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No. 57926-6-I

WASHINGTON COURT OF APPEALS, DIVISION ONE

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In re the Detention of

KEVIN AMBERS

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STATE'S RESPONSE BRIEF

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ORIGINAL

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I. **INTRODUCTION**

As recognized in *In re Young*, 122 Wn.2d 1, 26, 857 P.2d 989 (1993), the indefinite civil commitment of sexually violent predators is justified by the twin compelling state interests of community safety and sex offender treatment. Contrary to these compelling interests, two recent lower appellate court decisions -- *In re Young (Young AR)*, 120 Wn.App. 753, 86 P.3d 810 (2004) and *In re Ward*, \_\_\_ Wn. App. \_\_\_, 104 P.3d 747 (2005) -- interpreted the annual review provisions of RCW 71.09.090 to effectively remove all incentive to engage in sex offender treatment and to facilitate premature release trials of untreated sexually violent predators. Laws of 2005, ch. 344 § 1 (legislative findings). The Legislature responded quickly through SB 5582 by unanimously amending the annual review provisions to clarify that defense- initiated release trials were necessary only upon a showing of "substantial change" in the person's condition brought about through "continuing participation in treatment," which renders the person "safe to be at large" in the community. Laws of 2005 Ch. 344 (SB 5582). Because the SB 5582 amendments restore the RCW 71.09 focus "in treating sex predators and in protecting society from their actions," *Young*, 122 Wn.2d at 26, the trial court decision denying a release trial for appellant Kevin Ambers should be affirmed.

## **II. ISSUES**

A. Do the SB 5582 amendments to RCW 71.09.090 require an enhanced showing when a sexually violent predator seeks a release trial over the objection of the Department of Social and Health Services (DSHS) annual review and against the continuing effects of his indefinite civil commitment?

B. Does SB 5582 violate due process by requiring a "substantial change" in the sexually violent predator's mental condition brought about through "continuing participation in treatment" which indicates that the person is "safe to be at large" in the community when the predator seeks a release trial solely on the opinion of his own retained defense expert?

C. Does the proof submitted by Ambers warrant a release trial when Ambers confirmed that he was a sexually violent predator as recently as May 27, 2003, but his retained expert disagrees that Ambers was ever a sexually violent predator and fails to opine to the "safe to be at large" standard?

## **III. FACTS**

### **A. Procedural History of Ambers Civil Commitment**

On October 30, 1996, just prior to his release from prison on one count of Rape in the First Degree and one count of Rape in the Second

Degree with Forcible Compulsion, the State initiated RCW 71.09 civil commitment proceedings against Kevin Ambers . CP 125 (Affidavit of Probable Cause). The facts that resulted in initiation of commitment proceedings are set forth in the Affidavit of Probable Cause. *Id.*

Following discovery and depositions, a lengthy Fall 1997 jury trial before Judge Lasnik hung 10-2 in the State's favor.

A mistrial was declared and the matter reset for jury trial on January 5, 1998. On the first day of re-trial, Ambers agreed to commit himself by stipulation. CP 164. In return to stipulating to commitment under RCW 71.09, the State waived the requirement of a show cause hearing and allowed Ambers the possibility of an LRA trial and unconditional release trial 18 months after the date of the stipulation. *Id.* By agreement of the parties, this trial was continued a year so that Ambers could "continue his efforts for treatment at the Special Commitment Center." Supp. CP \_\_\_\_ (Sub. 181; Stipulated Order Continuing LRA Trial).<sup>1</sup>

On July 7, 2000, the parties resolved the questions of whether Ambers was entitled to an LRA trial and a recommitment trial by entering a further detailed stipulation. Supp. CP \_\_\_\_ (Sub. 202; Stipulation and Agreement Waiving July 10, 2002 Trial). Under this stipulation, Ambers

expressly waived "his right to a jury trial on July 10, 2000 where . . . the issue to be decided was whether [Amber's] 'mental abnormality or personality disorder remain such that he is likely to engage in predatory acts of sexual violence if conditionally released to a less restrictive alternative or unconditionally discharged.'" *Id.* at 2. Ambers waived any requirement for the State to prove beyond a reasonable doubt that Ambers mental condition and danger "remains such" that he should not be unconditionally released. *Id.* at 3. Amber's stipulation that he continued to meet RCW 71.09 civil commitment criteria was adopted "as the court's findings of fact in this matter." *Id.* at 8.

Under the July 7, 2000 stipulation, Ambers was entitled to an LRA release only so long as he maintained good behavior at the Special Commitment Center prior to his conditional release. The completed LRA plan was filed in Fall 2001 and a conditional release hearing was set for November 29, 2001. *See* Supp. CP \_\_\_\_ (Sub 211; Stipulated Scheduling Order).

In early November 2001, however, it was learned that Ambers made inappropriate contact during spring 2001 with a female, former SCC staffer by calling her home phone number. Supp. CP \_\_\_\_ at 2 (Sub.214; Motion for Jury Trial on LRA Issue). The behavior was of extreme

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<sup>1</sup> The State has filed supplemental designations of clerk's papers with this brief.

concern because Ambers has a long history of inappropriate behavior toward female staff, including stalking, inappropriate comments, and other behavior that is part of his rape offense cycle. *Id.* Of even greater concern, when confronted with his actions, Ambers lied about this contact to his treatment providers. *Id.*

As a result of this behavior, in accord with the July 7, 2000 stipulation, the State brought a motion to cancel the LRA release and force a jury trial. Ambers did not contest the State's motion. Supp. CP \_\_\_\_ (Sub. 215; Order Finding Probable Cause). The court granted the State's motion, setting an unconditional release and LRA trial on October 14, 2002. Supp. CP \_\_\_\_ (Sub. 218; Scheduling Order); Supp. CP \_\_\_\_ (Sub. 246; Order re Scope of Trial).

The question of whether Ambers continued to be a sexually violent predator and whether he should be released to a less restrictive alternative was resolved<sup>2</sup> by a May 27, 2003 stipulation. Supp. CP \_\_\_\_ (Sub. 282; Stipulation and Order for Conditional Release). Under the stipulation, which was entered by the court:

The Respondent, Kevin A. Ambers, in person and by  
counsel, Dennis Carroll and Laurie Fall, and the Petitioner, the

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<sup>2</sup> Prior to the 2003 stipulation, Ambers moved to withdraw his original stipulation to civil commitment. *See* supp. CP \_\_\_\_ (Sub. 245; Order Denying Motion to Vacate Stipulation). He appealed this order. Supp. CP \_\_\_\_ (Sub. 252; Notice of Appeal). As part of the May 27, 2003 appeal, Ambers abandoned his appeal and his effort to vacate the original stipulation.

State of Washington, through the King County Prosecuting Attorney, Senior Deputy Attorney David J.W. Hackett, *hereby submit the following stipulation and agreement that Kevin A. Ambers is a Sexually Violent Predator.*

*Id.* (Emphasis added) Ambers further agreed that his original 1998 stipulation that he is a sexually violent predator "remains valid." *Id.*

In accord with the May 27, 2003 stipulation, Ambers was granted conditional release to the McNeil Island Secure Community Transition Facility, a half-way house for sexually violent predators. Supp CP \_\_\_\_ (Sub. 291; Conditional Release Order). He was conditionally released on December 22, 2003.

He did not remain in the community very long due to persistent violations of his conditional release order. On March 17, 2005, the State moved to revoke the Ambers' conditional release. Supp. CP \_\_\_\_ (Sub. 293; Motion to Revoke LRA). His violations of the LRA order included: (1) Failure to follow his CCO's verbal instructions, (2) Violation of his treatment contract by failing to disclose active deviant fantasies, (3) Engaging in unauthorized contact with adult females, and (4) Viewing sexually explicit materials in violation of the release order. *Id.* Due to these violations and other problems, Amber's treatment provider determined to terminate Ambers from treatment. *Id.*

On December 20, 2004, following another agreement by the parties, the court entered an order revoking Ambers' conditional release. Supp. CP \_\_\_ (Sub. 304; Stipulated Order Revoking LRA). The result of this order was to retain Ambers in the Special Commitment Center subject to the annual review provisions of RCW 71.09.070 and .090.

**B. The Annual Review Process**

The current case involves the 2005 annual review of Amber's civil commitment as a sexually violent predator. In accord with RCW 71.09.070, Dr. Jonathan D. Allison of the Department of Social and Health Services examined Ambers to determine if he continued to satisfy the definition for civil commitment as a sexually violent predator and whether he should be conditionally released. CP 428-448. Because Ambers continued to meet criteria for civil commitment and needed more treatment prior to another attempt at conditional release, the Secretary of DSHS did not recommend Ambers for an automatic recommitment or LRA trial under RCW 71.09.090. CP 428.

