

NO. 80144-4

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**SUPREME COURT OF THE STATE OF WASHINGTON**

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KIM SMITH,

Petitioner,

v.

STATE OF WASHINGTON,

Respondent.

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**ANSWER TO PETITION FOR REVIEW**

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**ORIGINAL**

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## I. INTRODUCTION

In 2002, the superior court committed Mr. Smith to indefinite detention and treatment as a sexually violent predator (SVP) as defined in RCW 71.09.020(16). The SVP commitment statute allows for annual reviews and opportunities for the committed person to seek unconditional release or conditional release to a less restrictive facility.

This case concerns the application of the 2005 amendments to RCW 71.09.090, which defines the criteria that must be met in order to justify reopening the commitment determination to hold an unconditional release trial. RCW 71.09.090(4)(b) and (c) provide that the court shall not hold a release trial based on the change in a single demographic factor like age. Based on the 2005 amendments, the superior court dismissed a then-pending trial to consider unconditional release of Mr. Smith because there was not sufficient evidence of a relevant change in Mr. Smith's condition since his commitment.

Mr. Smith seeks review to argue that the 2005 amendments have been applied retroactively, and that such retroactive application violates due process by eliminating what he calls a "vested" right in the pre-amendment version of the statute through which he had been granted an

unconditional release trial. Mr. Smith offers no argument that the court erroneously applied the 2005 amendments.<sup>1</sup>

## II. ISSUE PRESENTED FOR REVIEW

1. Is it retroactive application of law when the legislature defines the criteria that must be met in order to hold an unconditional release trial, expressly states the amendments apply to cases in which such a trial has not yet been held, and the amendments are applied to a case in which the trial has been ordered but not yet held?

2. If the applying the amended 2005 statute to a pending civil release hearing of a sexually violent predator is retroactive, does the constitution restrict that exercise of legislative power?

3. Does the legislature violate the separation of powers doctrine when it requires a threshold showing that must be met before holding any future trial considering the unconditional release of committed sexually violent predators, but the evidence required to meet that threshold showing is different than a prior judicial construction of previous statutory language?

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<sup>1</sup> If Mr. Smith had proceeded to trial under order from the pre-amendment version of the statute, the burden and issue at that trial would have been the same – whether Mr. Smith meets the definition of a sexually violent predator. RCW 71.09.090(3)(b). This illustrates how Mr. Smith's claims relate solely to the procedural step of deciding whether or not to hold an unconditional release trial. It does not affect the standards that control whether he would be released.

### III. STATEMENT OF THE CASE

The Snohomish County superior court committed Mr. Smith as a sexually violent predator (SVP) on March 11, 2002, following a bench trial. CP 509-515. After his commitment, Mr. Smith has resided at the Special Commitment Center (SCC) for detention and treatment. CP 101.

Pursuant to statute, the SCC is required to submit an annual review evaluation addressing whether Mr. Smith continues to meet the definition of an SVP, as well as whether conditional release to a less restrictive alternative (LRA) is appropriate. RCW 71.09.070. The 2004 annual review evaluation concluded that Mr. Smith had regressed in treatment over the past year, was not participating in the treatment program, that he continued to meet the definition of an SVP, and that release to an LRA was not appropriate. CP 101, 154-185.

Mr. Smith retained Dr. Luis Rosell as his expert for the 2004 annual review, a right he enjoys pursuant to RCW 71.09.070. Dr. Rosell opined that Mr. Smith has "so changed" that he no longer meets the definition of an SVP and that release to an LRA would be appropriate. CP 187-205. However, the change identified by Dr. Rosell was not a result of any behavioral changes caused by treatment; it was simply "the change in demographics and the effect of the Respondent's age as it pertains to the risk assessment instruments." CP 13.

