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No. 56604-1-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

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IN RE THE DETENTION OF:

KIM SMITH,  
Appellant.

FILED  
COURT OF APPEALS DIV. 1  
2006 MAY 10 PM 5:00

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ON APPEAL FROM THE SUPERIOR COURT OF  
THE STATE OF WASHINGTON FOR SNOHOMISH COUNTY

The Honorable George N. Bowden

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BRIEF OF APPELLANT

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TABLE OF CONTENTS

**A. SUMMARY OF ARGUMENT..... 1**

**B. ASSIGNMENTS OF ERROR..... 2**

**C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR..... 2**

**D. STATEMENT OF THE CASE..... 3**

**E. ARGUMENT ..... 4**

THE COURT’S RETROACTIVE APPLICATION OF  
THE 2005 AMENDMENT WAS OBVIOUS ERROR  
WHICH RENDERS FURTHER PROCEEDINGS  
USELESS ..... 4

1. Application of the amended RCW 71.09.090 to Mr.  
Smith’s case deprives him of due process..... 6

a. The language of RCW 71.09.090 lacks a clear  
expression of legislative intent for retroactive  
application..... 8

b. The 2003 amendment of RCW 71.09.090 is not  
curative. .... 10

c. The 2005 amendment of RCW 71.09.090 is not  
remedial. .... 11

2. Applying the 2005 amendment to RCW 71.09.090 to Mr.  
Smith violates the separation of powers doctrine..... 14

3. The error in applying the 2005 amendment to Mr. Smith  
was obvious error which rendered further proceedings  
useless, or probable error which substantially limited Mr.  
Smith’s freedom of to act, requiring this Court to grant  
discretionary review. .... 16

**F. CONCLUSION ..... 17**

TABLE OF AUTHORITIES

**CONSTITUTIONAL PROVISIONS**

Article I, § 10 .....	6
Article I, § 9 .....	6
U.S. Const. amend. V.....	6

**WASHINGTON DECISIONS**

<i>Carrick v. Locke</i> , 125 Wn.2d 129, 882 P.2d 173 (1994).....	14, 15
<i>Collins v. Youngblood</i> , 497 U.S. 37, 110 S.Ct. 2715, 111 L.Ed.2d 30 (1990).....	12
<i>Haddenham v. State of Washington</i> , 87 Wn.2d 145, 550 P.2d 9 (1976).....	12
<i>In re Detention of Thorell</i> , 149 Wn.2d 724, 72 P.3d 708 (2003) .....	7
<i>In re F.D. Processing, Inc.</i> , 119 Wn.2d 452, 832 P.2d 1303 (1992) .....	7, 9, 10, 11
<i>In re Juvenile Director</i> , 87 Wn.2d 232, 552 P.2d 163 (1976).....	15
<i>In re Marriage of MacDonald</i> , 104 Wn.2d 745, 709 P.2d 1196 (1985) .....	9
<i>In re the Detention of Petersen</i> , 138 Wn.2d 70, 980 P.2d 1204 (1999) .....	16
<i>In re the Detention of Ward</i> , 125 Wn.App. 381, 104 P.3d 747 (2005) .....	5
<i>In re the Detention of Young</i> , 120 Wn.App. 753, 86 P.3d 810, review denied, 152 Wn.2d 1007, 99 P.3d 896 (2004) .....	4, 7

<i>Johnson v. Morris</i> , 87 Wn.2d 922, 557 P.2d 1299 (1976) .....	10
<i>Marine Power &amp; Equipment Co. v. Human Rights Comm'n Hearing Tribunal</i> , 39 Wn.App. 609, 694 P.2d 697 (1985) .....	12
<i>Oelsen v. State of Washington</i> , 78 Wn.App. 910, 899 P.2d 837 (1995) .....	11
<i>State v. Bennett</i> , 92 Wn.App. 637, 963 P.2d 212 (1998).....	13
<i>State v. Cruz</i> , 139 Wn.2d 186, 985 P.2d 384 (1999).....	6, 7, 8
<i>State v. Dunaway</i> , 109 Wn.2d 207, 743 P.2d 1237 (1987) 10, 11, 15	
<i>State v. Hennings</i> , 129 Wn.2d 512, 919 P.2d 580 (1996) .....	13
<i>State v. Moreno</i> , 147 Wn.2d. 500, 58 P.3d 265 (2002) .....	15
<i>State v. Osloond</i> , 60 Wn.App. 584, 805 P.2d 263, <i>review denied</i> , 116 Wn.2d 1030 (1991) .....	14
<i>State v. Smith</i> , 144 Wn.2d 665, 30 P.3d 1245 (2001) .....	10
<i>Vashon Island Comm. for Self-Gov't v. Wash. State Boundary Review Bd.</i> , 127 Wn.2d 7591, 903 P.2d 953 (1995) .....	10
<i>Washington Waste Sys. v. Clark County</i> , 115 Wn.2d 74, 794 P.2d 508 (1990) .....	11
<i>Zylstra v. Piva</i> , 85 Wn.2d 743, 539 P.2d 823 (1975) .....	15

