

No. 79331-0

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In re the Detention of
KEVIN AMBERS

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STATE'S SUPPLEMENTAL AUTHORITIES

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The State of Washington, through the Prosecuting Attorney for King County, hereby submits the following supplemental authority pursuant to RAP 10.8.

* *In re Detention of Stout*, ___ Wn.2d ___, 150 P.3d 86, 93 - 94 (2007)(emphasis added).

The first *Mathews* factor weighs heavily in Stout's favor. There is no dispute that Stout has a significant interest in his physical liberty. However, the remaining factors weigh in favor of the State. As to the second *Mathews* factor, existing protections indicate that there is a minimal risk of erroneously depriving Stout of his liberty. A comprehensive set of rights for the SVP detainee already exists. For example: before commitment proceedings may even be initiated against a suspected SVP, the State must show probable cause to proceed with a commitment trial. RCW 71.09.040(1). At the probable cause hearing, the suspected SVP has the right to counsel, to present evidence on his or her own behalf, to cross-examine adverse witnesses, and to view and copy all petitions and reports in the court file. RCW 71.09.040(3). At all stages of an SVP proceeding, the detainee has the right to counsel, including appointed counsel. RCW 71.09.050(1). An SVP detainee may request a jury of 12 peers. RCW 71.09.050(3). Most importantly, at trial the State carries the burden of proof beyond a reasonable doubt, and in a jury trial, the verdict as to whether a detainee is a sexually violent predator must be unanimous. RCW 71.09.060(1); *Young*, 122 Wash.2d at 48, 857 P.2d 989. *Given these significant protections, it is unlikely an SVP detainee will be erroneously committed if he is not also able to confront a live witness at commitment or be present at a deposition.*

* * *

¶ 19 The third *Mathews* factor also balances in favor of the State. Stout acknowledges that the State has an interest in protecting the community from sex offenders who pose a risk of reoffending. Pet'r's Suppl. Br. at 10. *Stout also acknowledges that the State has an interest in streamlining commitment*

procedures and avoiding the heavy financial burden that would be attendant with requiring live testimony of out-of-state witnesses like T.D.

* **John Kirwin, ONE ARROW IN THE QUIVER--USING CIVIL COMMITMENT AS ONE COMPONENT OF A STATE'S RESPONSE TO SEXUAL VIOLENCE, 29 Wm. Mitchell L. Rev. 1135, 1188 (2003)** (emphasis added; footnotes omitted).

"The discharge standard under the SPP/SDP statutes has also been challenged. The U.S. Supreme Court has held that "due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed." As explained in Part III above, *the discharge standard for persons committed as SPP and SDP does not simply mirror the commitment standard--a person is not entitled to discharge as soon as it is shown that he no longer meets the commitment standard. Instead, "[c]onfinement may continue without meeting this threshold if . . . the person continues to need treatment for his sexual disorder and continues to pose a danger to the public."* In *Call v. Gomez*, the Minnesota Supreme Court rejected the patient's constitutional challenge to this discharge standard, concluding that as long as "the confinement still bears the reasonable relationship to the original reason for commitment," the constitutional requirement is met."

* ***Call v. Gomez*, 535 N.W.2d 312, 319 (Minn., 1995), cert. denied 519 U.S. 1094 (1997)**(emphasis added):

"A person committed as a psychopathic personality must be discharged if no reasonable relation exists between the original reason for commitment and the continued confinement. As noted above, a person is committed as a psychopathic personality because he or she both requires treatment for an identifiable sexual disorder, as defined by the statute and by this court's decision in *Pearson*, and poses a danger to the public. To justify discharge, the statutory discharge criteria for persons committed as mentally ill and dangerous to the public require a showing that the person is capable of making an acceptable adjustment to open society, is no longer dangerous to the public, and is no longer in need of inpatient treatment and supervision. Minn.Stat. § 253B.18, subd. 15.

[4] So long as the statutory discharge criteria are applied in such a way that the person subject to commitment as a psychopathic personality is confined for only so long as he or she continues both to need further inpatient treatment and supervision for his sexual disorder and to pose a danger to the public, continued commitment is justified because the confinement bears a

reasonable relation to the original reason for commitment. We believe that the statutory discharge criteria set forth in section 253B.18, subd. 15, can be applied to meet these requirements.

[5] [6] In applying the discharge criteria, we note that a slight change or improvement in the person's condition is not sufficient to justify discharge. Moreover, contrary to what the appeal panel held in the present case, it is also not sufficient that the person no longer evinces the utter lack of control over his sexual impulses. The utter lack of control over one's sexual impulses is part of the threshold showing that must be met to justify commitment. *Confinement may continue without meeting this threshold if the confinement still bears the reasonable relation to the original reason for commitment; that is, the person continues to need treatment for his sexual disorder and continues to pose a danger to the public, which are the reasons for which the person was originally committed as a psychopathic personality. We do not believe that a person who is one step below an utter lack of control over his sexual impulses is necessarily in "remission" of his or her sexual disorder, such that his or her "deviant sexual assaultive conduct is brought under control." Blodgett, 510 N.W.2d at 916.*

* *In re Smith*, ___ Wn.App. ___, 2007 WL 518558, 4 (2007) (emphasis added)

"The 2005 statute [RCW 71.09.090 amendments] did not alter the underlying framework in which the detainee has the right to a new trial if there is prima facie evidence that he had 'so changed' as to no longer meet the description of a sexually violent predator. The 2005 statute added a new subsection, subsection 4, *articulating what is necessary to satisfy the 'so changed' standard and listing certain types of evidence that do not satisfy it.*

* **Transcript of Hearing on SB 5582 Before the Human Services and Corrections Committee of the Washington State Senate (February 3, 2005)** (copy attached; audio recording cited in State's brief at 15).

* **Transcript of Hearing on SB 5582 Before the Criminal Justice and Corrections Committee of the Washington State House of Representatives (March 25, 2005)** (copy attached; audio recording cited in State's brief at 15)

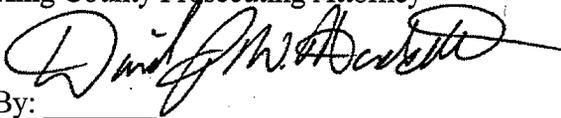
* **People v. Salomon Munoz**, 129 Cal.App.4th 421, 429, 28 Cal.Rptr.3d 295, 300 (Cal.App. 4 Dist., 2005) (cited by Ambers in reply; emphasis added)

“As we will explain, an *SVP extension hearing is not a review hearing*. It is not the mere continuation of an earlier proceeding and, except in a limited sense, the petitioner cannot rely on findings made at earlier SVP hearings to shape the issues or to prove SVP status in a current proceeding. An SVP extension hearing is a new and independent proceeding at which, with limited exceptions, the petitioner must prove the defendant meets the criteria, including that he or she has a currently diagnosed mental disorder that renders the person dangerous.”

* *State ex rel. Schottel v. Harman*, 208 S.W.3d 889, 891 (Mo.,2006) (noting substantial amendments to Missouri SVP law following case cited by Ambers, *In re Schottel*, 159 S.W.3d 836 (Mo. 2005), and affirming application of those changes to Mr. Schottel).

DATED this 23rd day of February 2007.

NORM MALENG
King County Prosecuting Attorney



By: _____
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Senior Deputy Prosecuting Attorney
Attorney for Petitioner

ATTACHMENT A

Transcript of Hearing on SB 5582

**Before the Criminal Justice and Corrections Committee of the Washington State
House of Representatives**

March 25, 2005

CHAIR O'BRIEN: We'll now move to House Bill 5582 stuff.