If a detainee does not agree with the DSHS annual review evaluation or otherwise does not affirmatively waive the right to petition for release, the trial court must hold a show cause hearing to determine if probable cause exists to warrant a hearing on whether the detainee no longer meets the definition of an SVP. RCW 71.09.090(2)(c)(ii)(A). Probable cause can be established through the failure of the State to present prima facie evidence through the SCC evaluation that the committed person continues to meet the definition of an SVP and that conditional release is not appropriate, or through evidence presented by the committed person. RCW 71.09.090(2)(c). In making the probable cause determination, the court does not weigh the evidence. *In re Detention of Petersen*, 145 Wn.2d 789, 797-98, 42 P.3d 952 (2002) (hereafter, *Petersen II*).

The trial court below, relying on the evaluation of Mr. Smith's expert, Dr. Rosell, initially entered an order setting a trial to consider unconditional release. CP 430. The trial was set for July 18, 2005.<sup>2</sup> CP 207; VRP 4/15/05 at 13-15.

However, even before Mr. Smith's trial was set to begin, the Washington Legislature amended the annual review provisions of RCW

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<sup>2</sup> Mr. Smith originally sought both unconditional release and conditional release to an LRA. As Mr. Smith submitted no proposed LRA plan meeting the statutory requirements of RCW 71.09.092, the trial court granted the State's summary judgment motion on this issue on June 29, 2005.

71.09.090 in response to two court of appeals decisions in order to clarify the proof necessary to hold a trial to consider unconditional release. Laws of 2005, ch. 344. The legislature noted that the amendments were necessary to preserve the indeterminate nature of SVP commitment, to further the State's compelling interest in treating SVPs and protecting the public from them while treatment occurs, and to strengthen the treatment-focus of the commitment scheme. Laws of 2005, ch. 344 § 1.

The two court of appeals' decisions that spurred the 2005 amendments held that an increase in age since commitment and new diagnostic practices were changes in condition within the meaning of former RCW 71.09.090, and were sufficient to establish probable cause for an unconditional release trial. *In re Detention of Young*, 120 Wn. App. 753, 761-63, 86 P.3d 810 (2004); *In re Detention of Ward*, 125 Wn. App. 381, 386, 104 P.3d 747 (2005).

In drafting the amendments to RCW 71.09.090 that responded to these decisions the legislature heard extensive testimony and considered documentary evidence that cast doubt on the relevance or utility of expert opinion testimony being offered to obtain unconditional release trials through the annual review process.<sup>3</sup> Such evidence is "relatively weak"

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<sup>3</sup> The affidavits considered were from national and international experts. One stated that the age-based opinion referenced in *Young* "is clearly not generally accepted in the field of sexual offender treatment, or in the field of study relative to risk

and “not generally accepted or empirically validated.” S.B. 5582, 56th Leg., Reg. Sess. (Wash. 2005), House Bill Report at 5.<sup>4</sup> The legislature subsequently made findings reiterating that the mental disorders from which SVPs suffer “are severe and chronic and do not remit due solely to advancing age or changes in other demographic factors,” and that SVPs “will generally require prolonged treatment in a secure facility.” Laws of 2005, ch. 344 § 1.

In addition to the weakness of the aging evidence that had been offered to justify a new trial in some cases, the legislature also found that holding a trial based on the *Young* and *Ward* decisions would undermine compelling State interests served by the SVP statute:

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

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assessment for sexual offenders.” Affidavit of Dr. Dennis Doren submitted to House Criminal Justice & Corrections Committee, March 23, 2005. Another stated, “there is not sufficient research to make general statements about the impact of age on risk of sex offenders. . . . There have been far too many examples of individuals who have committed acts of sexual aggressions at ages of 50 (and 60) and over, for us to simply infer that such acts are ‘highly unlikely’ since, obviously, they do happen.” Affidavit of Dr. Richard Packard submitted to House Criminal Justice & Corrections Committee, March 23, 2005.

<sup>4</sup> This conclusion is supported in the scientific literature. For example, with regard to the effect of age-at-release on the sexual recidivism risk of high risk offenders, the scientific community is, at best, split. See e.g., Dennis M. Doren, *What Do We Know About the Effect of Aging on Recidivism Risk for Sexual Offenders?*, 18 *Sexual Abuse: A Journal of Research and Treatment* 137, 153-54 (2006) (“We do not yet know if there is a meaningful age-at-release threshold after which high risk necessarily dissipates for all sexual offenders.”).

committed persons from fully engaging in sex offender treatment.”