### UNITED STATES SUPREME COURT DECISIONS

<i>Calder v. Bull</i> , 3 Dall. 386, 1 L.Ed. 648 (1798) .....	8
<i>Dobbert v. Florida</i> , 432 U.S. 282, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977) .....	12

<i>I.N.S. v. St. Cyr</i> , 533 U.S. 289, 121 S.Ct. 2271, 150 L.Ed.2d 347 (2001) .....	9
<i>Landgraf v. USI Film Prods.</i> , 511 U.S. 244, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994) .....	6, 8, 9
<i>Lynce v. Mathis</i> , 519 U.S. 433, 117 S.Ct. 891, 895, 137 L.Ed.2d 63 (1997) .....	6
<i>United States v. Heth</i> , 3 Cranch 399, 2 L.Ed. 479 (1806) .....	9
<i>Usery v. Turner Elkhorn Mining Co.</i> , 428 U.S. 1, 96 S.Ct. 2882, 49 L.Ed.2d 752 (1976) .....	7
<i>Weaver v. Graham</i> , 450 U.S. 24, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981) .....	8

## STATUTES

RCW 71.09.050 .....	7
RCW 71.09.060 .....	7

## COURT RULES

RAP 2.3 .....	16, 17
---------------	--------

## OTHER CASES

<i>Dash v. Van Kleeck</i> , 7 Johns. 477 (N.Y.1811) .....	8
<i>Society for the Propagation of the Gospel v. Wheeler</i> , 22 F. Cas. 756 (C.C.N.H. 1814) (No. 13,156) .....	8

A. SUMMARY OF ARGUMENT

Kim Smith seeks review of the order of the Superior Court ruling he is ineligible under RCW 71.09.090 for a new trial on the question of whether he should be committed as a sexually violent predator. Specifically, Mr. Smith challenges the court's conclusion that recent amendments of RCW 71.09.090 altering the standard of proof necessary to obtain a new trial on a sexually violent predatory commitment applied to Mr. Smith's case, even where those amendments were enacted well after Mr. Smith was found to be a sexually violent predator, and well after the court had concluded he was eligible for a new trial.

Mr. Smith contends the court committed obvious error which renders further proceedings useless, and/or committed probable error substantially limiting his freedom to act, when it retroactively applied the 2005 amendment to RCW 71.09.090 to him in the absence of statement of legislative intent that the amendment was retroactive, and where the amendment is neither remedial nor curative.<sup>1</sup>

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<sup>1</sup> Mr. Smith originally filed a notice of appeal in this matter. Pursuant to *In re the Detention of Petersen*, 138 Wn.2d 70, 980 P.2d 1204 (1999), however, it appears this matter is only reviewable as a motion for discretionary review.

**B. ASSIGNMENTS OF ERROR**

The trial court erroneously applied the 2005 amendment to RCW 71.09.090 retroactively to Mr. Smith.

**C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. A statutory amendment is presumed to apply prospectively. The amendment may apply retroactively where the Legislature clearly expresses an intent it apply retroactively, or where it is curative or remedial, and the amendment would not otherwise deny the individual due process. Where the 2005 amendment to RCW 71.09.090 was not expressly made retroactive, the amendment did not clarify but sought to overrule prior decisions of this Court, and the amendment was not remedial because it was a substantive change in the law, may the amendment be applied retroactively to permit the trial court to vacate its order directing a new trial for Mr. Smith?

2. Did the retroactive application of the 2005 amendment to RCW 71.09.090 deprive Mr. Smith of a vested right?

3. Did the retroactive application of the 2005 amendment to RCW 71.09.090 violate the separation of powers doctrine where it expressly sought to overrule prior decisions of this Court?

#### D. STATEMENT OF THE CASE

On November 3, 2004, the trial court issued an order granting Mr. Smith's motion for a new trial pursuant to RCW 71.09.090 to determine if he was still a sexual violent predator. CP 430.