K. LEATHERS (staff): Thank you Mr. Chair. Senate Bill 5582 clarifies that for purposes of a hearing on a sexually violent predator's petition for release from civil commitment from a state institution, a change in a person's age or any other single demographic factor standing alone cannot establish probable cause petition to warrant a new commitment trial. A sexually violent predator means any person who has been convicted of, or charged with a crime of sexual violence, and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility. If a person is found at trial to be a sexually violent predator, the state is authorized by statute to involuntarily commit a person to a secure treatment facility. Civil commitment as a sexually violent predator is for an indefinite period of time. Once a person is so committed the Department of Social and Health Services must conduct annual reviews to determine whether the detainees' condition has so changed such

that he or she no longer meets the definition of a sexually violent predator, or whether conditional release to a less restrictive alternative in the best interest of the detainee and the conditions can be imposed to protect the community. Even if the department's annual review does not result in a recommendation of any type of release, the detainee may nonetheless petition annually for conditional release or unconditional discharge. If a detainee petitions for a release or discharge, the court must set a Show Cause hearing to determine whether the detainee is entitled to a new trial on the issue of his or her continued commitment. In order for a new commitment trial to be granted, the detainee must establish probable cause to warrant the new trial. Probable cause may be established in one of two ways: if the State failed to provide prima-facie evidence that the detainee continues to meet the definition of sexually violent predator, or if the detainee presents prima-facie evidence that he or she no longer suffers from a mental abnormality or personality disorder or is not likely to engage in predatory acts. The bill analysis includes brief descriptions of two recent Washington State Court of Appeals decisions because those two decisions were specifically identified in a senate bill as examples of judicial decisions that are contrary to the intent of the legislature as they relate to the sexually violent predator statute. Both cases relate to the

sufficiency of a detainees petition at a hearing for a new trial on the issue of his or her release from civil commitment as a sexually violent predator. I'll briefly discuss one of the cases, not both, but I am also happy to discuss the other case if the committee would like me to. In the Young case, Mr. Young was civilly committed in 1991 as a sexually violent predator at trial. His criminal history included six felony rapes of adult females, two of which involved threatening the victims with a deadly weapon. Several years later, he petitioned the trial court for release from civil commitment. At the Show Cause hearing Mr. Young presented a report of Dr. Barbaree as evidence that he had changed such that he no longer met the definition of a sexually violent predator. In short, Dr. Barbaree concluded that Mr. Young was no longer a sexually violent predator because, having reached the age of 61, his risk of re-offending was reduced to zero. The trial court terminated Mr. Young's Show Cause hearing without granting a new trial, ruling that that Mr. Young had not established probable cause that his condition had so changed.

On appeal, the Court of Appeals reversed. They remanded for a new commitment trial holding, in part, that in determining whether the detainee has established probable cause, the trial court may not weigh the evidence, but rather may only determine

whether the evidence, if it is believed, is sufficient to require a new commitment hearing. The Court of Appeals also found that Dr. Barbaree's report was sufficient evidence of probable cause. The senate bill clarifies that for purposes of a hearing on a sexually violent predator's petition for release from civil commitment, a change ...does not establish probable cause sufficient to warrant that new commitment trial. Probable cause that a detainee's condition has so changed is established when a detainee shows that since his or her last commitment proceeding, there has been a substantial change in his or her physical or mental condition. Sufficient evidence of such change is established only by showing either an identified, permanent physiological change to the detainee such as paralysis, stroke or dementia that renders him or her unable to commit a sexually violent act, or a change in the detainees 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. Absent such a showing, a detainee's petition must be denied. That concludes my report.

CHAIR: Representative Darneille.

REP. DARNEILLE: Thank you Mr. Chair, where are these detainees held?

STAFF: I don't know which civil treatment facility they're at but maybe someone...

CHAIR: We have three answers up here...do any of us get bingo up here? We have Monroe we have Western State, we have McNeil. Okay these are the ones with severe mental illness then, they're all out of McNeil? Okay.

CHAIR: Other questions from the committee? Senator Regala.

SENATOR REGALA: Thank you Mr. Chair and I'm glad to know that I showed up on time. Your staff did an excellent, excellent job of explaining this and maybe I'll cut it down to the very simple way that I understand this. We have a Civil Commitment statute that says you have to have so changed that you can have a new commitment trial to see if you could move to something less restrictive. I believe that when the legislature put those words in they were contemplating that you had gone through some kind of treatment or that something very physical had changed for you so that you really weren't as large a risk. When we have a gentleman who argues that his change simply is the fact that he has now turned 61 years old, I would argue that there needs to be something more than that. I believe the Legislature meant that there needed to be something more than that. So, we really want to clarify that you need to go through some treatment. There needs to be something more than the fact that you got a year

older or even two years older. So, it's just as simple as that, with all due respect to all the guys, because I know a lot of you.

Maybe I shouldn't say this because I know a lot of you are about that age and you're still very vital people (laughter).

CHAIR: So anyway, any other questions up here? Okay, thank you.

David Hackett, King County Prosecutor's office please, Suzanne Brown-McBride, you can join him.

Todd Bowers, general attorney.

Tom McBride of the Washington Association of Prosecuting Attorneys is pro on this and wish to testify.

DAVID HACKETT: Good afternoon Mr. Chairman, members of the committee. My name is David Hackett and I'm a Senior Deputy with King County. I've been committing sexually violent predators to the facility on McNeil Island since about 1997 and have been involved in all aspects of this law from the trial courts up to the U.S. Supreme Court and in, of course, our Supreme Court on multiple times. As this Legislature is aware it adopted this law in 1990 to both protect our communities and to provide treatment for those sex predators that were willing to avail themselves to treatment. People that we place on McNeil Island are the worse of the worse sex offender. People with long histories of rape and child molestation and persons that have gone in and out of our prison systems again and again. For example, Mr. Young the

individual primarily involved in the case that resulted in this legislation has been convicted six times of various sexual offenses and has at least that many additional offenses. The idea of the statute is that you worked your way through treatment to get released. Not simply that you sit there, get a few years older and then ask for release based on your age. That does not protect the community and that does not encourage treatment.

The purpose of this legislation is to bring that balance back to the statute, to bring it back to the situation where people are encouraged to go through treatment and where the community is protected against the release of untreated sex offenders like Mr. Young.

I'd like to give you an example of one case that has resulted in a new trial in our county based on this. The individual's name, Mr. Strauss he was committed at the age of 46, at the age of 49½ or 50 he received a new trial. Not because of anything he had done, like Mr. Young he had refused all treatment, denied many of his offenses. But because he had experienced a few birthdays while sitting at the SCC, he was able to find a defense attorney to pull some statistical, not an attorney I'm sorry, defense expert to pull some statistical manipulations and say that he was now too old to be a sex offender. Clearly, someone who is 50 is more than capable of raping; someone who is 60 or 70 is more than

capable of raping if they have not addressed their underlying concerns. This bill promotes the hard work of treatment and encourages the safety of our communities by requiring people to stay committed until they can make that showing that they have gone through treatment and that will ensure community safety. Now, you will hear testimony later today that there are problems with this bill under due process. As I mentioned I have been involved in most of the cases in our State Supreme Court. That has always been the claim with our legislation from 1990 on and that is simply not bore fruit. This bill has been reviewed by my office and we do feel confident that we will be able to defend this because, after all our State Supreme Court, and the other courts have recognized that those twin pillars of community protection and treatment are the things that sustain this bill and this bill simply restores that balance. Thank you.

CHAIR: Questions? Thank you.