Despite his recent failure at conditional release and his May 27, 2003 reaffirmation that he was a sexually violent predator, Ambers used the occasion of his 2005 annual review to seek unconditional release. CP 182. If unconditionally released, he would be free to enter the community without court restriction. In order to accomplish this purpose, he retained

a Canadian expert, Dr. Abracen, to opine that he had never been a sexually violent predator given the results of actuarial tools that had been developed after his original 1998 stipulation. CP 182.

There was no dispute that the RCW 71.09.070 annual review report by Dr. Allison satisfied the State's prima facie burden to demonstrate continuing grounds for Ambers' civil commitment. *See* VRP 1/19/2006 (no argument over sufficiency of Dr. Allison's report).<sup>3</sup> The court found that "the State has satisfied its prima facie burden through the submission of the DSHS annual review report . . ." CP 487.

On the remaining question of whether Dr. Abracen's report satisfied the statutory criteria for an unconditional release trial, the trial court found Abracen's report to be legally insufficient. CP 489-90. The court determined that Dr. Abracen failed to offer an opinion that was relevant to the legal standards adopted by the Legislature in SB 5582 during the 2005 legislative session. The trial court noted that "SB 5582 requires a professional opinion that respondent is 'safe to be at large if unconditionally released from commitment.'" *Id.* Dr. Abracen did not opine to the legally relevant standard:

9. Reviewing the report under the probable cause standard, Dr. Abracen does not establish probable cause for a recommitment trial because he fails to address the "safe to be at large" criteria in RCW

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<sup>3</sup> A copy of the transcript has been filed with the Superior Court.

71.09.090(4). Rather, he focuses his opinion exclusively on the "more likely than not" standard. Although a risk level of 36% might establish probable cause that respondent is no longer more likely than not to engage in predatory acts of sexual violence, it does not establish probable cause under the more stringent "safe to be at large" standard. Dr. Abracen does not opine to the relevant statutory standard.

*Id.* at 489-90.

The trial court further rejected Ambers' due process argument that he was entitled to a recommitment trial anytime he was able to hire an expert willing to opine that Ambers was not a sexually violent predator:

8. The court rejects respondent's due process argument that he is entitled to a re-commitment trial when his expert opines only that respondent falls below the "more likely than not" threshold for commitment, even if that change is due to treatment participation. As it has done in SB 5582, the Legislature may establish a risk threshold lower than "more likely than not" before allowing re-commitment trial proceedings from an indefinite commitment based on respondent's proof. The constitution does not require the grant of a recommitment trial merely because respondent's expert disagrees with the risk assessment or assessment of change in the annual review report. Respondent further argues that "safe to be at large" creates an absurd 0% risk standard that is impossible for respondent to meet. In his deposition, Dr. Abracen places Mr. Amber's risk of committing a new sexually violent offense at 36% over his lifetime. Because Dr. Abracen's opinion falls well above the zero percent range that respondent argues is constitutionally problematic, the court does not need to address respondent's constitutional argument.

*Id.* at 89.

Because the amendments in SB 5582 present a significant issue of great public importance, the State agreed to certify Ambers' annual

review for consideration by this court. The Commissioner accepted the certification.

**IV. IN ORDER TO ENCOURAGE TREATMENT COMPLETION, SB 5582 REQUIRES A PARTICULARIZED SHOWING IN ORDER FOR A DEFENSE EXPERT REPORT TO ESTABLISHE PROBABLE CAUSE FOR AN UNCONDITIONAL RELEASE TRIAL**

**A. The Annual Review Process**

Civil commitments under RCW 71.09 are indefinite in duration. *In re Petersen*, 138 Wn. 2d 70, 81, 980 P.2d 1204 (1999)(*Petersen I*).

According to legislative findings accepted in *Young*, the "prognosis for curing sexually violent offenders is poor." 122 Wn.2d at 30. The persons subject to civil commitment under RCW 71.09 "possess a proven history of rape and sexually motivated violence" and their "likelihood of reoffense is extremely high." *Id.* at 32. As a result, an indefinite duration of confinement is constitutionally appropriate under due process because it serves the twin compelling state interests of "treatment and incapacitation." *In re Young*, 122 Wn.2d at 33. "Facially, the Statute and associated regulations suggest that the nature and duration of commitment is compatible with the purposes of commitment." *Id.* at 35.

In order to ensure that a person continues to meet criteria for civil commitment as a sexually violent predator, the statute allows for annual

review of the commitment. Under RCW 71.09.090(2)(a), the purpose of the annual review show cause hearing is to address the question of:

whether probable cause exists to warrant a hearing on whether: (i) The person's condition has so changed that he or she no longer meets the definition of a sexually violent predator; or (ii) conditional release to a less restrictive alternative would be in the best interest of the person and conditions can be imposed that would adequately protect the community.

An annual review show cause hearing does not automatically come before the court. Instead, the annual review show cause proceeding is required if respondent so requests, petitions for a hearing, or otherwise refuses to affirmatively waive his right to a show cause hearing. RCW 71.09.090(2)(a).

The purpose of the show cause hearing is not to “re-commit” the respondent, but to ensure that there is a continuing basis for the commitment. In *Petersen I*, the Supreme Court clarified this point, holding that commitments are of an indefinite duration, persisting “until such time as the person's mental abnormality or personality disorder has *so changed* that the person is safe either (a) to be at large, or (b) to be released to a less restrictive alternative as set forth in RCW 71.09.092.” 138 Wash.2d 70 at 78 (emphasis added). As a result, the scope of the annual review show cause hearing is limited:

The show cause hearing is in the nature of a summary proceeding wherein the trial court makes a threshold determination of whether

there is evidence amounting to probable cause to hold a full hearing. The show cause hearing is an expression of the Legislature's wish that judicial resources not be burdened annually with full evidentiary hearings for sexually violent predators absent at least some showing of probable cause to believe such a hearing is necessary.

*Petersen I*, 138 Wn.2d at 86. Like a summary judgment proceeding, it is limited to the submission of affidavits or declarations. RCW 71.09.090(2)(b).

At the annual review show cause hearing, the trial court is to determine whether a new trial addressing either the commitment or LRA question must be ordered. RCW 71.09.090(2)(c). Although *Petersen II* addressed a prior version of the statute, there remain “two possible statutory ways for a court to determine there is probable cause to proceed to an evidentiary hearing under former RCW 71.09.090(2): (1) by deficiency in the proof submitted by the State, or (2) by sufficiency of proof by the prisoner.” *In re Petersen (Petersen II)*, 145 Wn.2d 789, 798-799, 42 P.3d 952 (2002).

It is the State’s obligation to present prima facie proof that respondent continues to meet the criteria for civil commitment. As required by statute, the State must present “prima facie evidence that the committed person continues to meet the definition of a sexually violent predator and that no proposed less restrictive alternative is in the best

interests of the person and conditions cannot be imposed that would adequately protect the community.” RCW 71.09.090(2)(c)(i). “If the State cannot or does not prove this prima facie case, there is probable cause to believe continued confinement is not warranted and the matter must be set for a full evidentiary hearing.” *Petersen II*, 145 Wn.2d at 798-99.

Once the State satisfies its prima facie burden to establish a continuing basis for the commitment, a new trial may be ordered only if respondent’s proof establishes probable cause “to believe that the *person’s condition has so changed* that: (A) The person no longer meets the definition of a sexually violent predator; or (B) release to a proposed less restrictive alternative would be in the best interests of the person and conditions can be imposed that would adequately protect the community.” RCW 71.09.090(2)(c)(ii) (emphasis added). “If the prisoner (sic) makes either showing, there is probable cause that continued incarceration is not warranted.” *Petersen II*, 145 Wn.2d at 798-99. At that point, a new trial addressing either the re-commitment or LRA issues (or both) must be ordered. RCW 71.09.090(2)(c) & (3).