On May 9, 2005, while the motions to reconsider were pending, the Legislature passed SB 5582, amending RCW 71.09.090 regarding petitions for conditional release or unconditional discharge by sexually violent predators. Specifically, the amendment added subsection (4) defining when a person's condition has so changed that the individual no longer meets the definition of a sexually violent predator. *Id.* The amendment stated that "a change in a single demographic factor, without more, does not establish probable cause for a new trial proceeding." Laws 2005 c 344 § 2. The amendment defined a "single demographic factor" to include a change in chronological age. Mr. Smith had petitioned for release based upon the increase of his chronological age.

On June 29, 2005, the trial court applied the amendment to RCW 71.09.090 to Mr. Smith's case concluding it barred a new trial, and entered an order vacating the trial date in his petition,

found his claim to be moot, and dismissed the petition. CP 12-15. In its oral ruling, the court reasoned the changes brought by the amendment were procedural rather than substantive because “they deal with the issues to be presented at trial and the evidence that may be considered.” 6/29/05 RP 21.<sup>2</sup>

E. ARGUMENT

THE COURT’S RETROACTIVE APPLICATION OF  
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RCW 71.09.090 in effect at the time Mr. Smith filed his motion to show cause, and at the time the court granted that motion to show cause, allowed a person committed as an SVP to petition for unconditional release where he could establish probable cause existed that his condition was so changed that he no longer met the definition of an SVP. Former RCW 71.09.090(2)(a). If the court found the person established probable cause, the person had the right to a jury trial on the issue. Former RCW 71.09.090(3)(a). The statute did not establish what amounted to a change in condition.

In *In re the Detention of Young*, this Court ruled that a change in chronological age alone may establish such a change in

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<sup>2</sup> This matter was originally raised in a motion for discretionary review. Commissioner Ellis ruled the issue raised was appealable as matter of right, thus it is raised in its current posture.

condition warranting a jury trial. 120 Wn.App. 753, 762, 86 P.3d 810, *review denied*, 152 Wn.2d 1007, 99 P.3d 896 (2004). *Accord*, *In re the Detention of Ward*, 125 Wn.App. 381, 386, 104 P.3d 747 (2005) (new diagnostic practices established committed person's condition had so changed he no longer met definition of SVP).

In direct response to the *Young* and *Ward* decisions, the Legislature amended RCW 71.09.090, adding a new subsection (4), which limits when a new trial may be granted based upon a change in the person's condition:

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

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

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

(c) For purposes of this section, a change in a single demographic factor, without more, does not establish probable cause for a new trial proceeding under subsection (3) of this section. As used in this section,

a single demographic factor includes, but is not limited to, *a change in the chronological age*, marital status, or gender of the committed person.

(Emphasis added.) RCW 71.09.090(4) (2005). In its findings attached to the amended statute, the Legislature noted the amendment was in direct response to the *Young and Ward* decisions. RCW 71.09.090.

1. Application of the amended RCW 71.09.090 to Mr. Smith's case deprives him of due process. "The presumption against retroactive application of a statute 'is an essential thread in the mantle of protection that the law affords the individual citizen. That presumption 'is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic.'" *State v. Cruz*, 139 Wn.2d 186, 190, 985 P.2d 384 (1999), *quoting Lynce v. Mathis*, 519 U.S. 433, 439, 117 S.Ct. 891, 895, 137 L.Ed.2d 63 (1997) and *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994). The prohibition against retroactive laws is found in several provisions of the United States Constitution, including: the Ex Post Facto Clause Article I, § 10; the Fifth Amendment's Takings Clause; the prohibitions on "Bills of Attainder" in Article I, §§ 9-10; and the Due Process Clauses. *Landgraf*, 511 U.S. at 266. The prohibitions against retroactive

statutes in the Due Process Clauses are concerned with “the interests in fair notice and repose that may be compromised by retroactive legislation.” *Id.*, citing *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 17, 96 S.Ct. 2882, 49 L.Ed.2d 752 (1976). These principles of due process apply equally to matters dealing with sexually violent predators. See *In re Detention of Thorell*, 149 Wn.2d 724, 744, 72 P.3d 708 (2003) (quantum of evidence in SVP proceedings reviewed under criminal standard); *In re Detention of Young*, 122 Wn.2d 1, 47-48, 857 P.2d 396 (1995) (where SVP statute indicates due process protections similar to criminal proceeding, criminal law standards apply); RCW 71.09.050 (granting accused SVP rights to attorney, expert witnesses, and 12 person jury); RCW 71.09.060 (requiring State prove SVP allegations beyond a reasonable doubt and jury verdict be unanimous).