TODD BOWERS: Thank you Mr. Chair. For the record, my names is Todd Bowers, I'm an Assistant Attorney General and I work in our Sexually Violent Predator unit and have worked doing pretty much nothing but sex predator cases since 1995. Like Mr. Hackett, I've been involved in all aspects of them since that time. The attorney general's office represents county prosecutors in these cases in 38 of the 39 counties. The only county that we

don't do them in is King County, so we handle quite a few of them. What I wanted to do was just illustrate the problem with the Young decision just by telling you about one of the cases that I personally have. This gentleman's name is Keith Elmore, it is a case out of Clark County. Mr. Elmore, in 1994, when he was 38 years old lured a woman to his home and his intent, as he later told the police, told me when I interviewed him and has told his treatment providers was to strangle a woman (thereby killing her) cutting her up and then eating her in order to fulfill his life-long fantasy of becoming a woman. I filed a civil commitment petition against him just prior to his release, and he was committed in 2001. Two years later, he found a defense expert who was willing to say that because he was two years older than he was at the time of his commitment he was no longer dangerous and the trial court, because of the Young decision, was forced, felt forced, to give Mr. Elmore another commitment trial. Now, I've appealed that ruling and that's on appeal, but clearly the Young decision was what caused Judge Bennett, down in Clark County, to grant Mr. Elmore a new trial. And again, based solely on the fact that he was two years older than he was at the time of his commitment.

And then the only other thing I wanted to share with the committee was some of the numbers. There are about 210

people currently at the Special Commitment Center. Of those 210, about 80 are over 50 so that's what about 40%? And Mr. Elmore, as I explained, actually he's now he just 48, he's under 50. If you count people that are 40 and older, at the Special Commitment Center, you're talking well over two thirds of the people at the Special Commitment Center are over 40. So, I hope those numbers give you an example of the possible ramifications of the Young decision. So, thank you very much Mr. Chair.

CHAIR: Thank you, questions? Representative Darneille.

REP DARNEILLE: Thank you Mr. Chair. I'm going to plead ignorance here I'm trying to read the bill notes and I'm...I can't understand if the Young case is finished or if he simply was given the opportunity for a new commitment trial and if that's still in the process or has he been released, I mean is that process concluded?

MR. HACKETT: No, I'm actually trial counsel on the Young case. The way the statute is set up and this bill does not change that, while a person is awaiting this re-commitment procedure they do remain at the SCC, but the problem comes that the State is then required to prove yet again beyond a reasonable doubt that Mr. Young is a sexually violent predator which is the same thing that a jury had previously found.

REP. DARNELL: Okay, so I just wanted to clarify that that we don't have Mr. Young out on the streets again ready to perpetrate another crime. Okay, thank you.

DR. RICHARDS: Mr. Chairman I'm Henry Richards, Superintendent of the Special Commitment Center, DSHS where sexually violent predators are detained and treated here in Washington State. By training, I'm a clinical psychologist and researcher. We're here to support this bill for two primary reasons. One, is that we think it really will promote among those individuals at our center the understanding that what the law has always stressed was that their change should come through treatment. Those are the kind of significant changes we're looking at: engagement and some sort of understandable, reasonable change process. Our facility is there to provide resources for that kind of change. The second reason is I think simply to support a bill that prevents a misapplication of relatively weak and sometimes not carefully thought-through scientific evidence that really isn't scientific in that it's not generally accepted and hasn't really been empirically validated certainly on our population. As you've heard some of these cases, we have a population of extreme individuals. Not only do they have mental disorders, those disorders tend to be on the extreme side, they have extreme criminal offense histories. So, most of what we know about science says that any estimates tend

to push their severity toward the extreme, toward the more severe, not some sort of simple algorithm where we would reduce their risk by something...by the mere passage of time. So, that's why we're here to support this bill.

CHAIR: Representative Darneille.

REP. DARNEILLE: So, I think what you're saying then is that you don't make a lot of mistakes, that once a person's there it's really for this body of evidence that concludes that this is not a person that's going to be rehabilitated through the normal process of incarceration and do require this additional level of therapy and maybe even with the therapy they would never reach a point where they would be suitable for living in the community again.

DR. RICHARDS: The courts make those decisions but they're based on very sound evidence and very carefully applied evidence. It takes a lot of work, in most cases, a lot of history, so sometimes people are older just to be able to chalk up the kinds of offenses that start to qualify somebody for this category.

REP. DARNEILLE: I know that we've been talking about this as if ah the sexual act is the only way that a rape of this kind of degree can happen and I wanted to make sure that we make it clear that we're not talking just about someone's physical ability to have an erection and perpetrate a rape, but that the rape happens in a variety of ways and with a variety of objects and that the age in itself or even the

physical ability in itself are irrelevant. I would hope under the way the bill is drafted to preclude someone being eliminated from the program or released based on somebody not having the physical ability to perpetrate a sexual act.

DR. RICHARDS: I share exactly that understanding.

S. BROWN-McBRIDE: Good afternoon Chair and members of the committee. Now that you've heard from the lawyers and the doctor, I am Suzanne Brown-McBride from the Washington State Coalition of sexual assault programs. I think I'd like to add a little community perspective to this as well. This is a very special population of sex offenders. They are folks who have been almost all, if not all of them, have been convicted in criminal court, served their time and been remanded over civilly due to the nature of who they are as individuals as well as the crimes that they've committed. And so I think that there is a lot of concern from the community as we've all talked about when we've had these bills come through here over the years about how it is that these individuals progress through the stages of treatment that they have at the Special Commitment Center. I think those of us in the community and those of us who are victims have over time started to learn and value some of the work sex offender management folks have been doing with actuarial risk assessment and variety of tools that we have. However, actuarial risk assessment is not, it is the

sum of its part, it is not any one individual part. And so I think what the Young decision highlights is this notion that if you have sort of one individual factor change that it would somehow change you from dangerous to not dangerous. I think clearly with the population of individuals that have been described to you with the kind of crimes that they have committed, it simply isn't true and it simply isn't something I think community members would be very tolerant of if they thought wow, at 59, this person was dangerous enough to create...you know to go to this special center, to be convicted under...to be remanded under these statutes but now at 60 they're not. I think that that doesn't really hold water from the public perspective, as well as, I think from the treatment and research perspective and what we know about the laws themselves. And so, it is our interest to make sure that these individuals receive the treatment that they should, the management that they should, that they are progressing in a way that the Courts have found to be constitutional and appropriate and that that would be the deciding factor when they are released. Not simply progressing in age or any other sort of one demographic mechanism. So, I'd urge your support of this bill.

CHAIR: Representative Darneille.

REP. DARNEILLE: I've got a lot of questions about that, thank you. Perhaps one of you can tell...maybe the attorney general can tell us what the

actual process is. We've got 210 folks out there, I presume that on...maybe on a regular basis that we probably have more than one request for the Court to look at the case again. Because that's part of our civil liberties too, to ask for additional assessment of a case. We've got 210 folks out there, when they make these kinds of requests, can you tell us what the process is, what kind of board they make this request. Who...is there one judge that makes these kinds of determinations or where...who is this judge that, that made the finding in the Young case that we're dealing with now?