**B. SB 5582 Clarifies The Level Of Defense Proof Necessary to Establish Probable Cause for a Release Trial**

The 2005 amendments to RCW 71.09.090 found in SB 5582 do not alter the State's constitutional requirement to present prima facia proof of a continuing basis for the commitment, but are directed to clarifying the level of proof that a predator must submit to establish probable cause for a new trial revisiting his *indefinite* civil commitment. *See In re Elmore*, \_\_\_ Wn. App. \_\_\_, No. 31769-9-II (Aug. 8, 2006)(SB 5582 amendments designed to clarify legislative intent). SB 5582 came in response to the statutory interpretation of RCW 71.09.090 made by the appellate court in the *Young AR* and *Ward* cases. *Id.* These cases broadly interpreted RCW 71.09.090 to allow a recommitment trial based solely on a favorable opinion from a new defense expert, rather than actual change in the person's physical or mental condition from the time of the last commitment proceeding. As recognized in *Elmore*, the SB 5582 amendments supersede the *Young AR* and *Ward* decisions. *Id.*

In a clear statement of its intent, the Legislature rejected the statutory approach endorsed by the *Young AR* and *Ward* cases:

The legislature finds that the decisions in *In re Young*, 120 Wn. App. 753, review denied, Wn.2d (2004) and *In re Ward*, Wn. App. (2005) illustrate an unintended consequence of language in chapter 71.09, RCW.

The *Young* and *Ward* decisions are contrary to the legislature's intent set forth in RCW 71.09.010 that civil commitment pursuant to chapter 71.09, RCW address the "very long-term" needs of the sexually violent predator population for treatment and the equally long-term needs of the community for protection from these offenders.

SB 5522 Sec. 1. In this statement, the Legislature voiced its intent to re-center the annual review process around the "irrefutable" compelling state interests "both in treating sex predators and protecting society from their actions." *In re Young*, 122 Wn.2d 1, 26 (1993).

In the course of adopting SB 5582, which was unanimously passed by both houses, the Legislature heard testimony in both the House and the Senate on how paid defense experts were using the *Young AR* and *Ward* decisions to essentially grant their own clients new commitment trials based on highly questionable theories.<sup>4</sup> The Final Bill Report observes that the *Young AR/Ward* interpretation of RCW 71.09.090 requires a trial court to "assume the validity of the petition, even where it knows it is not valid." CP 315-16. According to the testimony of Dr. Henry Richards, SCC Superintendent, the bill would encourage residents to seek change

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<sup>4</sup> The Senate Human Services and Corrections Committee held a hearing on SB 5582 on February 3, 2005. The record of this hearing is available commencing one hour and fifteen minutes into the hearing at <http://www.tvw.org/MediaPlayer/Archived/WME.cfm?EVNum=2005021042&TYPE=A>. The House Criminal Justice and Corrections Committee considered SB 5582 on March 25, 2006. The record of this hearing is found 15 minutes into the hearing at <http://www.tvw.org/MediaPlayer/Archived/WME.cfm?EVNum=2005030188&TYPE=A>.

through treatment participation, rather than by hiring a new expert.<sup>5</sup> As noted in testimony before the House, "[t]his bill prevents a misapplication of relatively weak and sometimes not carefully thought through 'scientific evidence' evidence that is not generally accepted or empirically validated." CP 322 (House Bill Report at 5).

Based on the testimony and submissions to the Legislative committees, the Legislature adopted significant legislative findings:

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

The legislature finds, although severe medical conditions like stroke, paralysis, and some types of dementia can leave a person unable to commit further sexually violent acts, that a mere advance in age or a change in gender or some other demographic factor after the time of commitment does not merit a new trial proceeding under RCW 71.09.090. To the contrary, the legislature finds that a new trial ordered under the circumstances set forth in *Young* and *Ward* subverts the statutory focus on treatment and reduces community safety by removing all incentive for successful treatment participation in favor of passive aging and distracting committed persons from fully engaging in sex offender treatment.

The *Young* and *Ward* decisions are contrary to the legislature's intent that the risk posed by persons committed under chapter 71.09, RCW will generally require prolonged treatment in a secure facility followed by intensive community supervision in the cases where positive treatment gains are sufficient for community safety. The legislature has, under the guidance of the federal court, provided avenues through which committed persons who successfully progress in treatment will be supported by the state in

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<sup>5</sup> House Criminal Justice and Corrections Committee Hearing at 31:00

a conditional release to a less restrictive alternative that is in the best interest of the committed person and provides adequate safeguards to the community and is the appropriate next step in the person's treatment.

Laws of 2005 c 344 § 1.

Under separation of powers, the legislative findings in SB 5582 are entitled to substantial deference.<sup>6</sup> *See Washington State Legislature v. Lowry*, 131 Wash.2d 309, 320, 931 P.2d 885 (1997) (noting need to defer to legislative findings of fact). After considering testimony and submissions, the Legislature determined in SB 5582 that the mental conditions involved in RCW 71.09 civil commitments are chronic and long term, that they are unlikely to ameliorate without treatment, that conditional release following treatment completion is the best course for public safety and that the statutory interpretation adopted by the *Young AR* and *Ward* decisions undermines the treatment and public safety purposes of the statute. Laws of 2005 c. 344 sec. 1. Such legislative findings of fact are owed "an additional measure of deference out of respect for [the Legislature's] authority to exercise the legislative power." *Turner Broadcasting System v. F.C.C.*, 520 U.S. 180, 196 (1997). Particularly when the Legislature "undertakes to act in areas fraught with medical and scientific uncertainties, legislative options must be especially broad and

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<sup>6</sup> "Even in the absence of [legislative findings], the existence of facts supporting the legislative judgment is to be presumed." *United States v. Carolene Prods. Co.*, 304 U.S.

courts should be cautious not to rewrite legislation." *Kansas v. Hendricks*, 521 U.S. 346, 360 (1997)(affirming civil commitment of sexually violent predators).<sup>7</sup>

In order to re-focus annual review on the compelling state interests of treatment and community safety, SB 5582 clarifies the *specific* probable cause showing necessary to justify revisiting an indefinite commitment:

(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.

(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*

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144, 152 (1938).

<sup>7</sup> In making these legislative findings, the Legislature also considered testimony in the form of lengthy declarations submitted by international experts on risk assessment. CP 325-426 (legislative history from House committee file). These materials, submitted by some of the foremost researchers in North America, reject the notion that high risk sex offenders simply stop offending due to a change in a single demographic factor like age. *Id.* Ambers argues that these materials and committee testimony should not be considered to establish legislative intent. He misses the point. The materials were not submitted below to establish legislative intent, but to illustrate the strength of the Legislative fact finding. *See Turner Broadcasting System*, 520 U.S. at 199 ("It is the nature of the legislative process to consider the submissions of the parties most affected by the legislation."). Indeed, Mr. Ambers appellate counsel testified before both the Senate and House in opposition to the bill.

*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.

RCW 71.09.090(4)(emphasis added).<sup>8</sup>

In this way, the Legislature restored the annual review focus to a *change* in the person's *mental condition* brought about through treatment participation. In order to avoid the situation created by the *Young AR* and *Ward* decisions, where a release trial was necessary anytime a retained defense expert merely disagreed with the annual review report, the amended statute requires: (1) an opinion from a licensed professional, (2) claiming a substantial change in the predator's mental condition, (3) brought about through positive response to continuing participation in treatment that (4) renders the person "safe to be at large" if unconditionally released from civil commitment.<sup>9</sup>

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<sup>8</sup> Ambers claim that this is an "evidentiary burden" misses the mark. The Legislation defines a substantive level of proof that Ambers must satisfy before his indefinite commitment can be revisited through a release trial.

<sup>9</sup> Ambers argues that this statute would preclude a recommitment trial even where the

C. **SB 5582 Requires More Than a Mere Disagreement With the Annual Review Report Before A Release Trial May Be Ordered to Revisit the Indefinite Commitment**

Despite the language of the statute and the legislative findings, Ambers claims that use of the phrase "safe to be at large" in SB 5582 somehow means the same thing as "more probable than not."<sup>10</sup> He makes this claim because numerous other portions of the annual review statute refer to the "more probable than not" standard in the sexually violent predator definition. Opening Brief at 16. Because his expert was unable to opine to the stricter "safe to be at large" language, Ambers' claims that the phrase is merely a "shorthand" reference to the "more probable than not" standard. Ambers argument is wholly untenable.

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RCW 71.09.070 annual review determines that the predator no longer satisfies civil commitment criteria. He is incorrect. The amendments in SB 5582 are addressed exclusively to evidence suggesting that the person's condition has "so changed," which is the defense portion of the annual review hearing. The annual review report in RCW 71.09.070 is completed to assess the person's current condition with no consideration of "change." If the annual review report finds that the predator no longer meets civil commitment criteria, then the State fails to make its prima facie case and a new civil commitment trial is required under the annual review statute and *Foucha v. Louisiana*, 504 U.S. 71 (1992). *See* further discussion below. There is no indication that SB 5582 intended to relieve the State of its burden to demonstrate a continuing basis for the indefinite commitment. The legislation was motivated purely by concerns that the predator should not be able to overturn his commitment simply by retaining a new defense expert. The structure of RCW 71.09.090(4) -- which is the subsection added by SB 5582 -- also indicates that it applies only to evidence submitted to show change and overcome the effects of the annual review report. The State's required prima facie showing does not reference a "so changed" standard that would be altered by SB 5582. RCW 71.09.090(2)(c).