Despite the presumption of prospective application, a statute may apply retroactively if: “(1) the legislature so intended; (2) it is “curative”; or (3) it is remedial, provided, however, such retroactive application does not run afoul of any constitutional prohibition.” *Cruz*, 139 Wn.2d at 191, citing *In re F.D. Processing, Inc.*, 119 Wn.2d 452, 460, 832 P.2d 1303 (1992).

A law is unconstitutionally retroactive if it:

takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past.

*Society for the Propagation of the Gospel v. Wheeler*, 22 F. Cas. 756 (C.C.N.H. 1814) (No. 13,156), *citing Calder v. Bull*, 3 Dall. 386, 1 L.Ed. 648 (1798), and *Dash v. Van Kleeck*, 7 Johns. 477 (N.Y.1811).

The various constitutional bars to retroactive legislation serve in part, to “restrict[ ] governmental power by restraining arbitrary and potentially vindictive legislation.” *Landgraf*, 511 U.S. at 266-67, *quoting Weaver v. Graham*, 450 U.S. 24, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981).

a. The language of RCW 71.09.090 lacks a clear expression of legislative intent for retroactive application.

Legislative intent for retroactivity must be clearly found within the statute’s language. *Landgraf*, 511 U.S. at 268, *Cruz*, 139 Wn.2d at 191. In *Landgraf* the Supreme Court recognized its long tradition of declining to apply statutes retroactively where the statute lacks “clear, strong, and imperative’ language requiring retroactive application.” 511 U.S. at 270, *quoting United States v. Heth*, 3

Cranch 399, 2 L.Ed. 479 (1806). Subsequently, the Court held that because a legislature's

unmatched powers allow it to sweep away settled expectations suddenly and without individualized consideration. Its responsiveness to political pressures poses a risk that it may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals. . . congressional enactments . . . will not be construed to have retroactive effect unless their language requires this result.

*I.N.S. v. St. Cyr*, 533 U.S. 289, 315-16, 121 S.Ct. 2271, 150 L.Ed.2d 347 (2001), *citing Landgraf*, 511 U.S. at 266. Intent may also be gleaned from other sources, including from legislative history. *F.D. Processing*, 119 Wn.2d at 460; *In re Marriage of MacDonald*, 104 Wn.2d 745, 748, 709 P.2d 1196 (1985).

There is nothing in the amended version of RCW 71.09.090 indicating the Legislature's intent the statute be retroactive. RCW 71.09.090 was originally enacted in 1990. Laws 1990 c. 3 § 1009. The statute has been amended on three prior occasions and on each occasion the amendment was explicitly made retroactive. Laws 1992 c. 45 § 7; Laws 1995 c. 216 § 9; Laws 2001 c. 286 § 9. The lack of any explicit statement of retroactivity by the Legislature with regard to this amendment implies an intent it is *not* retroactive. Because the language of the amended statute does not clearly

convey the Legislature's intent for retroactive application, the presumption of prospective application continues.

b. The 2003 amendment of RCW 71.09.090 is not curative. "A curative amendment clarifies or technically corrects an ambiguous statute." *State v. Smith*, 144 Wn.2d 665, 674, 30 P.3d 1245 (2001). Legislation which merely clarifies prior statutes generally may be applied retroactively. *State v. Dunaway*, 109 Wn.2d 207, 216, 743 P.2d 1237 (1987). However, ambiguity is lacking in statutory language, the reviewing court presumes an amendment to the statute constitutes a substantive change in the law, and the amendment presumptively is not retroactively applied. *F.D. Processing*, 119 Wn.2d at 462. Ambiguity exists when a law "can be reasonably interpreted in more than one way." *Vashon Island Comm. for Self-Gov't v. Wash. State Boundary Review Bd.*, 127 Wn.2d 759, 771, 903 P.2d 953 (1995). However, once a statute has been subject to judicial construction, subsequent "clarifying" legislation cannot apply retrospectively, otherwise the legislature would be given "license to overrule [the judiciary], raising separation of powers issues." *Johnson v. Morris*, 87 Wn.2d 922, 925-26, 557 P.2d 1299 (1976); see also, *Dunaway*, 109 Wn.2d at 216 n.6.