MR. BOWERS:

That I don't know...ah Mr. Hackett handled that case. But, I can tell you that after a person is committed as a sexually violent predator the statute requires that once a year Dr. Richard's staff at the facility do an annual review of their mental status. The idea basically is to see, I'm paraphrasing the statute, but the idea basically is to see...does this person continue to meet the definition of a sexually violent predator and has the person so changed that even if they still meet the definition of a sex predator can we safely put them in what we refer to as a LRA or Lesser Restrictive Alternative facility? Once that report is done it's sent to the trial court that committed the person and then a copy is also sent to the committed person's attorney, as well as the prosecutor on the case; myself, Mr. Hackett or one of the

people that we work with. After that there's a, what we call a Show Cause Hearing, before the commitment court and at that hearing the person has an opportunity (the committed person has an opportunity) through their lawyer to come forth and either challenge the evidence that Dr. Richard's staff has brought forth saying that for example the person continues to meet criteria and needs to stay at the facility for more treatment. Or the statute also affords the person, if they're indigent, and all of them are, to go out and get their own expert at public expense. That expert can present their own report. So, at that Show Cause Hearing what happens is that the trial court considers the evidence presented to it by both parties. Because the trial court cannot at that proceeding weigh the evidence; it's kind of like a Summary Judgment proceeding. If the defense expert comes forth, as happened in my case with Mr. Elmore, the want-to-be cannibal, because that expert said he's two years older and based upon my reading of the literature, he's less likely than 50% to re-offend if we release him the trial court judge was required based on this Young decision to order a new trial. So you have this kind of preliminary Show Cause proceeding, before the trial court judge, and then if there's sufficient evidence presented you have a whole new re-commitment trial. One of the problems that no one really mentioned, but another problem here is, with the

Young decision is...let's assume that I take Mr. Elmore to trial as a result of this Young decision, okay? Let's assume that I win, knock wood? He stays. He can go back to that same doctor next year, as part of next year's annual review, get that doctor to sign another declaration saying, well, he's a year older and I still read the research the same way. And we bought us a whole new trial with all of the expenses that go into the these things and because I want to win that trial because I think Mr. Elmore's still dangerous, I've got to bring those victims of his in. I've got to bring that woman in that he tried to do this thing to and I don't want to have to do that and I shouldn't have to do that frankly. So, I hope I answered your questions and explained how the process works?

MR. HACKETT:

...And if I could also add to that. Another important part of this bill is it does not remove in any way the ability to come forward through a PRP or through some other type of collateral challenge to claim that there was an error with the initial commitment proceeding. So if you do have that type of evidence, you can go through the RAP rules, you can file a habeas petition...that type of thing. But, in that proceeding, the court is allowed to say, "well, does this opinion from Dr. Barbaree, does that make any sense and is it enough to overcome the evidence that was in front of the jury and that was determined unanimously beyond a

reasonable doubt?” This is a statute that overall has a very extreme civil liberties protections at the beginning of the statute when there is a trial and then continues to have those annual reviews each year because the state is putting people in a facility for an indefinite commitment and I think those types of protections are appropriate, but where they have gone awry in this case is that these entirely not accepted novel defense expert theories that just being a couple of years older somehow makes you not dangerous are being allowed to carry the day and then...you know one word Viagra. There are many things in this day and age that, you know, 60-year-old men do not have problems with.

CHAIR: Representative Pearson.

REP. PEARSON: I wanted to talk about ah...if a person say, in looking through the bill report, says if a person has paralysis, stroke or dementia that they may be able to go to a least restrictive alternative. Would they have to be totally incapacitated then?

MR. BOWERS: No, I think that would be basically up to doctor...we would rely on Dr. Richard's staff to let us know what degree of physical impairment from, for example, a stroke would be sufficient to reduce their risk to below 50%. I can tell you Representative Pearson, to my knowledge that's only happened on one occasion that I can think of, Mr. McClatchy. And, I believe he had a

stroke. He had a stroke and he was placed in a nursing home. But, we would rely on Dr. Richard's staff...they're not only psychologists on staff at the Special Commitment Center they're also physicians, and two psychiatrists on staff that can help us, medical doctors, understand how much and whether the impairment has been enough to reduce their risk sufficiently so that they're safe to be brought back into the community.

S. BROWN-McBRIDE:I was just wondering if I could follow-up for a second. I appreciate, Mr. Bowers, you bringing up the point around victims testifying. I think cause when you understand where civil commitment happens, sort of along the line of a prosecution, you very likely have that victim testifying in a criminal trial. You have that victim then live through the entire experience of having been incarcerated. They have then testified at the initial commitment trial and then would be essentially called upon year after year after year to come in again. For some of these victims the commitment trials are happening in 15, 20, 25, 30 years later. So I think that...I appreciate that being raised again sort of in the context is also saying that you know victims attempt to cooperate and to be a part of the process as best they can, but at some point that becomes wholly unreasonable when you're talking about simply this person's getting a year older or that, you know, that one demographic piece has changed. I think

it's exceptionally difficult on victims to ask them to continue to do that. A lot of them are living out of state, they're traveling in, they're moving around and quite often they're trying to move on with their lives. This individual can be sort of, you know, continuing to petition to have these trials for merely that reason and continuing to ask victims to make that sacrifice to come in and do that.

CHAIR: Other questions from the committee? Representative Darneille.

REP. DARNELL: Thank you Mr. Chair. I came into the legislature in 2001 and that was the year we opened the first least restrictive alternative which is also at...McNeil Island but since then we are placing these kinds of facilities in other parts of the state. Can you give us, Dr. Richards, a sense of what the process is when a person is remanded to the Special Commitment Center. I think in 2001 when we were first looking at the center it was almost viewed as a halfway point or a clearing house if you will for ah people to enter the center, to undergo treatment, to have these routine or semi-routine assessments about their improvement and to...with the intention that federal court sort of placed on our system which was that we didn't just assume that that person was going to stay in the Special Commitment Center forever, but would eventually move to this less restrictive alternative and possibly even with good treatment outcomes and move on into the

community again. Can you tell us ah how many people have actually moved through that process and whether or not I know at this point...in 2001 the prediction was that this point and time in 2005 that we would have 400 people would have gone through this system and would now be in LRA's and there was this concern that we were not building facilities and operating/opening facilities in sufficient time to meet that sort of moving through the process timeframe. Have...my sense is that that hasn't happened and can you give us a little update on that?

DR. RICHARDS:

My understanding to is that the original planning was for a large number of secure transition facilities and not a large number...a number of secure transition facilities in the community.

Currently there's one at McNeil and there's one in the process of being built in Seattle. It appears that given the pace at which people are moving through the program that those will be sufficient for some time. And I can say that there are a couple of reasons for that, I think one of the largest one is that many of these offenders have not engaged in treatment. Many of the residents have waited out in hopes that the law will be found unconstitutional, in hopes that there'd be an illegal nuance in their case, loophole and that they'll get out through that route. The treatment looks hard and it is hard ah these people have to admit to things they denied all their lives. They have to talk

about their childhood, they have to talk about the victims, they have to be confronted with the pain that they've caused both for the victims, their families and themselves. So, this is a difficult process for people. So you'd have the fact that many don't engage in treatment. The other problem is that the law is designed for a severe class of offenders or people who have severe disorders and it's my belief that that's who we have. We have people who have very serious disorders and by the nature of their disorders it is often difficult for them to engage in treatment and to make the kind of changes that we might see in sex offenders who are appropriately treated and managed in the community, who make these changes much more readily because of the fact that they don't have these severe disorders. So, we certainly do see this case of people not engaging, and we find people who reach a ceiling effect for them. It's sort of my job to encourage my staff to not believe in that ceiling even though they're looking at it you know they're bumping their head against that ceiling. We're trying to make sure that they believe that they can help a resident push through that. But, in many cases it's just the fact that people do achieve a certain level and have a hard time going beyond that. Certainly, one of the reasons why I'm here to support this is I think it will encourage more of the residents to really put that extra effort in...wanting to

get engaged and say yes I'll get involved treatment and put the painful effort in and it's not a quick turn-around. So, I think unfortunately maybe people were misled to think this could happen quickly, that these changes could happen. Science and the therapeutics arts aren't that good when it comes to this population. If they were depressed, we could probably help them out but they have many, many other problems.

CHAIR: Representative Pearson.

REP. PEARSON: Thank you Mr. Chair. I'll be brief. If I heard you right you said many choose not to go into treatment because of denial and they think maybe future judgments might go their way?

DR. RICHARDS: ...legal strategy and personal defense strategy.

REP. PEARSON: How many have gone through treatment again?

DR. RICHARDS: We've actually had about 11 people I believe that may be a number...that have gone through the full course and been recommended for an LRA.

REP. PEARSON: So everyone else is in denial? That's fascinating, thank you.