Laws of 2005, ch. 344 § 1. By unanimous vote, the legislature amended the statute to redefine when a change in condition identified during the annual review process would warrant a trial to consider unconditional release.

The 2005 amendments indicated that the nature of the change in condition sufficient to trigger an unconditional release trial must have occurred since the most recent commitment trial and be either: (1) A permanent physiological change such as a stroke, paralysis or dementia that renders the person unable to commit a sexually violent act; or (2) A change in the committed person’s mental condition arrived at through treatment which indicates that the person would be safe to be at large if unconditionally released. RCW 71.09.090(4)(b)(i), (ii). A change in a single demographic factor, including age, is not a relevant change in condition and does not establish probable cause for a release trial under the statutory annual review processes. RCW 71.09.040(4)(c). These amendments became effective on May 9, 2005. CP 97-99.

Based upon the amended statute, the trial court struck Mr. Smith’s pending unconditional release trial. The court concluded that Dr. Rosell’s opinion did not address the relevant statutory criteria defining the nature

of the change in condition necessary to reopen the commitment determination and hold a release trial. CP 12-15. Specifically, the trial court found that Dr. Rosell's opinion that there had been a fundamental change in Mr. Smith's condition was predicated solely upon a change in demographics – the effect of Mr. Smith's age as it affected the risk assessment instruments. VRP 6/29/05 at 22; CP 13-14. An increase in age is an insufficient showing of change and is not a basis upon which a release trial may be granted. RCW 71.09.090(4)(c). Mr. Smith has not attempted to show any error in the court's findings and conclusions regarding the limited nature of Dr. Rosell's opinion.

Mr. Smith instead appealed the decision striking his release trial and argued that applying the amended version of RCW 71.09.090 was impermissibly retroactive in violation of separation of powers principles and due process. The court of appeals rejected Mr. Smith's claim. *In re Detention of Smith*, 137 Wn. App. 319, 153 P.3d 226 (2007). The court of appeals held that application of the amended statute by the trial court was not retroactive because such application did not impair any vested rights held by Mr. Smith, did not increase his liability for past conduct, and did not impose on Mr. Smith any new duties. *Id.* at 329-330.

Mr. Smith filed a timely petition for review.

#### IV. REASONS WHY REVIEW SHOULD BE DENIED

Mr. Smith cites RAP 13.4(b)(1) and argues that the Court of Appeals' decision that application of the amended RCW 71.09.090 is not retroactive is contrary to prior decisions of this Court holding that the legislature violates due process and separation of powers when the legislature substantively amends a statute in response to court decisions and the amended statute is retroactively applied. Pet. at 8-12, citing *State v. Dunaway*, 109 Wn.2d 207, 743 P.2d 1237 (1987); *Johnson v. Morris*, 87 Wn.2d 922, 557 P.2d 1299 (1976).

The primary reason the Court of Appeals' decision in this case creates no conflict with this Court's prior decisions regarding retroactivity, due process, or separation of powers is that applying amended RCW 71.09.090 to Mr. Smith's pending release trial does not involve retroactive application of law in the sense that term is used by this Court. The application of the amended statute was prospective, because the triggering event for purposes of application of the statute was the holding of the release trial, which had not yet occurred when amended RCW 71.09.090 became effective. It was not retroactive because it did not affect any vested right held by Mr. Smith, did not impose any new obligations on him and did not increase any liability on him.

In addition, none of the cases that Mr. Smith cites are on point. None of these cases involve an analogous legislative act applied to a pending trial.