In *Dunaway, supra*, the Supreme Court refused to apply an amended statute retroactively where it contravened an earlier Court of Appeals decision. 109 Wn.2d at 216 n.6. That is precisely what happened here. In spite of the language in the Notes to RCW 71.09.090 that the amendment was meant to be a clarification, the amendment contravenes the earlier decisions of the Court of Appeals in *Young and Ward*. See also *Washington Waste Sys. v. Clark County*, 115 Wn.2d 74, 79, 794 P.2d 508 (1990) (“legislation will be deemed curative if its purpose was to clarify an existing ambiguity and it overrules no case law”).

Further, the original version of RCW 71.09.090 was not ambiguous. The statute left open the question of what constituted a change in condition, recognizing the imperfect science that is involved in treating sexually violent predators. Instead of clarifying the law, the Legislature changed the law, and thus, the amendment cannot be curative. *Oelsen v. State of Washington*, 78 Wn.App. 910, 914, 899 P.2d 837 (1995).

c. The 2005 amendment of RCW 71.09.090 is not remedial. A remedial amendment “is one that relates to practice, procedures, or remedies, and does not affect a substantive or vested right.” *F.D. Processing*, 119 Wn.2d at 462-63.

While . . . cases do not explicitly define what they mean by the word “procedural,” it is logical to think that the term refers to changes in the procedures by which a criminal case is adjudicated, as opposed to changes in the substantive law of crimes.

*Collins v. Youngblood*, 497 U.S. 37, 45, 110 S.Ct. 2715, 111 L.Ed.2d 30 (1990), citing *Dobbert v. Florida*, 432 U.S. 282, 292, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977). “Remedial” statutes are those that “afford a remedy, or better or forward remedies already existing for the enforcement of rights and the redress of injuries.”

*Haddenham v. State of Washington*, 87 Wn.2d 145, 148, 550 P.2d 9 (1976) (holding that the crime victims compensation act, which compensated innocent victims of criminal acts, was an attempt to “remedy” that situation and therefore applied retroactively); see also *Marine Power & Equipment Co. v. Human Rights Comm'n Hearing Tribunal*, 39 Wn.App. 609, 617, 694 P.2d 697 (1985) (holding amendment to statute permitting administrative body to award up to \$1000 in damages in discrimination cases applied retroactively because it created “a supplemental remedy for enforcement of a preexisting right”).

The 2005 amendment to RCW 71.09.090 had nothing to do with the procedure for filing a petition for unconditional release; rather, the statute eliminated a cause of action Mr. Smith

possessed at the time of the filing of his petition, which, if he succeeded in proving, would likely have resulted in his release from commitment.

Further, the application of the 2005 amendment deprived Mr. Smith of a vested right. "Retroactive application of a statute violates due process if it deprives an individual of a vested right. To establish a deprivation, the defendant must show he changed his position in reliance on the old law or that retroactive application defeats a reasonable expectation." *State v. Bennett*, 92 Wn.App. 637, 642, 963 P.2d 212 (1998), *citing State v. Hennings*, 129 Wn.2d 512, 528, 919 P.2d 580 (1996). A vested right entitled to protection under the due process clause

must be something more than a mere expectation based upon an anticipated continuance of the existing law; it must have become a title, legal or equitable, to the present or future enjoyment of property, a demand, or a legal exemption from a demand by another.

*Hennings*, 129 Wn.2d at 528.

Prior to the 2005 amendment to RCW 71.09.090, Mr. Smith possessed a right to petition the superior court for his immediate and unconditional release based upon a change in his condition, primarily the change in his chronological age. Mr. Smith's right to

petition the court on this basis vested once he filed the petition. Application of the 2005 amendment *after* Mr. Smith filed his petition for unconditional release deprived him of this vested right since it deprived him of the reasonable expectation of release based upon his petition.

2. Applying the 2005 amendment to RCW 71.09.090 to Mr. Smith violates the separation of powers doctrine.

One of the fundamental principles of the American constitutional system is that the governmental powers are divided among three departments--the legislative, the executive, and the judicial--and that each is separate from the other.