<sup>10</sup> The "more probable than not" standard is part of the definition of "Sexually Violent Predator" and must be proven to support the original commitment. *See* RCW 71.09.020(7) & (16).

First, the court is not permitted to "interpret" unambiguous statutory language. In examining the statute, "the first rule is 'the court should assume that the legislature means exactly what it says . . . . [p]lain words do not require interpretation.'" *King County v. Taxpayers*, 104 Wn.2d 1, 5, 700 P.2d 1143(1985). "More probable than not" means a greater than 50% risk of reoffense. *In re Brooks*, 145 Wn.2d 275, 296-97, 36 P.3d 1034 (2001) *reversed on other grounds by, In re Thorell*, 149 Wn.2d 724, 72 P.3d 708 (2003). "Safe to be at large" means exactly what it says. In contrast to a person who is more likely than not to reoffend, a sex offender who is "safe to be at large" does not present a significant likelihood of reoffense or danger to the community if released to the community. The mere fact that "safe to be at large" is undefined in SB 5582 "does not make the statute ambiguous." *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 814, 828 P.2d 549 (1992). Ambers cannot create an ambiguity or urge judicial construction simply because he does not like the impact of the language on his case.

Even if this language were somehow ambiguous, the rules of statutory construction would not lead to Amber's proposed interpretation. The primary intent of judicial interpretation of a statute is "to ascertain and give effect to the Legislature's intent." *Ski Acres v. Kittitas Cy.*, 118 Wn.2d 852, 856, 827 P.2d 1000 (1992). An important motivating factor

for SB 5582 was to eliminate the situation where a defense expert could obtain a new trial for his client through mere disagreement with the annual review. Ambers proposed reading that equates "safe to be at large" with "more probable than not" leaves the amendment without an amendment. In essence, Ambers argues that it was the legislature's purpose to adopt new language that meant the same thing as the old language. There is no indication that the legislative intent was to amend RCW 71.09 by not amending it.

Any ambiguity in meaning is also resolved through consideration of "ordinary meaning." "When a statute fails to define a term, a court may rely on the ordinary meaning of the word as stated in a dictionary." *State v. Klein*, 156 Wn.2d 103, 124 P.3d 644, 650 (2005). The ordinary meaning of "safe" indicates a lack of danger to the community. *See* Webster's Ninth New Collegiate Dict. at 1036 (defining "safe" as "freed from harm or risk . . . secure from threat of danger, harm or loss"); Black's Law Dictionary 1362 (8th ed.2004) (defining "safe" as "[n]ot exposed to danger; not causing danger"). The statutory concept of more likely than not does not comport with the ordinary meaning of "safe."

The State's interpretation is confirmed by the statutory construction rule that the court must "give meaning to every word, clause and sentence of a statute and no part should be deemed superfluous." *Clark v.*

*Pacificcorp*, 118 Wn.2d 167, 183, 822 P.2d 162 (1991). The claim that "safe to be at large" means the same thing as "more probable than not" violates this rule. The Legislature's decision to use a wholly different description of the danger standard necessary to obtain a new trial through the defense expert report indicates an intent for different meaning, not supposed "shorthand" for the same thing.<sup>11</sup> "Where the Legislature uses certain statutory language in one instance, and different language in another, there is a difference in legislative intent." *State v. Roberts*, 117 Wn. 2d 576 (1991). Under this rule, Ambers' argument that the Legislature meant the same thing when it used an entirely different phrase fails.

Finally, the claim that "more probable than not" bears the same meaning as "safe to be at large" also fails when the structure of the amendment is considered. Under SB 5582, the defense proof can alternately provide probable cause for a new trial when a serious physical ailment renders the predator "unable to reoffend." RCW 71.09.090(4)(b)(i). Because "unable to offend" and "safe to be at large"

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<sup>11</sup> Ambers claims that the SB 5582 language would somehow render the prior references to the probable cause standard superfluous. He is incorrect because SB 5582 represents an overlay amendment that defines the showing necessary to demonstrate probable cause for a release trial. In essence, the SB 5582 amendments clarify the level of proof necessary for a release trial proceeding. These requirements go beyond the statute as it existed at the time of the *Young AR* and *Ward* decisions in order to correct the mis-interpretation offered by those decisions.

are alternate proof standards under RCW 71.09.090(4)(b), Ambers' shorthand theory would need to apply with equal force to prong (i) unable to offend as it does to prong (ii) safe to be at large. *See* Opening Brief at 18 (admitting that argument applies to both provisions). Whatever the intellectual difficulties in equating "safe to be at large" with "more probable than not," these pale when one attempts to equate "unable to commit" with "more probable than not." Ambers' argument does not account for the Legislature's language and tramples the legislative intent.

Thus, properly interpreted in accord with the plain language of the statute, SB 5582 requires enhanced defense proof before probable cause exists for a new trial.<sup>12</sup> The enhanced level of proof is necessary in order to overcome the sexually violent predator's indefinite civil commitment based on a jury verdict or stipulation and the annual review report. In order to justify an interruption in the indefinite commitment (including a

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<sup>12</sup> Ambers argues that this court should follow the statutory interpretation "safe to be at large" that was adopted by the Missouri Supreme Court in *In re the Care and Treatment of Schottel*, 159 S.W.3d 836 (2005). The Missouri statute interpreted in that case, however, was very different from SB 5582. First, the Missouri statute was not accompanied by Legislative findings disproving a statutory interpretation that allowed release trials based on a mere disagreement with the annual review, nor did it outline the need for specific defense proof prior to establishing probable cause. Second, in Missouri, "a person is not committed as an SVP indefinitely." 159 S.W.3d at 839. This means that annual reviews serve a different function in Missouri more akin to an annual recommitment proceedings, not true reviews of the indefinite commitment. Third, the Missouri standard went beyond safe to be at large to require a showing -- in all cases -- that the person "will not engage in acts of sexual violence if discharged." 159 S.W.3d at 841. The SB 5582 standard, absent a claim of physical incapacity, is not this strict. Finally, there is no authority for binding the State of Washington to concessions made by

significant disruption in treatment), the defense expert's report must show that (1) the person's condition has (2) so changed since the last civil commitment (3) due to treatment that he is now (4) safe to be at large. RCW 71.09.090(4).

V. **THE STATUTE WITHSTANDS ANY DUE PROCESS CHALLENGE**

Ambers claims that SB 5582 is unconstitutional if he is not allowed a release trial any time his retained expert disputes the annual review report. His argument ignores the fact of his *indefinite* civil commitment based on a chronic mental condition that is resistant to treatment. The decision of the Legislature to require a stricter showing before a defense expert can vitiate the indefinite commitment in order to strengthen the role of treatment in release decisions does not violate due process. Certainly, Ambers has not met his burden of proving SB 5582 unconstitutional beyond a reasonable doubt. *Island County v. State*, 135 Wash.2d 141, 146-47, 955 P.2d 377 (1998).

A. **Substantive Due Process Is Satisfied Through the Initial Indefinite Civil Commitment**

Under substantive due process, a civil commitment must be supported by clear and convincing evidence that the person is mentally ill and dangerous. *In re Young*, 122 Wn.2d at 27. The seminal *Young* case

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a Missouri prosecutor when Missouri has yet to face the problems caused by a wide-open

determined that indefinite civil commitment of sexually violent predators under RCW 71.09 satisfies this doctrine. *Id.*

In addressing substantive due process in the context of an annual review proceeding, it is crucial to remember that civil commitments under RCW 71.09 are indefinite in nature. A person is civilly committed under RCW 71.09.060(1) “for control, care, and treatment until such time as . . . [t]he *person’s condition has so changed* that the person no longer meets the definition of a sexually violent predator.” (Emphasis added). As noted in *In re Young*, 122 Wn.2d 1, 39, 857 P.2d 989 (1993):

civil commitments [under RCW 71.09] are not subject to any rigid time limit. Rather, *the commitment is tailored to the nature and duration of the mental illness.*

(Emphasis added). In *Petersen I*, the Supreme Court confirmed that “[o]ur sexually violent predator statute *unequivocally contemplates an indefinite term of commitment*, not a series of fixed one-year terms with continued commitment having to be justified beyond a reasonable doubt *annually* at evidentiary hearings where the State bears the burden of proof.” 138 Wn.2d at 81 (emphasis added). Indeed, “[t]he term of commitment under Washington’s statute is potentially indefinite because it depends on the cure or elimination of the person’s sexually violent predilections.” *Id.* at 81 n. 7. Because the treatment needs of the sexually

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annual review process were defense experts are free to grant their own clients new trials.

violent predator population are long-term and the mental conditions are chronic, "the statute contemplates a prolonged period of treatment." *Id.* at 78.