CHAIR: Further questions? Thank you. Dennis Carroll, Christine Sanders.

DENNIS CARROLL: Thank you Mr. Chairman and other members of the committee. My name is Dennis Carroll, I'm an attorney with the Defender Association. I've been doing these cases since about 1997. I'm here on behalf of the Washington Association of Criminal

Defense Lawyers and the Washington Defender Association to speak in opposition to this bill. This bill is unnecessary and it also implicates constitutional problems that could raise problems in the future regarding the review process under the Sexually Violent Predator Act. The Young and Ward decisions are based on well established and well recognized principles. That principle is that the current...to justify commitment a person must have a current mental condition and a current risk such that they meet the criteria for commitment and this bill contravenes these principles. If you look at the Ward case for example, the Attorney General's office didn't even seek review on our State Supreme Court on that case and that the mandate from the Court of Appeals was recently issued. I think that recognizes that it was based on well established, well recognized principles and was consistent with what the statute says.

This bill contravenes what has been found in the literature. Now the people who spoke previously have characterized the defense experts as...from left field, that they're cooking the numbers.

The expert in the Young case was Dr. Howard Barbaree he is an internationally known well published, well recognized expert who was the Honorary Chair of a recent conference for an international organization called The Association for the Treatment of Sexual Abusers, which is made up of treatment

professionals and that's what he is. He also does research. Nobody disagrees with the basic premise that as a folks get older, particularly offenders, that their risk decreases with age. Nobody's saying that as we get older we're unable to commit these horrible acts but that the risk of it happening does decrease. The question is the application to specific cases. This principle is recognized by even folks at the Special Commitment Center. Dr. Lynn Saari and Dr. Rob Saari are either current or former psychologists at the Special Commitment Center and they've written an article about the effective age on recidivism and its practical implications for the use of current risk assessment techniques for sex offenders. This bill also limits change to two things; one, that the physical disability which I'll get to in a minute but also, it limits it primarily to treatment effect. The literature is very ambiguous about the ability of treatment to reduce recidivism, its mixed results we're not really sure. And what's interesting is in some cases, for example, in Snohomish County, the prosecutor's office there is saying that in a particular case treatment can have no effect on recidivism and that is a person who has been engaging in treatment for a number of years.

This bill also creates conflicting issues or standards for risk in the application of its statute. For example, for those who have a

substantial physical disability, a stroke; under this bill the standard had said they are unable to re-offend in the future and no expert is ever going to say that somebody who is alive is unable to re-offend in the future; it would be unethical. In fact when the Association for the Treatment of Sexual Abusers, they have ethical guidelines and they specifically say no expert should do this it would be unethical to say somebody absolutely will or will not or is unable to re-offend.

A different standard is set up under this bill for those who participate in treatment and inclined that they've changed their treatment and that would be whether they're safe to be at large. This term is not defined in the statute, it wasn't defined...it's not defined in this bill, and it's not defined anywhere else in the current Sexually Violent predator Act.

These two standards have to be juxtaposed against the criteria for commitment which is what the standard would be if you are awarded a trial whether your condition remains such that you are a sexually violent predator or that you are still a sexually violent predator. And that standard of risk is whether the person is likely to commit a future act of predatory sexual violence. That's defined as more probable than not or something greater than 50%.

These standards are inconsistent. I would suggest the impossible or unable to re-offend standard is both unconstitutional but also impractical. I think the prior question about folks who have strokes and things like that you'll have under DSHS care people who are in advanced state of age, who are far beyond their years of being high-risk offenders who will still be committed under this act and really no way for that issue to get back to the trial court where this issue would simply go to a jury.

And that's one thing I do want to stress is the Young and Ward decisions don't let anybody out. They simply allow the issue to go to trial for where a fact-finder can decide the issue.

The State has means through the evidence rules if they think a scientific opinion is not grounded in the empirical science or the literature there are evidence rules to deal with that. If something is not accepted by the general scientific community, the courts shouldn't let it in. In the Young decision, the second time we went to the trial court and had his annual review they dropped that issue because they knew that the...general principle that age reduces recidivism is well accepted in the community. And when a person is granted a trial through their review process, we've been calling it a new commitment trial or a re-commitment trial and it's really not a new commitment trial.

The issue at that trial is whether the person's condition has

changed or remains such that they're still a sexually violent predator. So there is, whether it's in the law or not, kind of a presumption that the person was... and yes the State has the burden of proving that there has been no change but I would suggest...if they have an outrageous case and they decided the Elmore case, the man who was the would-be cannibal, as the person from the Attorney General said they're burden of proof is not so difficult in that case.

I don't see what's wrong with having the State have the burden of proving these things from time to time. It's not a situation...the Young case recognizes that a person can't come back year after year after year and say my condition has changed from...you know I'm just one year older. It has to relate back to the last time that they had one of these unconditional release trials. The science for risk assessment has changed dramatically in the last 15 years. Now we have very mathematically precise or based instruments to assess risk. Mr. Young was committed long before these type of instruments were in place as Mr. Ward, his commitment was some time ago and things have changed since then. And so...unless the committee has any questions I would happy to turn it over to Ms. Anderson.

REP. PEARSON: Okay Mr. Carroll, we'll start out here...first of all this legislation is unnecessary. First of all I'd like to say I think that's our

choice to judge not yours. What you said...just doesn't match with the fact that the fact that were in this place to begin with is the defense lawyers clearly manipulated the Legislature's intent in this original legislation, that's why we're here. I would like to hear your response to that, also to point out to you and you're not dealing with this in your testimony here and that is the fact that by having these re-commitment trials over and over again we're re-victimizing those victims. That's something that you need to think about and I'd like to hear your response to that...

MR. CARROLL:

First, I'm here representing my position, the position of the Washington Association of Criminal Defense Lawyers and WDA. It's our view that this is unnecessary. And the reason I say its unnecessary is because people haven't gotten out of the review process. Nobody, nobody has been unconditionally released through treatment or through the review process who's been committed. I'm not sure, frankly, what to say about our position that I have somehow manipulated the science or the statistics. I can't come in and talk about my opinion as to what the science says, I have to bring an expert. That expert's testimony or report is subject to what we call a Frye analysis and that's whether it's generally accepted in the scientific community. The State can keep out and ask a judge not to consider something if it is not generally accepted in the scientific

community, they have that option. They initially raised that in the Young case, they lost they had another review hearing because my expert hadn't interviewed Mr. Young for a variety other reasons and they dropped that argument. They tried to raise it again in fact I don't even think they raised it in the appeal I think it's addressed in a footnote somewhere, but I'm not sure I don't recall that exactly. So, I do disagree respectfully with your opinion that its defense attorneys who are manipulating things. The literature regarding risk assessment is dynamic, it changes, it's new there are different studies coming out all the time. In fact, this international organization ATSA, The Association for the Treatment of Sexual Abusers is soon coming out with a journal volume specifically and solely addressing the age issue and how do we deal with age older sex offenders and how do we assess risk and changes in risk due to that. I'll also point out the diagnostic and statistical manual which is generally thought of as the Bible for making mental illness diagnosis specifically states that for sexual disorders, paraphilia (which are the disorders we're usually dealing with in these types of cases), it specifically says that while they tend to be chronic and life-long the behaviors associated with them tend to diminish with age. The same is true for personality disorders, the same thing while they tend to be chronic and life-long there tends to be a burn-out as

people get older, particularly for anti-social personality disorder which was one of the more common personality disorders that we deal with in these cases. In that section of the DSM, it says that after a person's third or fourth decade that you'll note that the behaviors generally tend to burn out as folks get older. So, I think that addresses the manipulating science issue. Regarding re-victimizing I did address the fact that, for example, Mr. Young was last committed in 1991. His trial is currently scheduled for June. It's been 14 years since he last had a commitment trial. Now, there are other ways of preserving testimony, there are ways to present the information provided by the victims through the experts. Frankly, its powerful testimony for the State and that is one of the reasons that they call them. There are many other reasons to show what really happened and to show how the detainees version is much different then the victims' and things like that. But it's all so very strategically powerful testimony for the State and I would submit that sometimes that is why they are called at this cases because there are other ways to present this same type of information to juries in these types of cases.

