambers presented *prima facie* evidence that his condition has changed through treatment such that he is no longer an SVP. See CP 489-90. He has satisfied his burden under RCW 71.09.090(2) and .090(4). Because Dr. Abracen addressed the correct standard, a recommitment trial is required.

IV. AN UNCONDITIONAL RELEASE TRIAL IS REQUIRED WHEN THE DETAINEE PRESENTS PRIMA FACIE EVIDENCE THAT HE IS NOT A SEXUALLY VIOLENT PREDATOR, REGARDLESS OF ANY CHANGE IN HIS MENTAL CONDITION OR RISK.

As discussed above, the trial court found that Mr. Ambers presented *prima facie* evidence that his condition has changed through

treatment such that he is no longer a sexually violent predator. CP 488-89. If this Court determines that the “safe” standard incorporates the commitment criteria and affirms the trial court’s factual findings, it need not address this issue.²¹

The Court in Young AR and Ward plainly held that due process requires a recommitment trial if the detainee presents new scientific evidence that he does not currently meet the commitment criteria, regardless of any changes in the person’s mental condition. Young AR, 120 Wn.App. at 763-64; In re Ward, 125 Wn.App. 381, 386 (2005). Cases from Wisconsin support this analysis. See In re Pocan, 267 Wis.2d 953, 671 N.W.2d 860, 863 (2003); and In re Combs, ___ N.W.2d ___ (WI Ct. App. 2006).

The State argues that Pocan is questionable precedent in light of the more recent decision in Combs. This argument lacks merit. In Combs, a Wisconsin SVP case, the detainee presented evidence at a review hearing showing he was not an SVP. Pocan, at 8-15. The detainee’s expert explicitly did not rely on “treatment progress” in finding that the detainee did not meet the commitment criteria. Id. at 12-14. Reiterating the holding in Pocan, the Wisconsin court stated:

²¹ To be clear, the “new science” due process analysis discussed in this section is different than his argument that due process requires a trial if he can show that his condition has changed through treatment such that he no longer meets the initial commitment criteria.

[T]he significant point of our holding in *Pocan* is that probable cause to believe a person is "no longer ... sexually violent" may be established by a method professionals use to evaluate whether a person is sexually violent that was not available at the time of the prior examination, as well as by a change in the person himself or herself.

(Emphasis added.) *Id.* at 21. The Court then held:

We conclude the legislature did not intend that probable cause . . . may be established by an expert's opinion that a person is not sexually violent without regard to whether that opinion is based on matters that were already considered by experts testifying at the commitment trial or a prior evidentiary hearing. Rather, we conclude that the legislature intended that, in order to provide a basis for probable cause to believe a person is no longer sexually violent . . ., an expert's opinion must depend upon something more than facts, professional knowledge, or research that was considered by an expert testifying in a prior proceeding that determined the person to be sexually violent. By way of example, an opinion that a person is not sexually violent based at least in part on facts about the committed person that did not occur until after the prior adjudication would meet this standard, as would an opinion based at least in part on new professional knowledge about how to predict dangerousness. These examples are not exhaustive.

Id. at 28-29. (Emphasis added. Citations and footnotes omitted.)

Here, Dr. Abracen relied on actuarial tools that were not available at Mr. Ambers' initial commitment hearing. Even assuming *arguendo* that Mr. Ambers' mental condition has not changed through treatment, he has identified new actuarial tools that indicate he is not currently eligible for commitment. Therefore, due process requires a hearing on the issue.

This Court should affirm its reasoning in Young AR that scientific advances showing the detainee is no longer an SVP must be considered at

the review hearing. Young AR, 120 Wn.App. at 764. Without such a rule, detainees will remain committed even if the commitment was based on outdated and inaccurate science.