*Carrick v. Locke*, 125 Wn.2d 129, 134-35, 882 P.2d 173 (1994), citing *State v. Osloond*, 60 Wn.App. 584, 587, 805 P.2d 263, review denied, 116 Wn.2d 1030 (1991). Neither the Washington nor federal constitutions specifically enunciate a separation of powers doctrine, but the notion is universally recognized as deriving from the tripartite system of government established in both constitutions. See, e.g., Const. Arts. II, III, and IV (establishing the legislative department, the executive, and judiciary); U.S. Const. Arts. I, II, and III (defining legislative, executive, and judicial branches); *Carrick*, 125 Wn.2d at 134-35. *Carrick* recognized that although the Washington Constitution contains no specific

separation of powers provision “the very division of our government into different branches has been presumed throughout our state’s history to give rise to a vital separation of powers doctrine.” *Carrick*, 125 Wn.2d at 134-35, *citing Osloond*, 60 Wn.App. at 587; *In re Juvenile Director*, 87 Wn.2d 232, 238-40, 552 P.2d 163 (1976).

The fundamental principle of the separation of powers is that each branch wields only the power it is given. *State v. Moreno*, 147 Wn.2d 500, 505, 58 P.3d 265 (2002). Thus, courts have announced the following test for determining whether an action violates the separation of power:

The question to be asked is not whether two branches of government engage in coinciding activities, but rather whether the activity of one branch threatens the independence or integrity or invades the prerogatives of another.

*Carrick*, 125 Wn.2d at 135, *quoting Zylstra v. Piva*, 85 Wn.2d 743, 750, 539 P.2d 823 (1975).

Here, the impetus for the 2005 amendment to RCW 71.09.090 by the Legislature was the Court of Appeals decisions in *Young and Ward*. In essence what the Legislature attempted to do in amending the statute was to overrule the Court of Appeals’ decisions. To do so invaded the provinces of the Supreme Court and the judiciary. *Dunaway*, 109 Wn.2d at 216 n.6. As a

consequence, the retroactive application of the amendment to Mr. Smith *after* he filed his petition violated the separation of powers doctrine.

3. The error in applying the 2005 amendment to Mr. Smith was obvious error which rendered further proceedings useless, or probable error which substantially limited Mr. Smith's freedom of to act, requiring this Court to grant discretionary review. Decisions governing the trial court's denial of a committed person's petition for release is properly reviewed as a motion for discretionary review under RAP 2.3(b). *In re the Detention of Petersen*, 138 Wn.2d 70, 85, 980 P.2d 1204 (1999). Under this standard, the petitioner must show:

- (1) If the superior court has committed an obvious error which would render further proceedings useless;
- or (2) If the superior court has committed probable error and the decision of the superior court substantially alters the status quo or substantially limits the freedom of a party to act;

RAP 2.3(b); *Petersen*, 138 Wn.2d at 84 n.11.

Here, in applying the 2005 amendment to Mr. Smith after his petition had been filed and the court had preliminarily determined there was probable cause to believe a trial was necessary, the court committed obvious error in light of the fact the amendment

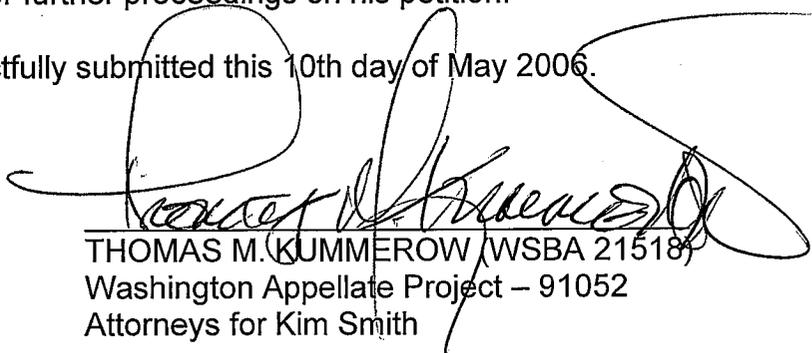
could not be applied retroactively. In addition, application of the amendment extinguished Mr. Smith's claim that a change in his age entitled him to a trial on whether his condition still met the definition of a sexually violent predator, thus rendering further proceedings useless. RAP 2.3(b)(1).

Alternatively, the court's action in applying the 2005 amendment to Mr. Smith's petition was probable error which substantially limited Mr. Smith's freedom to act as it eliminated a previously valid claim for unconditional release. RAP 2.3(b)(2). As a consequence, this Court should grant discretionary review, reverse the trial court's dismissal of Mr. Smith's petition, and remand the matter for further proceedings.

**F. CONCLUSION**

For the reasons stated, this Court must grant discretionary review, reverse the trial court's dismissal of Mr. Smith's petition, and remand for further proceedings on his petition.

Respectfully submitted this 10th day of May 2006.



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