**A. Mr. Smith's Retroactivity Claim Is Deeply Flawed**

The court of appeals properly rejected Mr. Smith's due process and separation of powers arguments because the underlying premise—retroactive application of law—was incorrect. 137 Wn. App. at ¶¶ 24-27. The opinion first recognized that on the surface the 2005 law had no impact on any vested right or completed transaction because it applied to a trial yet to be held. *Id.* at ¶ 24. Second, the opinion noted that Mr. Smith made no arguments that the 2005 amendments impaired rights the party had or increased the liability for past conduct or imposed new duties for completed transactions. *Id.* at ¶ 25. Finally, the opinion concludes that Mr. Smith had no vested right in his “mere expectation” that the legislature would not amend the law concerning the criteria for release. The opinion's reasoning is sound and demonstrates that there is no retroactive application of law.

This Court's recent decision in *State v. Pillatos*, 159 Wn.2d 459, 150 P.3d 1130 (2007), further demonstrates why no review is necessary to consider Mr. Smith's retroactivity arguments. Two of the four individuals involved in the *Pillatos* case, Base and Metcalf, had been charged with

crimes and were awaiting trial when the United States Supreme Court issued its landmark decision in *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). See *Pillatos*, 159 Wn.2d at 466-67. *Blakely* held that the State must prove any facts supporting an exceptional sentence to the trier of fact, according to the beyond a reasonable doubt standard. *Id.* This Court accepted review in *Pillatos* to determine whether a trial court has the authority to empanel a sentencing jury to comply with *Blakely*. *Id.*, at ¶ 1.

While the matter was before the Court, the legislature amended the Sentencing Reform Act to be consistent with *Blakely* and provide a new procedure for juries to find the facts that justify an exceptional sentence. *Id.* at ¶10. The amendments took effect immediately and expressly provide that they apply to all cases in which the trial has not yet been held or in which a guilty plea has not been entered. *Id.*

Two of the parties, Base and Metcalf, argued that the *Blakely*-fix legislation should not apply to them, claiming it would be impermissibly retroactive. *Id.* at ¶ 14. This Court rejected their argument and held that “the procedural changes” of the *Blakely*-fix legislation “do not resemble the sort of retroactive statutes which have been found in the past to offend our constitutions.” *Id.* at ¶17. Application of the amendments was prospective in their cases because they had not yet been tried and the prior

statutes had already put them on notice of the potential for exceptional sentences; only the procedure of adding a jury was added. *Id.* By analogy, Mr. Smith was already on notice of the terms of his commitment and release; the amendment changed only a procedure for determining when to hold a release trial.

The *Pillatos* Court focused on the “triggering” or “precipitating” event which determines if an amended statute is applicable to a particular case. *Id.* at ¶ 18. A statute applies retroactively when the triggering event for application of the statute occurred *before* the effective date of the statute; a statute applied prospectively when the triggering event occurs *after* the effective date. *Id.* The triggering event for application of the *Blakely*-fix legislation is, by the express terms of the statute, “either the entry of the plea or the trial.” *Id.*

The facts of Mr. Smith’s case are therefore analogous to this Court’s ruling regarding Base and Metcalf. Just as the precipitating event in *Pillatos* was whether a plea had been entered or a trial held, RCW 71.09.090(4)(b) also refers to whether a release trial may be “ordered, *or held*”.<sup>5</sup> The precipitating event is the holding of the release trial under the

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<sup>5</sup> Because the plain language of the 2005 amendments applies to any trial to be held on a petition for release, there is no merit to the petitioner’s arguments that the legislature did not intend it to apply to his pending trial. *See* Pet. at 7-8 (where Mr. Smith argues that the legislation lacks a clear expression of intent to apply to pending release trials).

plain language of the statute, an event that occurred *after* enactment of the amendments. The statutory amendments were thus prospectively applied under the rule of *Pillatos*.

Mr. Smith argues that the precipitating event for determining that application of the amendments is retroactive was his passive action of getting older. He erroneously says that by aging, he “carried his burden of proving that he no longer met the definition of an SVP as that definition was stated in the former statute.” Pet at 5. However, Dr. Rosell’s slim opinion premised on Mr. Smith’s aging does not prove that he no longer meets the definition. It only met the procedural threshold of offering evidence, which was not weighed. The plain language of the statute refers to holding a trial, RCW 71.09.090(4)(b), which was an event that occurred *after* amendments were adopted.