Because RCW 71.09 civil commitment is indefinite, a predator's civil commitment flows indefinitely from the latest jury determination or stipulation that he or she is a sexually violent predator. In Ambers case, substantive due process is satisfied by his May 27, 2003 stipulation that he is a sexually violent predator.<sup>13</sup> The annual review does not implicate substantive due process because the doctrine is already satisfied by the initial commitment beyond a reasonable doubt. As the *Elmore* court recently held in rejecting a similar due process challenge to the SB 5582 amendments: "civil commitment as an SVP satisfies due process because a person may only be committed upon a finding that the person is both mentally ill and dangerous." *In re Elmore*, \_\_\_ Wn.App. \_\_\_.

With the indefinite commitment firmly grounded in Amber's stipulated mental condition and danger, substantive due process does not require the State to "reprove" his civil commitment each year. Similarly,

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<sup>13</sup> If Ambers one day proceeds to a recommitment trial and the State successfully recommitments him, all subsequent years of commitment would flow from the new jury finding. See *In re Petersen I*, 138 Wn.2d 70, 87 n. 13, 980 P.2d 1204 (1999) ("the predator's continuing commitment would flow from this new, subsequent determination, rather than from the original order of commitment"). In this way, the May 27, 2003 stipulation that Ambers bargained for as part of his LRA release is the current source for his indefinite commitment.

there is also no substantive due process need to re-open Ambers' indefinite commitment merely because his retained expert disagrees with the prior jury determination or stipulation. The *res judicata* effects of the indefinite commitment protect it from the contrary word of a hired defense expert.

Washington courts have frequently analogized the review requirements of RCW 71.09 with the review requirements for insanity acquittees under RCW 10.77. *E.g. State v. Platt*, 143 Wn.2d 242, 253 n.6, \_\_\_ P.2d \_\_\_ (2001)(noting similarities between RCW 71.09 and 10.77 review proceedings); *Petersen II*, 145 at 795 (analyzing annual review burdens under *Foucha*, which involved an insanity acquittee civil commitment); *In re Turay*, 139 Wn.2d 379, 411 n.22, 986 P.2d 790 (1999) (comparing SVP release provisions with civil commitment statutes applicable to sexual psychopaths and insanity acquittees) Civil commitments of both sexually violent predators and insanity acquittees are limited to dangerous persons with a proven track record of antisocial criminal acts.

With civilly committed insanity acquittees, it has been long held that due process allows placing the entire burden of establishing regained sanity on the civil committee. *State v. Klein*, 156 Wn.2d 103, 114, 124 P.3d 644 (2005); *Platt*, 143 Wn.2d at 250. Because of the demonstrated

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danger of this population through commission of a criminal act, the constitution does not require a release trial when there is some disagreement between experts on whether the committee continues to meet commitment criteria. *Klein*, 156 Wn.2d at 653. As a result of the danger presented by the population, the constitution does not mandate release proceedings absent the committee satisfying a higher burden:

The standard to be applied is one of dangerousness; clearly, past conduct is heavily indicative of the likelihood that a person will commit similar acts which will again endanger others. *Therefore, it is logical that those who have reached the attention of the State because of serious antisocial acts, would be subject to more procedural burdens in obtaining their release than are those whose acts are less threatening to the public safety.* This latter group is appropriately relieved of such burdens, the responsibility of proving their dangerousness falling accordingly to the State. The distinction in both cases is one of degree; the more serious acts result in a heavier burden on the actor on the issue of whether that person must be confined in the interest of public safety. *Alter*, 85 Wash.2d at 420, 536 P.2d 630.

*Platt*, 143 Wn.2d at 247 (emphasis added; quoting *Alter v. Morris*, 85 Wn.2d 414, 420, 536 P.2d 630 (1975)). In the same way, it is constitutionally permissible to impose “a heavier burden” on sexually violent predators who are seeking release from an indefinite commitment over the annual review recommendation. *See Petersen v. State*, 104 Wn.App. 283, 290-91, 36 P.3d 1053 (2000) (“differences in dangerousness, treatment methods and prognosis” justify differing release procedures for sexually violent predators); *In re Bradford*, 712 N.W.2d

144 , 150 (Iowa 2006) (upholding annual review statute imposing “rebutable presumption” that commitment of sexually violent predators should continue).

The limits of substantive due process in the annual review area are illustrated by the *Foucha v. Louisiana* decision. In *Foucha*, an annual review proceeding raised substantive due process questions only where the state’s expert could reach no opinion on the committee’s continuing mental illness and danger. *See Young*, 122 Wn.2d at 39; *Platt* 143 Wn.2d at 249-50. The Washington annual review statute avoids this problem by requiring the State to present prima facia proof through the RCW 71.09.070 annual review report of continuing grounds for the indefinite commitment. In the current case the DSHS report from Dr. Allison satisfied this statutory requirement.<sup>14</sup> If the State failed in this prima facia burden, the predator automatically receives a full release trial.

Reviewing a statute with far less generous review provisions, the *Young* court determined that RCW 71.09 "withstands the scrutiny required

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<sup>14</sup> Ambers suggests that it somehow odd or unfair that the DSHS report addresses different substantive danger criteria than is applicable to defense proof. The simple fact is that the reports serve very different purposes. The DSHS report is statutorily (and constitutionally) required to maintain Ambers indefinite civil commitment for a continuing term. As a result, the DSHS evaluator is only required to address whether Ambers continues to be a “sexually violent predator,” *i.e.* one who is more probable than not to reoffend. In contrast, Ambers’ retained defense expert is seeking to reopen an indefinite civil commitment over the original jury verdict and the DSHS annual review report. As a result, in order preserve the compelling state interests of treatment and community safety, the Legislature has imposed a higher substantive burden before the

in *Foucha*." Id. at 37. The annual review provisions, consistent with *Foucha*, "provide the opportunity for periodic review of the committed individual's current mental condition and continuing dangerousness to the community." 122 Wn.2d at 39.

In accord with the *Young* reading of *Foucha*, the case law makes it clear that the constitution requires only minimal periodic review in order to maintain an indefinite civil commitment. In *Williams v. Wallis*, 734 F.2d 1434 (11th Cir. 1984), the court held that the dangerousness of insanity committees justified a difference in release provisions from standard mentally ill patients:

Binding precedent in this circuit holds . . . that differences in release procedures based on dangerousness are constitutionally permissible. See *Powell v. Florida*, 579 F.2d 324, 333 & n.15 (5th Cir. 1978) (dangerousness of insanity acquittee "justifies treating such a person differently from ones otherwise civilly committed for purposes of deciding whether the patient should be released."). Thus, Alabama's release procedures do not violate equal protection.

734 F.2d at 1437. Likewise, the dangerousness of sexually violent predators justifies indefinite commitment with annual review procedures, rather than the semi-annual recommitment trials found in RCW 71.05. *In re Petersen I*, 138 Wn.2d 70, 78-81, 980 P.2d 1204 (1999) (Statute provides for indefinite commitment with periodic reviews, not periodic determinate commitments).

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contrary opinion expressed by the defense expert can justify a release trial.

The Wisconsin Supreme Court has also rejected the need for heightened review procedures when addressing indefinite civil commitment under the Wisconsin SVP statute. In *State v. Post*, 197 Wis.2d 279, 541 N.W.2d 115, 132 (1995), *cert. dismissed*, 138 L.Ed.2d 1011 (1997), the court noted that "the increased likelihood of accurate initial [SVP] commitment decisions reduces the need for some of the recommitment procedures that act as a safety net in [Wisconsin's RCW 71.05]". By providing for heightened commitment procedures in the sex predator statute, it is constitutionally unnecessary to offer the same procedures on annual review as the recommitment procedures provided under the standard involuntary commitment statute, which allows for initial commitment on a lesser showing. *Accord In re Paulick*, 570 N.W.2d 626, 628 (Wisc. Ct. App. 1997).