C. SANDERS:

Good afternoon, I'm Christine Sanders from Snohomish County Public Defender Association. I represent Bradley Ward and just adding to what Mr. Carroll said about changing the science. Mr. Ward essentially stipulated to being a sexually violent predator in

1991. He was 19 and he was...he had been a juvenile-only sex offender. And what that means is that all of his sex offenses, which he committed very few, that they happened before he turned 18 and as you're probably all aware, there's a lot of new science that's evolving around that issue. In fact, a recent U.S. Supreme Court case that says it's unconstitutional to execute juveniles is based partly on the fact that juvenile development, the brains, don't completely develop until...well in young men maybe as late as 25. So, Mr. Ward did not have an adversarial hearing in 1991. He was brain damaged very young. He had a head injury, he had been hit by a car. So, he was very young he was brain damaged, he stipulated so it was a non-adversarial proceeding. And, that illustrates another point, Mr. Ward has essentially now spent 13 years at the SCC...or 14 years at the SCC. He could spend the rest of his life there and he's being committed, he's being incarcerated essentially. So, it does have to be an adversarial proceeding. He does need another expert...or two as it's been to come in and look at his case and say, look the science has evolved. He was a juvenile when he committed his sex offenses. He's not at risk to re-offend at this point in his life because his brain has settled down. It's evidenced by the last ten years at the SCC where his behavior has improved and it has modified.

Can I just give you one example too, about treatment and all of the residents know about this particular case. Mitch Gaff, is anyone aware of Mr. Gaff's situation? In 2000 the SCC recommended that he be released to an LRA and it was a good recommendation. Mr. Gaff had really actively engaged in treatment. He was at Twin Rivers of the SOTP and he graduated there and then he came to the SCC and did very well. Anyone who has looked at his work. It's not, it's not a shallow attempt. He's bright and he's really, he just...worked at it. The SCC recommended his release, he was all set to go. The prosecutor decided that he was going to challenge that...did not offer any evidence or any expert, demanded a jury trial, and then on the basis of what Mr. Gaff did in 1984, which was horrific, Mr. Gaff was not released and he is still at the SCC. So...and everybody at the SCC knows about that...knows that here's a man who was diligent, he's smart he has not had one BMR the whole time he's been at the SCC since 1994 and...he's easy to get along with, he's a hard worker, he really...he helps other people with treatment and even after losing in 2000 or even after not prevailing he's still going through treatment, he's still helping other people in the treatment program, but it's certainly, it certainly...it was a devastating blow to the treatment at the SCC that a prosecutor could request a jury trial and on the basis of no

evidence keep Mr. Gaff at the SCC even though he sought all of the treatment. So, these are considerations that you should really, strongly consider and that these are human beings, I know they committed some horrific acts, but they're still being civilly committed. We're still detaining them against their will. There does have to be an adversarial situation set up, safe guards and as Mr. Carroll said, no one is getting out if they haven't...if there's not good evidence that they're not at risk to re-offend.

CHAIR: Representative Darneille.

REP. DARNEILLE: Thank you Mr. Chair. It's so clear to me in the Young case we're talking about in age, not just a change in age. I'm curious if you could explain the Ward case since we're just looking at it for the first time here. In the Ward case what is the one issue that's changed, or what's brought that case to the forefront in the discussion of this bill?

MS. SANDERS: Well, Dr. Wollert was the initial expert on Mr. Ward and he opines that Mr. Ward did not have a mental abnormality at this point in his life. And when he was committed...Mr. Ward is a very specific case, it's a very special case...Mr. Ward and his mother essentially petitioned the SCC to commit him because he had gone through this brain injury and his behavior was a little compulsive in terms of making phone calls and doing certain things. His mother didn't know what to do with him so

essentially she and Bradley went to the SCC and they said it's a short-term program in terms of...I think they believed he would be out within four years after getting through treatment and Ms. Ward didn't know what to do with him because there was very clearly so much brain damage in Mr. Ward's case at that point that his ability to act in a normal way was severely impaired. So, in Mr. Ward's case...

REP. DARNELLE: But he also did admit to raping and committing incest with his younger brother and molesting, I'm sorry not raping, five female children so this wasn't a case where it was a simple obsessive compulsive disorder it...

MS. SANDERS: ...no, that's right...

REP. DARNELL: ...of making telephone calls and his mother not knowing what to do with him, this was rather severe wouldn't you say?

MS. SANDERS: Well, what Dr. Wollert found was that a lot of what Mr. Ward...a lot of the evidence surrounding what Mr. Ward did came only from Mr. Ward. There's only one victim, aside from his brother, and his brother was two younger than him, I won't talk about that but...the indecent liberties that Mr. Ward was convicted of that's the one contact offense that he was convicted of. All of the other victims were mostly just Mr. Ward's self-report and Dr. Wollert couldn't find any evidence to back that up. There was a lot of evidence that suggested at the time that

Mr. Ward was severely brain damaged at the time that he...what he was saying might not be entirely credible. So, what Dr. Wollert ultimately found was that Mr. Ward didn't have a mental abnormality...or doesn't have one now that the brain injury that he had that may have caused him, at that point to act out and to offend, had corrected itself which is something that is not outside the realm of possibility. I mean brain injuries often correct themselves.

REP. DARNEILLE: I'll ask a question, maybe it's too long to ask but...the situation with Mr. Ward does it seem...as my reading of the bill I can't see where the bill would preclude Mr. Ward from pursuing his wrongful and you know...if he was wrongly imprisoned or held in that facility or in that program in the original proceedings I don't see how this bill would preclude the review of that case and his potential finding that that was an appropriate placement at the time. I'm seeing the bill as being...as addressing those people that are appropriately placed who then want to be released based on one issue that's changed or not changed. So, how is Ward even...?

MS. SANDERS: Well, let me...abnormality but...his risk to re-offend Dr. Wollert found at his risk to re-offend had changed. That, he may have very well.

REP. DARNEILLE: What's the one change?

MS. SANDERS: That was the change that over...and it was based on this juvenile only sex offense data that has just recently come out and I'm sure you're all somewhat familiar with that...so that was the change, that was essentially the change I think that the Court of Appeals accepted.

CHAIR: Let's make it quickly, we got another bill to hear.

REP. PEARSON: This will be a real simple question...was that juvenile offender data though based on people without mental abnormalities?

MS. SANDERS: Oh, you mean in the U.S. Supreme Court's position. Yeah, that wasn't for sex offenders that was for people...but there's actually quite a bit of literature out there as well on sex offenders and juvenile only sex offenders.

REP. PEARSON: ...including mentally incap...or mentally damaged ones”?

MS. SANDERS: You mean brain damaged? You know that's...that's a very specific case study but it's something...but with Mr. Ward's situation...I mean I think his brain did do some self-correcting for I mean over the period of time from when he was first committed in the SCC he hit his mid-20's you kind of see that progression...I don't know that the study specifically deal with brain injury but they do talk about the brain kind of settling in and so I think a neuropsychologist would be able to combine that and look at Mr. Bradley Mr. Ward...

CHAIR: Thank you.

Certificate of Authenticity

After reviewing the transcript against the official audio recording, David J. W. Hackett, declares to the best of his ability, subject to the perjury laws of the State of Washington, that the above written transcription is a true and accurate representation of the March 25, 2005 hearing on SB 5582 that was held before the Criminal Justice and Corrections Committee of the Washington State House of Representatives.