As shown above, Mr. Smith’s petition depends on the erroneous premise that he was subject to the retroactive application of legislation. The Court should deny review because there is no conflict or confusion in the lower courts with how to determine if a law is applied retroactively. *Pillatos* squarely addressed that topic and the Court of Appeals ruling is consistent with *Pillatos* and its predecessor cases.

**B. Review Is Not Warranted Because Mr. Smith Can Pursue Annual Review Rights Every Year**

Mr. Smith's appeal does not involve a pressing issue where the litigant lacks other options. Mr. Smith has had subsequent annual reviews and will receive another annual review within a year. Indeed, he can file a petition for release at any time. RCW 71.09.090(2)(a). He clings to the prior version of the statute which provided him with a release trial simply because he has gotten older; but the legislature condemned that result in the 2005 amendments because it seriously undermines the treatment-oriented nature of the SVP statute and thus endangers public safety. Denying review would complement this purpose because Mr. Smith could direct his attention to his treatment and subsequent annual reviews and release under the criteria set by the legislature.

**C. The 2005 Amendments Do Not Impair Vested Rights**

Mr. Smith also argues that the 2005 amendments are not prospectively applied in his case by characterizing his right to a release trial under the old version of the statute as a vested right. Pet. at 10. This argument is flawed for two reasons.

First, Mr. Smith has no vested right in the superseded version of the statute. A vested right must be "something more than a mere expectation based upon an anticipated continuance of the existing law." *In*

*re Estate of Burns*, 131 Wn.2d 104, 116 n. 2, 928 P.2d 1094 (1997) (citations omitted).

To make his argument, Mr. Smith claims a vested “right to petition the superior court for his immediate and unconditional release based upon . . . the change in his chronological age.” Pet. at 10. This is an inaccurate description of how the statute works. Mr. Smith uses the prior procedure for asking for a release trial and blurs it with the separate criteria for *holding* such a release trial. When the legislature determined that holding such trials based on change in a single demographic factor interfered with treatment and public safety goals, and that aging alone was not the type of change that justified holding a release trial, the legislature acted squarely in its role of setting prospective public policy.

The amendments therefore did not affect any vested rights by determining that no release trials would be held in the future based solely on evidence of aging. There was no vested right in his expectation that future trials would be held under the previous version of the statute.

**D. The 2005 Amendments Do Not Raise A Significant Separation Of Powers Question**

Mr. Smith’s final point argues that when the legislature set public policy for pending SVP release trials, it invaded the province of the judiciary and violated our constitutional separation of powers. Mr. Smith

cites to *Carrick v. Locke*, 125 Wn.2d 129, 882 P.2d 173 (1994), which asks “whether the activity of one branch threatens the independence or integrity or invades the prerogatives of another.” 125 Wn.2d at 135, quoting *Zylstra v. Piva*, 85 Wn.2d 743, 750, 539 P.2d 823 (1975).

Mr. Smith shows no colorable basis for claiming a violation of the separation of powers. He correctly claims that the Court of Appeals decisions in *Young* and *Ward* were the impetus for the 2005 amendments. However, the legislative power includes the power to react to judicial interpretations of statutes by adopting new and clarified public policy to be applied to civil release trials that would be held in the future. In contrast, if a judicial interpretation of a former statute barred the legislature from defining criteria for *future* SVP release trials, as urged by Mr. Smith, then the legislature itself might reasonably complain that a judicial ruling has invaded legislative powers.

Here, there is prospective application of the 2005 amendments, and the application to trials held after the amendments did not impair any vested right. Accordingly, the 2005 amendments do not invade the province of the judiciary. Mr. Smith’s separation of powers argument, therefore, does not present a significant constitutional question for review by this Court.

**IV. CONCLUSION**

The legislature acted prospectively when it defined the standards for holding future trials considering the release of an SVP. Review should be denied.

RESPECTFULLY SUBMITTED August 3, 2007.



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