**B. SB 5582 Satisfies Procedural Due Process**

The review provisions of RCW 71.09.090 as amended by SB 5582 also satisfy procedural due process. Whether periodic review and release provisions comport with procedural due process is determined by reference to the factors set out in *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L.Ed.2d 18 (1976):

First, the private interest that will be effected by the official action; second, the risk of erroneous deprivation of such interest through the procedures used, and the probative value, if any, of additional

or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

*Williams v. Wallis*, 734 F.2d 1434, 1438 (11th Cir. 1984) (quoting *Mathews*); accord *Parham v. J.R.*, 442 U.S. 584, 599-600 (1979). In applying these factors, the Supreme Court has cautioned:

As with most medical procedures, Georgia's are not totally free from risk of error in the sense that they give total or absolute assurance that every child admitted to a hospital has a mental illness optimally suitable for institutionalized treatment. But it bears repeating that "*procedural due process rules are shaped by the risk of error inherent in the truth finding process as applied to the generality of cases, not the rare exceptions.*"

*Parham*, 442 U.S. at 612-13 (emphasis added; quoting *Mathews*). See also *In re Brock*, 126 Wn. App. 957, 964, 110 P.3d 791 (2005) (applying *Mathews* test to due process challenge against RCW 71.09.090).

As for the first factor, the private interests of Ambers and other sexually violent predators in avoiding continued commitment are mixed. On the one hand, "[i]ndeterminate commitment does raise a serious due process issue since the patient's basic personal liberty is affected." *Harhut*, 385 N.W.2d at 311. On the other hand, these individuals suffer from a mental abnormality or personality disorder and therefore potentially "benefit from the continued treatment." *Williams*, 734 F.2d at 1440. Further, confinement at the Special Commitment Center prevents the

commission of further criminal acts of sexual violence -- acts which could place the Ambers in prison for a life term under the Washington criminal code.

With regard to the second factor, the risk of erroneous deprivation of liberty through an improperly continued commitment is minimized by the procedures provided in RCW 71.09.090 and SB 5582. The annual review statute provides two separate layers of review of the underlying civil commitment.

First, under RCW 71.09.070, DSHS is required to conduct a yearly annual review of the continuing basis for the commitment.<sup>15</sup> If a sexually violent predator's condition changes so as to justify release or less restrictive confinement, the Secretary is under a statutory *duty* to authorize an immediate recommitment trial where the State bears the full burdens of the original commitment trial. RCW 71.09.090(1). The existence of this independent review mechanism, initiated by the agency responsible for the care and treatment of the sexually violent predator, "significantly reduces the risk of an erroneous decision denying release." *Williams*, 734 F.2d at 1440.

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<sup>15</sup> Ambers claims that "DSHS never finds that a committed person no longer meets the criteria for commitment." Opening Brf. at 10 n.2. He is wrong. There have been several cases where DSHS recommended unconditional release. The more typical DSHS recommendation is for conditional release to an LRA following the completion of treatment -- a recommendation that Ambers received in 2003.

Second, the sexually violent predator has the *right* to independently petition the committing court for a recommitment trial. RCW 71.09.090(2). At the show cause hearing, the predator has a right to an attorney. *Id.* He also has a right to retain an expert to examine and evaluate him. RCW 71.09.070. He is entitled to a release trial if the State fails to present a prima facie case. RCW 71.09.090(3). As a backup, he can obtain a release trial through materials submitted by his own expert. Under SB 5582, the predator can obtain a release trial if the person's mental condition – the source of his sexually violent behavior – has substantially changed through treatment or other relevant means such that he is safe to be at large.

In fact, procedural due process likely requires less of an annual review procedure than currently afforded sexually violent predators under RCW 71.09.090. In *Parham*, a child commitment case, the Supreme Court recognized that there is a "continuing need for [the] commitment [to] be reviewed periodically . . ." 442 U.S. at 607. Nonetheless, the Supreme Court determined that the due process requirement of periodic review was satisfied when the commitment decision was reviewed by a "neutral fact finder." *Id.* "Due process has never been thought to require that the neutral and detached trier of fact be law trained or a judicial or administrative officer." *Id.* Instead, for due process purposes, "a staff

physician will suffice." It was not even necessary to hold a formal or quasi-formal hearing: "A state is free to require such a hearing, but due process is not violated by use of informal, traditional medical investigative techniques."<sup>16</sup> *Id.* See also *In re GRH*, \_\_\_ N.W.2d \_\_\_ (N.D. S.Ct. March 29, 2006) (consistent with due process for agency director determine least restrictive treatment placement); *Porter v. Knickrehm*, \_\_\_ F.3d \_\_\_ (8<sup>th</sup> Cir. August 8, 2006)(nonjudicial review of commitment sufficient to protect chronic adult population).

Similarly, in *Williams*, the eleventh circuit held that "[d]ue process does not always require an adversarial hearing." *Williams*, 734 F.2d at 1438 (quotation omitted). Due process was satisfied merely through nonadversarial reviews of the committee's current condition by hospital staff:

Alabama's nonadversary procedures do not create an undue risk of erroneous deprivation of this liberty interest. Hospitals and their medical professionals certainly have no bias against the patient or against release. Therefore we can safely assume they are disinterested decision-makers. In fact, the mental health system's institutional goal--i.e., transfer to a less restrictive environment and eventual release--favors release. Other factors also favor release, including a perennial lack of space and financial resources, which militates against any motivation to unnecessarily prolong hospitalization, and including the medical professional's pride in his own treatment. The frequency of the evaluations also reduces the risk that the patient will be confined any longer than necessary.

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<sup>16</sup> The Court held that "we do not believe the risks of error in that process would be significantly reduced by a more formal judicial-type hearing." *Id.* at 613.

734 F.2d at 1438. The court continued:

The probative value of the additional safeguard of adversary hearings is slight. . . . To impose an adversarial atmosphere upon the medical decision making process would have a natural tendency to undermine the beneficial institutional goal of finding the least restrictive environment, including eventual release. *Instead of an additional safeguard, the adversarial intrusion might very probably prove counterproductive to the interests of acquittees.*

*Id.* at 1438-39. The court concluded that the "nonadversary periodic review satisfies due process under the *Mathews v. Eldridge* balancing test." *Id.* at 1439. The periodic review undertaken by the Department of Social and Health Services under RCW 71.09.070 satisfies this concern.

In *In Re Harhut*, 385 N.W.2d 305, 311 (Minn. 1986), the Minnesota Supreme Court rejected equal protection and due process challenges brought by a mentally retarded person challenging her indefinite civil commitment. Similar to RCW 71.09, a Minnesota statute provided mentally retarded committees the right to an annual medical assessment and the right to petition the committing court for release or a less restrictive placement. 385 N.W.2d at 309-10. Also, "no mentally retarded person indeterminately committed is without counsel and . . . periodic medical reports are always sent to the attorney representing the patient." *Id.* at 311. The *Harhut* court held that "indeterminate commitment of mentally retarded patients does not violate due process as

long as the patient is continuously represented by an informed attorney and the additional safeguards outlined below are followed." *Id.* at 311. The additional safeguards required by the court were that all periodic medical reviews must be sent to the court and to the patient's counsel of record, and that there would be a "judicial review of a mentally retarded patient's status at least once every three years after the patient has been indeterminately committed." *Id.* The "judicial review" envisioned by the court was not a full-blown recommitment trial with all the procedural protections of the initial commitment, but rather a procedure closely resembling current RCW 71.09 review procedures:

This does not mean that the commitment period automatically ends and the state must petition again for continued commitment, as it must under section 253B.13 for mentally ill or chemically dependent persons; nor is this review always to be the equivalent of a section 253B.17 hearing, which may still be brought at any time by the patient or other interested person. Instead, this is to be an automatic periodic review, *the extent of which will vary at the sound discretion of the trial court.*

Id. at 311-12 (emphasis added). Presumably, although Washington meets or exceeds the above protections,<sup>17</sup> *Mathews* would not require this level

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<sup>17</sup> The review provisions of RCW 71.09.090 and RCW 71.09.070 exceed the protections required by *Harhut* in that judicial review occurs every year, rather than every third year. If a SVP committee does not waive his right to a show cause hearing, one must be scheduled. *Harhut* clearly does not require that the judicial review of a commitment be accompanied by all the procedural protections afforded at the initial commitment.

of protection for sexually violent predators, who are generally better equipped to handle their own affairs than the mentally retarded.