Dated this 23rd of February 2007 in King County, Washington.

A handwritten signature in black ink, appearing to read "David J. W. Hackett", written in a cursive style. The signature is positioned above a horizontal line.

David J.W. Hackett

ATTACHMENT B

Transcript of Hearing on SB 5582

Before the Human Services and Corrections Committee of the Washington State Senate

February 3, 2005

CHAIR HARGROVE: And we're going to move on to the next bill 5582.

FARA DAUN (Staff): Mr. Chairman, members of the committee, Senate Bill 5582 and the bill reporter behind Tab E in your books. Under the current law for persons committed as sexually violent predators there are two ways to get a new trial to determine whether or not they can be unconditionally released or conditionally released to a less restrictive alternative. The first one's the annual review and DSHS support to go out to...so far only LRA, or the second way is that any time a person who is committed there they can state a prima-facie case that he or she has so changed that he or she no longer meets the criteria for commitment. Or that it is in his or her best interest to be conditionally released to a less restrictive alternative and adequate protections can be made to protect the public.

Last year Mr. Young, who is one of the residents of the Special Commitment Center, stated a case at a Show Cause hearing, and based state Canadian study that included seven sex offenders over the age of 60, he had an expert testify that because he is over 60 he no longer met the criteria for commitment. The trial court did not accept that argument but the Appellant Court reversed the trial court because

they said the trial court inappropriately weighed the evidence because it was a prima-facie case. In an excerpt similar to a summary judgment, if you accept other things that they say on the face of it did they state a case? That went up to the Supreme Court and they declined to review the case. What this bill does is talk about how you state a case that you have so changed or how a predator would state that case. And that is by identifying...by demonstrating that they have personally an identified physiological change, some examples would be paralysis, stroke or dementia. That means that they're unable to commit a sexually violent offense and are likely to remain unable to do so or that they had a change in their mental condition due to treatment. And it also says that you can't...that a person can't base the petition solely on a demographic factor including age, gender or marital status.

CHAIR: Any questions for Fara? Okay, thank you. I've got to call up to get a few people together...

SEN. REGALA: Would you like me to make a comment?

CHAIR: Would you like to make a comment? Do you really need to make a comment? Okay.

SEN. REGALA: Okay Mr. Chair that's alright. He's intimidating me.

CHAIR: Go ahead and while she's getting ready to make a comment David Hackett, Todd Bowers and Suzanne Brown-McBride and I guess bring Henry Richards all up together. So, we need one more chair

now. And these are all the people in favor of the Bill and then Senator Regala go ahead.

SEN. REGALA: Thank you Mr. Chair. I was just going to make a couple of short comments that I think this is a very important bill, it's another one where I believe strongly that the Legislature needs to clarify what our intent was. Fara did a very good job of explaining this but as you heard, there's been an opportunity where someone has used the phrase "so changed" to their own advantage and I strongly believe that when the legislature put together the Civil Commitment we did provide a committed person an opportunity to get a new commitment trial if they were indeed so changed. I think that we firmly had some ideas about what that meant and it didn't just mean that I got a little bit older that I am now 60 years old. And I also believe that this bill still provides the opportunity for an offender to get that new commitment trial if indeed they meet some criteria. I think we're clarifying what those criteria are we're not cutting off anybody's opportunity. Thank you.

CHAIR: Okay.

DAVID HACKETT: Thank you Mr. Chairman and members of the committee. My name is David Hackett. I'm a senior deputy with King County and I'm here testifying today on behalf of Norm Maleng, my boss and the prosecutor of King County.

I've been involved in Civil Commitment well...since shortly out of law school over at the Supreme Court with the In re Young decision and then joining the King County Prosecutor's office in 1997. We currently prosecute about one third of the total caseload in the State of Washington and have the pleasure of having Mr. Young and others like him on our caseload.

This legislature adopted the SVP Law to serve two very important compelling purposes, that being community safety against sexually violent predators and then also providing those sexually violent predators with an opportunity for treatment, the opportunity to work hard in treatment and to gain conditional release or release through treatment.

The Young decision takes away from the purposes that this Legislature adopted the law in 1990 and it takes that purpose away by removing treatment from the equation. It allows someone like Mr. Young who has sat around for the last 14 years refusing all treatment to obtain a new trial simply because he has undergone new birthdays. But more importantly, the type of \$200-an-hour defense expert testimony that is brought in in this type situation, these experts have testified that anyone over the age of 25 is mathematically precluded from being SVP because of their age. The Young decision unfortunately allows this type of nonsense to go unchallenged in a Show Cause hearing, and that is why this legislation is needed.

To give you an example, we have another individual on my caseload, Mr. Bowers has some other examples, another individual who was committed at the age of 46 in 1999. He obtains a new trial in 2003 simply because he is three or four years older on expert testimony that someone who is 49 or 50 is simply too old to re-offend. That type of testimony is not supported by the science, it's not supported by all the commercials we see on Viagra and everything else and any healthy 50-year-old man hopefully still has the ability to have some drive in that area. That individual also did not undergo any treatment.

So with this bill, the Legislature would be restoring the equilibrium to the law where we are focusing on community safety, we are focusing on treatment and we are allowing individuals to obtain a new trial that have worked through that treatment system that this Legislature has set up and at that point have entitled themselves to the new trial. So for these reasons we would ask that the committee support the bill and aid in its assistance in passing through the senate and the legislature we would like to thank in particular Senator Regala for leadership on this issue and we would also like to thank staff, Ms. Daun for her continued understanding of this area and I think it's a very deep understanding of a complicated area.

One last thing I'd like to address real quickly is it will be argued in opposition to this bill that there are constitutional problems. This legislature has heard similar testimony every time an SVP issue has

come before this committee. Every time we have had this law affirmed by our State Supreme Court, by the U.S. Supreme Court and on occasion even by the Ninth Circuit. And this legislation does fit within the current law as the U.S. Supreme Court has announced it and as our State Supreme Court has announced it.

CHAIR: I think maybe what we need to do is add civil liability to experts that testify like that and are wrong. Maybe it would put a little damper on some of that testimony, huh?

MR. HACKETT: It is an absolute privilege right now.

CHAIR: Yes, Okay ah next...

TODD BOWERS: Good morning my name is Todd Bowers. I'm an Assistant Attorney General, I work in the Sexually Violent Predator Unit in my office. I've done SVP cases since I came to the office in November of 1995. It's pretty much all I do. I wanted to... in addition to saying basically ditto to Mr. Hackett's testimony I wanted to give members of the committee some figures. There are about 210 or 215 persons contained under the statute that are currently out of McNeil Island or on some form of less restrictive alternative. The vast majority of those are inpatient, of course, at the facility. Of those 210, there are 81 who are over 50. There are...

CHAIR: They're getting older every year.

MR. BOWERS: Exactly, they are exactly. The vast majority...the largest group is actually between the ages of 40 and 50. There are 62 between the

ages of 40 and 50. So we have a very...I think those numbers give you an idea of the impact if the Young decision is permitted to stand. And then, finally...briefly I just wanted to share with you one example. The Attorney General's office handles SVP cases for 38 of the 39 counties in Washington. The only one we don't handle is King County, although we work very closely with Mr. Hackett's unit. I've a case in Clark County, the Young decision resulted in a new trial for this gentleman, his name is Keith Elmore. Mr. Elmore in 1994 lured a woman to his home, his intent by his own admission, and he's admitted this many, many times was to kill her, dismember her and eat her. We filed an SVP petition against him in 1999, by the way he committed this crime in 1994 when he was 35. In 1999, we filed a petition against him. He was committed in 2001 and in 2003 he obtained a new commitment trial. The trial court was forced to order a new commitment trial because of the Young decision. I've appealed that and that's currently in front of Division II, I'm hoping we have better luck in front of Division II. Nonetheless the commitment trial was ordered...the re-commitment trial was ordered based solely upon this age issue and the trial court in that case, Judge Bennett, felt compelled by the Young decision, although he didn't like it, he felt compelled to order a re-commitment trial. As he stated and I will quote from his ruling; "The ramifications of Young are significant. The case can be read to require an Evidentiary Hearing,

in other words a re-commitment trial, on a yearly basis no matter what, simply because they responded we'll always be a year older than he or she was the preceding year." So, I think that's a pretty compelling example of the practicalities of the Young decision.

