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No. 56604-1-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

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DIVISION ONE  
JAN 16 2013

IN RE THE DETENTION OF:

KIM SMITH,

Appellant.

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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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REPLY BRIEF OF APPELLANT

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A. ARGUMENT

1. THE TRIAL COURT RETROACTIVELY APPLIED THE AMENDMENT TO RCW 71.09.090 TO MR. SMITH *AFTER* FINDING PROBABLE CAUSE AND SETTING A TRIAL

Kim Smith petitioned the trial court for release arguing he no longer met the definition of a sexually violent predator (SVP) because his condition had so changed as defined by former RCW 71.09.090. The specific change alleged was his increase in age, which former 71.09.090 specifically recognized as a change in condition. *In re the Detention of Young*, 120 Wn.App. 753, 762, 86 P.3d 810, *review denied*, 152 Wn.2d 1007, 99 P.3d 896 (2004). The trial court found Mr. Smith had established probable cause that he no longer met the definition of an SVP and ordered a trial to determine if Mr. Smith still met the definition of an SVP. CP 430. Following the Legislature's enactment of the amended version of RCW 71.09.090, the trial court struck the trial date, finding "[t]he May 2005 amendment to Chapter 71.09 RCW precludes this Court [from] holding a trial in this matter pursuant to RCW 71.09." CP 12-15.

The State now claims the trial court did not apply the 2005 amendment to Mr. Smith's matter since his trial had not yet been

held. Brief of Respondent at 12-13. The State's argument defies logic in light of the trial court's ruling. The court had already determined probable cause that Mr. Smith no longer met the definition of an SVP and had ordered a trial on the issue. CP 430. Contrary to the State's contention, the trial court retroactively applied the 2005 amendment to RCW 71.09.090 in striking its original finding of probable cause and striking of the previously ordered trial.

2. THE 2005 AMENDMENT TO RCW 71.09.090  
VIOLATES DUE PROCESS IN THAT IT IS  
NEITHER CURATIVE NOR REMEDIAL AND  
CONTRAVENES A PREVIOUSLY  
JUDICIALLY CONSTRUED STATUTE

a. The amendment is neither curative nor remedial.

The State contends that the 2005 amendment did not contravene the decisions in *In re Young, supra* and *In re the Detention of Ward*, 125 Wn.App. 381, 386, 104 P.3d 747 (2005), as the Courts' discussions regarding age as a significant change in condition was merely *dicta*. BOR at 14. The State contends those decisions held solely that trial courts may not weigh evidence at an annual review show cause hearing. *Id.* The State further contends any discussion of age as a significant change in condition was merely *dicta. Id.*

Initially, the State is wrong about the holdings of *Ward* and *Young*. While the discussion in those decisions concerned whether the trial court could weigh the evidence in a petition for release, in both cases this Court determined the petition based upon the single change of condition of age provided sufficient probable cause to warrant a trial. *Ward*, 125 Wn.App. at 389-90; *Young*, 120 Wn.App. at 763-64. Secondly, if this discussion of age was merely *dicta*, the Legislature went to an enormous amount of time and expense in amending RCW 71.09.090 when according to the State the *Young* and *Ward* decisions didn't really mean anything. In addition, the State's argument would mean the Legislature's finding in amending RCW 71.09.090 that these two decisions "are contrary to the legislature's intent set forth in 71.09.090 . . ." was wrong. This argument strains credibility. Finally, contrary to the State's argument, the Legislature's amendment of RCW 71.09.090 does not *clarify* the statute, rather by the Legislature's plain language, it overrules the *Ward* and *Young* decisions.

b. The amendment violated the separation of powers doctrine. For the same reasons discussed above, the State's argument that the amendment does not violate the separation of powers document also must be rejected. The State claims in

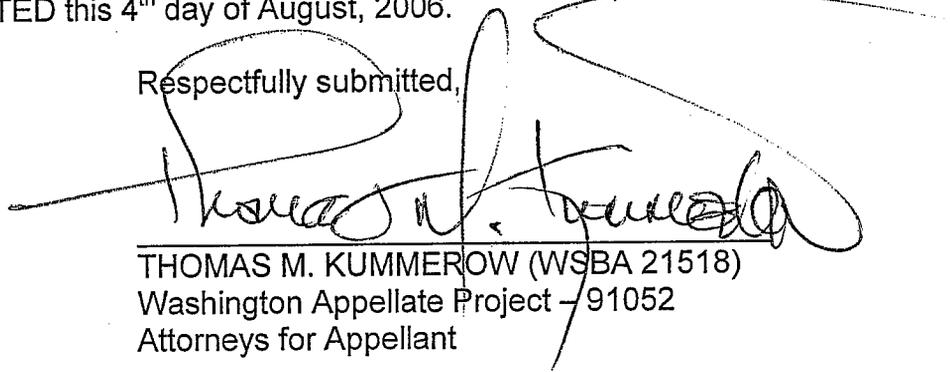
amending RCW 71.09.090, the Legislature was not overruling this Court's decisions, but was merely setting out the framework for court's to follow. BOR at 16. This argument may have had made some sense had the Legislature not clearly stated in its findings that it was responding specifically to this Court's *Young and Ward* decisions. The Legislature was not simply setting the framework for court's to follow but was dissatisfied and was specifically overruling those two decisions. By doing so the Legislature violated the separation of powers doctrine. *See State v. Dunaway*, 109 Wn.2d 207, 216 n.6, 743 P.2d 1237 (1987); *Johnson v. Morris*, 87 Wn.2d 922, 925-26, 557 P.2d 1299 (1976) (once a statute has been subject to judicial construction, subsequent "clarifying" legislation cannot apply retrospectively).

B. CONCLUSION

For the reasons stated, Mr. Smith submits the trial court's retroactive application of the 2005 amendments to RCW 71.09.090 to its finding of probable cause and order for a trial violated his right to due process. This Court should reverse the trial court's order applying the 2005 amendment and order a trial occur under the version of 71.09.090 in effect when the trial court entered its order granting a trial.

DATED this 4<sup>th</sup> day of August, 2006.

Respectfully submitted,

A large, stylized handwritten signature in black ink, appearing to read 'Thomas M. Kummerow', is written over the typed name and extends upwards into the 'Respectfully submitted,' line.

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