As for the final factor in the *Mathews* test, there are substantial state interests favoring the current system that, absent a recommendation of the Secretary, requires the committed person to establish probable cause that his condition has so changed to a degree exceeding a mere disagreement by the defense expert. The *Parham* Court remarked: "it is incumbent on courts to design procedures that protect the rights of the individual *without unduly burdening the legitimate efforts of the states to deal with difficult social problems.*" 442 U.S. at 608 n.16 (emphasis added). The legislative finding behind SB 5582 notes that the amendments are necessary to preserve the State's compelling interest in treatment and community safety. Laws of 2005, ch. 344 sec. 1. Although the substantive criteria for obtaining a release trial based on defense proof are difficult, the legislative findings make it clear that this is necessary to maintain the treatment and community protection interests that underlay the statute. *Id.*

With regard to insanity acquittee committees, one court recognized that "[t]he state's interest in preventing the premature release of individuals who have already proven their dangerousness to society by committing a criminal act is substantial." *Williams*, 734 F.2d at 1439. The same

comment applies with equal force to sexually violent predators. The State faces a high burden of proof -- beyond a reasonable doubt -- in both the initial commitment hearing and in any recommitment hearings ordered as a result of an annual review. The risk of erroneously releasing a sexually violent predator increases dramatically if the state is forced to resubmit its case to a different jury once every year, regardless of whether the committee's mental condition has changed, or whether the person has even engaged in treatment for his condition. Due process does not support injecting additional random chance into the release decision when there is no minimal showing of a "changed condition," as currently required by RCW 71.09.090(2). Similarly, due process does not require the Legislature to defer release decisions to the opinions of hired defense experts unable to provide an opinion sufficient to overcome the indefinite commitment.<sup>18</sup>

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<sup>18</sup> An important purpose of the SB 5582 substantive criteria is to require a high level of certainty in the defense expert opinion prior to the requirement of a release trial. If the defense expert, like Dr. Abracen, is only opining that the predator is somewhere just short of "more probable than not," such an opinion is not sufficient to overcome the indefinite commitment supported by the DSHS review. By requiring the retained defense expert to opine to the "safe to be at large" standard, the Legislature has struck an appropriate balance between the *res judicata* effects of the indefinite commitment and a predator's interest in obtaining a release trial. Moreover, the difficulty of obtaining a release trial through a retained expert encourages the predator to focus on treatment and DSHS-sponsored conditional release. Consistent with the Legislatures' concerns, it is worth noting that Ambers retained Dr. Abracen rather than confront through treatment the problems that led to quick revocation of his less restrictive alternative.

The administrative costs of requiring the State to conduct recommitment trials based solely on the contrary opinion of a retained defense expert who disbelieves the initial commitment would be tremendously high. *See Brock*, 126 Wn. App. at 964 (recognizing substantial governmental interest in burden imposed by annual review procedures). Presently, sexually violent predator trials are hard-fought affairs lasting many weeks with substantial discovery. The State generally pays for attorneys and expert witnesses on both sides. With attendant motions and discovery issues, these cases consume substantial judicial resources. Every decision of the trial court is nearly guaranteed to result in a notice of discretionary review or a notice of appeal. In short, while the probative value of trials based on contrary defense experts is minimal, imposing such a requirement would quickly overwhelm the state's resources.

In evaluating whether a particular procedure is due, it is appropriate to consider the "financial burden" on the state. *Williams*, 734 F.2d at 1439. In rejecting the same type of relief requested by Ambers, the *Harhut* court observed that:

Determinate commitment and yearly petition renewal is a substitute procedural safeguard, but the fiscal and administrative burden on the state would be heavy.

385 N.W.2d at 311.

As set forth in the SB 5582 legislative findings, another compelling state interest is to avoid disruptions in the treatment of sexually violent predators caused by unnecessary recommitment trials:

One factor that must be considered is the utilization of the time of psychiatrists, psychologists, and other behavioral specialists in preparing for and participating in the hearings rather than performing the task for which their special training has fitted them. Behavioral experts in courtrooms and hearings are of little help to patients.

*Parham*, 442 U.S. at 605-06. The Court cautioned against "increasing the procedures the state must provide." *Id.* at 606. A "direct consequence" of such an increase is "that mental health professionals will be diverted even more from the treatment of patients in order to travel to and participate in-- and wait for-- what could be hundreds--or even thousands--of hearings each year." *Id.* Under Amber's theory, the relative ease of obtaining a recommitment trial interferes with efforts to encourage Ambers and others like him to submit fully to sex offender treatment.

Ambers resort to the legislatively superseded *Young AR* and *Ward* decisions fails to support his sweeping due process argument. Both *Young AR* and *Ward* interpreted RCW 71.09.090 to require a release trial based solely on the disagreement of the defense expert with no demonstration of change in condition. Because the statute was interpreted in this manner, any incidental due process "holding" was dicta. It was unnecessary for

these courts to evaluate the statute for compliance with due process when the statute was interpreted to not include any supposedly problematic terms. Even if not dicta, the strength of any due process holding in those cases is minimal. The *Young AR* decision devotes an entire half a sentence to its due process analysis; *Ward* simply quotes *Young AR*. Certainly, the *Young AR* and *Ward* panels did not consider a detailed law like SB 5582 that was supported by an extensive legislative finding. The legislative finding alone requires further evaluation and deference to the concerns noted by the Legislature that result from the *Young AR* and *Ward* decisions.<sup>19</sup>

In short, the unspecified due process requirement claimed by Ambers to mandate recommitment trials based solely on his expert's disagreement with the prior commitment stipulations does not exist. It is fundamentally inconsistent with the approval of indefinite commitment in *Young* and *Petersen I*. When combined with the necessity of the State establishing a periodic prima facie case supporting a continuing basis for

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<sup>19</sup> Ambers also fails to present any argument why the traditional new evidence test violates due process concerns. The due process sentence in the *Young AR* decision is best limited to the proposition that due process sometimes requires consideration of new evidence that is potentially exculpatory. The appropriate way to consider supposed "new evidence" is through the mechanisms established by the case law, not through a torturous reading of RCW 71.09.090, which was adopted for an entirely different and limited purpose. The Legislative Findings that accompany SB 5582 clarify that RCW 71.09.090 is not meant as an alternative method of collateral attack to challenge a commitment that was based on faulty testimony. Instead, "[w]here necessary, other existing statutes and court rules provide ample opportunity to resolve any concerns about prior commitment

the commitment, the statutory requirement that there must be probable cause of a change in the person's mental condition supported by continuing participation in treatment that renders the person "safe to be at large withstands any due process challenge.

IV. **DR. ABRACEN FAILED TO PROVIDE A LEGALLY SUFFICIENT OPINION THAT WOULD MERIT A RELEASE TRIAL**

A. **Standard of Review**

In evaluating the proof that Ambers presented to the trial court, this court reviews the matter *de novo*. *Petersen II*, 145 Wash.2d at 799; *In re Elmore*, \_\_\_ Wn. App. at \_\_\_. There was no dispute that the State made the minimum constitutional showing necessary to preserve respondent's indefinite commitment through Dr. Allison's report. *See* Opening Brf. at 6. As such, the issue in this appeal is whether the report of the defense retained expert was legally sufficient to justify a release trial under the RCW 71.09.090 and SB 5582 criteria. It was not. The defense expert failed to opine to a treatment-based change in Ambers condition since the May 27, 2003 stipulation and he failed to opine to the "safe to be at large" criteria.

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trials." Laws of 2005, ch. 344 §1.

**B. The Defense Expert Failed to Show a Treatment Based Substantial Change Since the May 27, 2003 Stipulation**

The statute allows a new release trial only where there is "a substantial change in the person's physical or mental condition" that was "brought about through positive response to continuing participation in treatment."<sup>20</sup> RCW 71.09.090(4). The "substantial change" must be "since the person's last commitment trial proceeding." *Id.* Dr. Abracen's opinion was not legally sufficient under this standard.<sup>21</sup>

As noted in *Elmore*, the "recent statutory amendments make clear that the relevant focus is on changes since the last commitment trial."

*Elmore*, \_\_\_ Wn. App. at \_\_\_. Ambers "last commitment trial proceeding" was the unconditional and conditional release trial proceeding

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<sup>20</sup> Ambers cites the Wisconsin Court of Appeals decision in *In re Pocan*, 267 Wis.2d 953, 671 N.W.2d 860 (2003), but this case interprets a statute without the "substantial change" requirement found in SB 5582 and makes no claim that "due process" requires the grant of a release trial without proof of change. Even so, the Wisconsin courts do not accept Ambers broad reading of *Pocan*. In the recently published decision of *In re Combs*, \_\_\_ N.W.2d \_\_\_ (WI Ct. App. 2006), the court makes it clear that the Wisconsin annual review statute does not allow a release trial where the defense report is "based on historical facts, actuarial instruments and theories of interpreting those instruments that were considered by the experts testifying at the commitment trial.").