CHAIR: We have two more and please don't repeat...I'm running out of time unfortunately.

S. BROWN-McBRIDE: Thank you Senator Hargrove and members of the committee my name is Suzanne Brown-McBride, I'm the Executive Director of the Washington Coalition of Sexual Assault programs. We are an association of 41 rape crisis centers here in the state. I think not only does this legislation represent, I think your intent, as we've been working over the years to clarify and perfect Civil Commitment law. I think it also reflects the intent of the community. We recognize this community members that there are some individuals that in order to keep this program constitutional will end up going to lesser restrictive alternatives. I think we've made some heart-breaking and very hard decisions over the years to do that. But I think that it would be very disturbing for members of the community to think that not because of treatment, not because of some permanent physical disability or some other problem but because someone was 59 and now they're 60 that we'll continually have to retry these individuals or potentially put them into lesser restrictive alternative situations based solely upon that factor. And so from that perspective, I think consistent with your

expectations and the expectations of those of us who work with victims and are in the community, we would really appreciate your support of this legislation.

CHAIR: Thank you, next.

DR. H. RICHARDS: Hello Mr. Chairman, I'm Dr. Henry Richards, Superintendent of the Special Commitment Center. Usually the Special Commitment Center would be silent on a bill that mainly addresses legal procedural matters, but in this case, this bill has such a strong message regarding how the offenders should use his time while in the commitment center that we felt it was important to speak to this issue. We know that every year they do get older and we want them to use that time in making changes, basic changes in themselves and not waiting for external changes. And this bill not only addresses avoiding expensive unnecessary trials...they're launched by...

CHAIR: ...the way the incentive to participate in treatment?

DR. RICHARDS: Yes.

CHAIR: Okay.

DR. RICHARDS: So, we are definitely in support of this bill.

CHAIR: Thank you. Dennis Carroll and Anita Paulsen. Maybe you'd like to take personal civil liability for these people when they get out.

DENNIS CARROLL: Thank you Mr. Chairman and thank you members of the committee. My name is Dennis Carroll. I'm a staff attorney and assistant supervisor at the Defender Association. I've been defending these

cases for...since 1997. I'm speaking in opposition of this bill on behalf of the Washington Defender Association and the Washington Association of Criminal Defense Attorneys.

The constitution requires for civil commitment that a person have a current mental condition that makes them high risk. If a person lacks either one of those two things they cannot be civilly committed under our United States Constitution. The Young and Ward decisions are based on that simple premise about which there is no dispute.

There's also no dispute that generally, as a general matter, as people get older particularly sex offenders that their risk declines. The issue is to what degree and to how much that principle applies to certain classes of people. I don't think any expert is going to dispute that generally people at the age of 70 are at less risk for sex offenses than they are at the age of 20. And this is an indefinite treatment program, an indefinite commitment program where it is perfectly feasible to have people there for 50 years who may not be able to cognitively engage in treatment in an effective way. Now I do want to respond to Dr. Richard's response that this bill encourages people to engage in treatment. I'm not sure this bill will really make any difference to those people who are not engaging in treatment, they're just not going to be engaging in treatment. Let's, let's...realistically that is the case. And any person who is there who is thinking about just waiting for getting older and seeking unconditional release trial that way, they

know that they're going to have to go to trial and the jury is going to be told and the judge is going to be told that they have not been engaging in treatment and that will make the possibility of their release certainly less appealing to any judge or jury who is going to hear the case. But, nonetheless the Washington and federal constitutions require that we examine people's condition and determine whether or not they currently meet the criteria for commitment. The study by Dr. Hanson, which was referred to by Ms. Daun was actually based on thousands of sex offenders. There are very few sex offenders who are out in the community after the age of 60. The Washington Institute of Public Policy has also looked at this issue. A researcher named Dr. Cheryl Malloy looked at high risk offenders, people who were referred for civil commitment but were not filed on. So these are presumably the highest risk folks who are getting out into the community. She published research about the base rate for that group and she later on looked at the age issue in that group and she found that there were no recidivist who were released after the age of 49. Now, are there small groups and numbers of people who are over the age of 60 and at 50? Certainly, but that is just a problem with the research not with the general principle that risk goes down with age. And what's disturbing about this bill is that it tells people that you have to ignore the relevant research and you have to ignore the most recent science on the issue.

Re-commitment trial...part of the reasoning for this bill, I'm sure, is the cost of having additional trials. It's my understanding that only a handful of people have sought unconditional release trials under the age issue. Re-commitment trials or unconditional release trials would be less expensive than initial commitment trials. Most of the investigation has been done, people have already testified.

Transcripts can be used from the initial trial and we're only talking about having people have their commitments re-examined. Nobody's gotten out, that I'm aware of, through the unconditional release process or the annual or review process.

In the past, when there have been substantive changes, to the civil commitment process there have been working groups or it's been a collaborative process where the defense community can be heard and where treatment professionals can be heard from and that happened in 2001 when there are substantive changes to the process. It's my understanding that happened in 1995 when there are substantive changes to the process and that has not taken place regarding this change...or proposed change to the process.

I would point out that yes, the courts have upheld the civil commitment scheme in general but in In re Young the court held up and found certain aspects of it unconstitutional and opposed the judicial gloss requiring Probable Cause hearings and in consideration of less restrictive alternatives. In In re Albrecht our State Supreme

Court upheld the general process but also imposed certain requirements and clarifying the recent over act requirement. So, I'm not getting up here and saying that the Courts are going to toss out the whole thing if this law is passed. But, this bill will cause increased litigation and confusion and in my opinion it is unconstitutional because it violates very simple concepts of due process. Thank you and if anyone has any questions I'd be happy to ah...

CHAIR: We don't have any time for that unfortunately right now, we have another bill even so...Do you have anything different from what he just said?

ANITA PAULSEN: A couple of additions, thank you. I'm Anita Paulsen and I've worked in the division the last two-and-half-years and in that two-and-half-years I've had five civil commitment trials, none of them have been less restrictive alternative trials. And none of my clients have qualified for a less restrictive alternative trial under the existing law. I note that the existing statute says that the prosecuting attorney shall present prima-facie evidence establishing that the committed person continues to meet the definition of a sexually violent predator. Now that has two prongs one, that they have the mental abnormality or personality defect, and two, the likelihood of re-offense, the more likely than not. And so if that person doesn't meet that more likely than not standard then there isn't a basis to continue holding them. And I think that that's what really the issue is. Also, I did...I have a

copy of the Young opinion with me and the Court was very clear in that Mr. Young is not going to be able to every year on his birthday ask for a new trial. Basically the court says "It is unlikely that aging one year would be evidence that his condition is so changed." And so, the Court was cognizant of that and I think that it's not a reality.

CHAIR: We'll read that opinion too, if you leave it with our staff, I'll take a look at it. Okay, thank you we have to move on to our last bill...

Certificate of Authenticity

After reviewing the transcript against the official audio recording, David J. W. Hackett, declares to the best of his ability, subject to the perjury laws of the State of Washington, that the above written transcription is a true and accurate representation of the February 3, 2005 hearing on SB 5582 that was held before the Human Services and Corrections Committee of the Washington State Senate.

Dated this 23rd day of February 2007 in King County, Washington



David J.W. Hackett