The State argues that a new trial will be ordered if DSHS finds that the detainee never was an SVP in the RCW 71.09.070 evaluation. State's Br. at p. 34 n. 15. However, under RCW 71.09.090(1) and RCW 71.09.090(4)(b), a recommitment trial can only be held if the person's condition has changed, regardless of a new finding that the detainee is not an SVP based on more accurate scientific methods. Curiously, the State agrees there are significant constitutional concerns if new techniques find that the person never was an SVP. To address this, the State suggests that the "change" requirements in RCW 71.09.090 must be read out of the statute to preserve its constitutionality.

In re Elmore, 139 P.3d 1140 (8/8/06), implicitly acknowledges that new scientific information can be the focus of the review hearing. Addressing a new diagnosis made at the time of the annual review, the Court stated:

This information was available for Elmore to present at his initial commitment hearing. Because he chose not to do so and stipulated . . . we hold that he cannot now collaterally attack that initial report on appeal."

Id. at 24. The Court also noted that the actuarial risk assessments did not change from the time of the commitment to the review hearing, stating:

As Dr. Wollert notes, the results of Elmore's scoring have not changed. Because this was the same evidence that was available at the initial commitment hearing, we hold that the trial court properly discounted it as evidence of change warranting a new trial.

Id. Here, the Court acknowledges that new risk assessment tools are properly considered at the review hearing.

Due process requires a review procedure that examines the detainee's current mental condition and risk in such a way that accounts for the evolving nature of psychological judgments. Such a rule is consistent with prior judicial acknowledgements of the inexact nature of psychology and the imperfect fit between psychology and the law. See Jones, 463 U.S. at 365; Greenwood v. U.S., 350 U.S. 366 375 (1956); Klein, 156 Wn.2d at 120; Munoz, 129 Cal.App.4th at 302. To simply assume the validity of the past commitment would preclude the courts and experts from examining cases using the most up-to-date science.²²

Because Mr. Ambers has presented *prima facie* evidence that he is not

²² Forensic experts have an ethical duty to stay abreast of the latest scientific developments. See Ethical Standards, American Psychological Association, sec. 1.05 (Maintaining Expertise). Therefore, it would be unethical to essentially require experts to assume that the initial commitment decision was correct even if current techniques suggest otherwise.

likely to reoffend based on advancements in risk assessment techniques, a trial on the issue must be ordered.

V. CONCLUSION.

This Court must reverse the trial court and order a recommitment trial because Mr. Ambers presented *prima facie* evidence that his condition has changed through a positive response to sex offender treatment such that he is no longer “likely” to commit future acts of predatory sexual violence.

A recommitment trial must be ordered based purely on statutory construction. Because the “safe” standard in RCW 71.09.090(4)(b)(ii) applies to any evidence considered at the review hearing, not just the detainee’s evidence, it must be construed consistently with the numerous other references to the initial commitment criteria within the review process.

If the Legislature intended the “safe” standard to stand for a more restrictive release criteria, this Court must find that the amendment violates procedural and substantive due process. A “safe” standard that does not incorporate the commitment criteria would unconstitutionally expand the scope and purpose of the statute, violating substantive due process. Furthermore, such a standard would unconstitutionally balance “efficiency” and administrative deference over the liberty interests of the

detainee. Such a process would unconstitutionally risk the erroneous detention of people who no longer meet the initial commitment criteria. To correct such an unconstitutional scheme, this Court must impose upon the statute a scheme approved by the Court in Petersen II, *supra*, where a recommitment trial is required when the detainee presents *prima facie* evidence that his condition has changed such that he no longer meets the commitment criteria.

Finally, should this Court find that Dr. Abracen's materials do not constitute *prima facie* evidence of sufficient "change" in Mr. Ambers' condition, this Court must still order a recommitment trial. Under Young AR and Ward, a recommitment trial is required when the detainee presents *prima facie* evidence that he currently is not a sexually violent predator when that determination is based on changes in the scientific techniques since the last commitment determination. See Young AR, 120 Wn.App. at 764; Ward, 125 Wn.App. at 386.

Dated this 25 day of September, 2006.

Respectfully submitted,



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