<sup>21</sup> The trial court, relying on the superseded *Young AR* and *Ward* decisions, found that it was unnecessary for the defense expert to claim a change in Amber's condition. CP 494. The trial court provided no analysis on how it was free to avoid the explicit change requirement in SB 5582, but noted that "Dr. Abracen's current risk assessment method may suggest a conclusion that [Ambers] never satisfied the risk criteria for civil commitment." *Id.* On appeal, this court may affirm the lower court's denial of a release trial on any grounds supported by the record regardless of the lower court's "so changed" determination. *LaMon v. Butler*, 112 Wash.2d 193, 200-01, 770 P.2d 1027 (1989). Because the standard of review is *de novo*, this court may independently examine the record to determine if the defense expert's opinion was based on a legally sufficient change.

that resulting in the May 27, 2003 stipulation affirming Ambers status as a sexually violent predator and allowing his conditional release to a less restrictive alternative. Supp. CP \_\_\_\_ (Sub. 282; Stipulation and Order for Conditional Release). Thus, the defense expert's opinion was legally sufficient only if it established a substantial change due to treatment from this date.<sup>22</sup>

Dr. Abracen's opinion did not establish a "substantial change" in *Amber's* physical or mental condition since the May 27, 2003 stipulation because Dr. Abracen's risk assessment method concluded that Ambers was *never* a sexually violent predator. As Dr. Abracen acknowledged during his deposition, he doesn't "believe that Ambers has ever been more likely than not to commit an act of sexual violence if not confined in a secure facility because the risk assessment methods that [Dr. Abracen uses] would never lead [him] to that result. CP 465 (Deposition of Dr. Abracen at 58: 23 - 59: 16). Although Dr. Abracen saw some changes in Mr. Ambers over the course of the commitment, these changes were not the type of "substantial change" that rendered him "no longer" a sexually violent predator because Dr. Abracen never believed him to be a sexually

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<sup>22</sup> Dr. Abracen repeatedly referenced the lack of actuarial tools at the time of Ambers initial stipulation. *E.g.* CP 466-67 (Dep. at 65-69). He never indicated a change dating from May 27, 2003, when actuarial instruments were in routine use and readily available. *E.g. In re Detention of Strauss*, 106 Wash.App. 1, 20 P.3d 1022 (2001)(discussing admissibility of actuarial instruments at a year 2000 trial).

violent predator.<sup>23</sup> *Id.* (Dep. at 60: 7 - 61: 24). Dr. Abracen freely acknowledged that "the relevant change, which is when Mr. Ambers went from being over 50 percent to under 50 percent, has to do with [Dr. Abracen's] methods of risk assessment, not with Mr. Ambers' treatment specifically." *Id.* (Dep. at 61: 20-25).

The amendments in SB 5582 prevent a new trial based on this type of opinion. Evidence "questioning a past diagnosis is not in and of itself sufficient to establish probable cause that a detainee's condition has changed." *Elmore*, \_\_\_ Wn. App. at \_\_\_. The relevant question is a change in Ambers' "physical or mental condition" brought about through treatment, *not* a "change" in the purveyor of his expert services or a change in the theories that his new expert uses to assess risk. Otherwise, Ambers could win a new trial every year simply by going through the directory book of defense experts until he finds one with a different risk assessment theory to opine that he never should have been committed. He could try one expert approach at trial followed by different and inconsistent approaches each year. Such an approach removes the statutory incentive to engage in serious sex offender treatment. Laws of 2005, ch. 344 § 1. It

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<sup>23</sup> Likewise, Dr. Abracen noted no relevant change in Mr. Amber's mental condition. He agreed Ambers continued to suffer from Paraphilia NOS (Rape) and that this paraphilia continues to evidence itself through various "lapses." *Id.* at 52:20 - 53: 22. He agreed that Mr. Ambers continues exhibit an Anti-social Personality Disorder. *Id.* at 53: 20-22.

is also wholly inconsistent with Ambers own May 27, 2003 stipulation.<sup>24</sup>  
*See Elmore*, \_\_\_ Wn. App. at \_\_\_ (Cannot collaterally attack stipulated  
commitment through annual review based on information that was  
available at time of stipulation).

**C. Dr. Abracen Fails to Opine to the Safe Standard**

Dr. Abracen's opinion is also legally insufficient under SB 5582  
because he uses the wrong risk standard. Under SB 5582, probable cause  
for a new trial exists only where it is based on a "change in the person's  
mental condition brought about through positive response to continuing  
participation in treatment which indicates . . . that the person would be  
**safe to be at large** if unconditionally released from confinement." RCW  
71.09.090(4)(b)(ii). Dr. Abracen nowhere opines that Ambers would be  
safe to be at large if unconditionally released.<sup>25</sup>

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<sup>24</sup> Although it is inappropriate to weigh an expert's opinion in a show cause proceeding, the court is not required to accept "mere conclusory statements" and may "properly look beyond an expert's stated conclusions to determine whether it is supported by sufficient facts." *In re Jacobsen*, 120 Wn. App. 770, 780, 86 P.3d 1202 (2004). Dr. Abracen's conclusory claim of a nonspecific change is legally insufficient to merit a release trial.

<sup>25</sup> Ambers claims that it would be unethical for any expert to conclude that Ambers is "unable" to reoffend. The "safe to be at large" standard does not require a zero percent risk standard. Even so, due process does not require the public to bear an unreasonable risk simply because Ambers may have difficulty finding an expert willing to vouch that he presents an insubstantial risk to the community. *See Klein*, 156 Wn.2d at 115 n.7 ("we do not defer to psychologists on the interpretation of the law"). Whereas the diagnosis is a matter suited to medical judgment, the question of Ambers' danger involves legal social and medical judgments. *Cooley v. State*, 695 So.2d 1219, 1221 (Ala. Crim. App. 1997). The Legislature is certainly free to define the danger threshold that is acceptable to society and that must be proven to merit a release trial following indefinite commitment.

Dr. Abracen, in his deposition, was unaware of the legal standard governing his opinion. *See* CP 462 (Dep. at 47:21-23; claiming that standard was more likely than not). Although pressed several times by the prosecutor, Dr. Abracen would not opine that Mr. Ambers is "safe to be at large if unconditionally released from confinement" as required by RCW 71.09.090(4)(b)(ii). He refused to use the relevant legal term "safe" to describe his opinion, "preferring" a "more likely than not" standard. CP 464 (Dep. at 54:13-16). After numerous attempts to obtain Dr. Abracen's opinion under the relevant legal standard, he conceded that he had *no*

***opinion on the safe question:***

- 9 Q So you're not opining to anything more than he no longer  
10 meets the threshold of more likely than not?  
11 A Precisely.  
12 Q And your opinion shouldn't be read to address the question  
13 of whether he is safe to be in the community?  
14 A Precisely. . .

CP 465 (Dep. at 58: 9-14).

In contrast to the "safe to be at large" standard, based on his risk method, Dr. Abracen saw Mr. Ambers as presenting a 36% likelihood of committing a predatory sexually violent act if not confined in a secure facility. CP 463 (Dep. at 51:9-18). A 36% risk that Mr. Ambers will commit a new, predatory act of sexual violence cannot qualify as "safe to

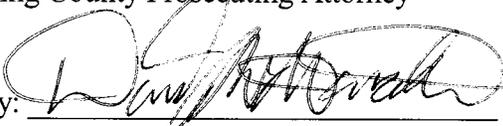
be at large."<sup>26</sup> Even Dr. Abracen eventually admitted that he would not want to board an airplane that had a 36% likelihood of falling out of the sky; such an airplane would not be safe. CP 464 (Dep. at 57). Because Dr. Abracen failed to opine to the relevant statutory standard and assessed Ambers as 36% likely to reoffend, his opinion was insufficient to provide probable cause for a recommitment trial. *See Westerheide v. State* 888 So.2d 702, 706 (Fla.App. 5 Dist.,2004) ("Westerheide failed to meet his burden of proof, since neither of his witnesses testified that Westerheide met the standard set forth in the statute for release, that being, that it was safe for him to be at large and that he would not engage in any acts of sexual violence if discharged.").

V. **CONCLUSION**

For the foregoing reasons, the State respectfully requests an order affirming the trial court.

DATED this 24th day of August 2006.

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<sup>26</sup> The term "safe to be at large" was approved against a vagueness challenge in *In re Young*, 122 Wash.2d at 49

