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NO. 35805-1-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

IN RE THE DETENTION OF DAVID MCCUISTION,

STATE OF WASHINGTON,

Respondent,

v.

DAVID MCCUISTION,

Petitioner.

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COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON  
DIVISION II  
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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON  
BY DEPUTY  
NANCY P. COLLINS

PETITIONER'S BRIEF

NANCY P. COLLINS  
Attorney for Petitioner

WASHINGTON APPELLATE PROJECT  
1511 Third Avenue, Suite 701  
Seattle, WA 98101  
(206) 587-2711

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A. SUMMARY OF ARGUMENT.

David McCuiston presented evidence that, if believed, showed he had markedly improved his behavior and did not suffer from a mental abnormality or other disorder that permitted his continued confinement as a sexually violent predator (SVP). The trial court erroneously denied his request for an evidentiary hearing by improperly weighing the evidence rather than applying the proper legal standard of probable cause. Moreover, the 2005 amendments to RCW 71.09.090, governing the type of evidence that may be relied upon to obtain a review of an individual's indefinite detention, violate the constitutional principles of due process, equal protection, and separation of powers. RCW 71.09.090 further violates the constitutional prohibition of confinement absent proof of current mental illness.

B. ASSIGNMENTS OF ERROR.

1. Mr. McCuiston's continued confinement without an evidentiary hearing violates his right to due process and equal protection of law under the Fourteenth Amendment and Washington Constitution, Article I, section 3.

2. The evidentiary restrictions contained in RCW 71.09.090 violate the principles of separation of powers.

3. The court improperly refused Mr. McCuiston's request for an evidentiary hearing based on a misapplication of the legal standard of probable cause despite sufficient evidence establishing grounds for a new release hearing.

4. Finding of Fact 6 in the court's denial of Mr. McCuiston's motion to show cause is not supported by substantial evidence. CP 585 (Findings of Fact to Order on Show Cause Hearing attached as Appendix A).

5. Finding of Fact 7 in the court's denial of Mr. McCuiston's motion to show cause is not supported by substantial evidence to the extent it finds, "The change in his behavior within the confines of a secure facility does not demonstrate that his mental disorder has been changed in any way." CP 585.

6. Finding of Fact 8 in the court's denial of Mr. McCuiston's motion to show cause is not supported by substantial evidence to the extent it finds, "Those materials . . . do not contain any persuasive evidence that would compel a finding that a further hearing is required for the consolidated review periods . . . ." CP 585.

7. Finding of Fact 10 in the court's denial of Mr.

McCuistion's motion to show cause is not supported by substantial evidence. CP 585.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. The constitutional guarantees of due process and equal protection of the law bar the state from indefinitely confining a person who is not mentally ill and dangerous due to that mental illness. By statute, an individual committed as an SVP may not obtain a release hearing unless he or she is physically incapacitated or owes the change in mental condition and dangerousness to success in the State's treatment program.

When Mr. McCuistion presented evidence that he is not currently mentally ill or dangerous due to that illness, does RCW 71.09.090 violate Mr. McCuistion's right to due process and equal protection where it does not permit him to have a hearing on whether he may be released?

2. The federal and state constitutions bar the State from involuntarily confining a person absent proof of current mental illness. Does Mr. McCuistion's continued detention violate these constitutional provisions when the State's evidence is based on past criminal history rather than proof of current mental illness?

3. The separation of powers prohibits the legislature from infringing on the independence of the judiciary. RCW 71.09.090 bars a court from using otherwise admissible and reliable evidence restricts as grounds for granting a new SVP trial. Does RCW 71.09.090 violate the separation of powers?

4. The evidentiary threshold for a new commitment hearing is probable cause, which restricts the trial court from weighing the persuasiveness of evidence presented. Here, Mr. McCuiston offered evidence that, if believed, would show he does not have a mental abnormality or personality disorder and is not unable to control his behavior. Did the court improperly weigh the evidence and deny Mr. McCuiston a new hearing on the grounds that Mr. McCuiston's evidence was not more persuasive than the evidence offered by the State?

D. STATEMENT OF THE CASE.

The State confined David McCuiston at the Special Commitment Center in October 1998, and after a number of delays related to litigation, he was ordered to serve an indefinite confinement under the SVP statute. CP 584 (Order on Show Cause Hearing, attached as App. A). In 2006, the court held an

annual review hearing for the consolidated periods of 2004-2006.

CP 585.

The State submitted psychologists' evaluations in support of Mr. McCuiston's continued total confinement. CP 5-30 (Report by Carole DeMarco); CP 48-80 (Report by Carla van Dam); CP 491-538; 11/27/06RP 15.<sup>1</sup> The State's psychologists stated that Mr. McCuiston continued to meet the criteria for commitment, on the grounds that the conditions still existed to find he had a mental disorder, risk assessment tests would show he presented a likelihood of reoffending, and his criminal history alone would make reoffending likely. 11/27/06RP 4; CP 18-25; CP 66-71.

Mr. McCuiston offered an evaluation by psychiatrist Lee Coleman, a professionally qualified psychiatrist familiar with the statutory requirements of SVP commitment in Washington. CP 585, 616-17. Dr. Coleman disputed the diagnosis of Mr. McCuiston rendered by the State's psychologists and contended those evaluations involved flawed applications of the standard diagnostic manual. CP 617-24. Dr. Coleman stated that Mr. McCuiston's criminal history did not establish a diagnosable mental

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<sup>1</sup> The verbatim report of proceedings ("RP") consists of one volume of transcripts that will be referred to herein by the date of the proceeding followed by the page number.

disorder and found no evidence that Mr. McCuiston lacked control over his behavior due to a cognitive or acquired condition. CP 618-24.

Mr. McCuiston also presented evidence supporting a long history of good behavior while at SCC. CP 638-49 (attachments C-F). He supplied the court with evidence that a number of SVP detainees engage in inappropriate behavior while confined, in an effort to dispute the State's claim that Mr. McCuiston had no opportunity to misbehave while in confinement that his recent good behavior was irrelevant. CP 585, 595-96. Four long-time supervisors at SCC filed affidavits on Mr. McCuiston's behalf, stating that they were familiar with Mr. McCuiston personally and with his SCC file and knew of no violent, assaultive, or sexual misbehavior that he had committed. CP 638-4. They further attested to his responsible behavior throughout the years they knew him at SCC. CP 638-49.

After considering the written motions and attachments presented, the trial court denied Mr. McCuiston's request for a hearing on his continued confinement. CP 585-86. The court reasoned that Mr. McCuiston had not proven that Dr. Coleman's opinion was the correct one and had not sufficiently rebutted the

State's evidence. CP 585-86. Mr. McCuiston timely appeals. CP 579-83. Pertinent facts are discussed in further detail in the relevant portions of the argument below.

E. ARGUMENT.

1. BY STRICTLY LIMITING THE TYPE OF EVIDENCE THAT MAY BE USED TO WIN A NEW COMMITMENT TRIAL, THE STATE IMPERMISSIBLY PERMITS THE CONTINUED COMMITMENT OF PEOPLE WHO ARE NOT MENTALLY ILL OR DANGEROUS, IN VIOLATION OF THE RIGHT TO DUE PROCESS OF LAW.

a. Principles of due process of law prohibit the State from confining a person pursuant to a commitment order when that person is no longer meets the criteria of being both mentally ill and dangerous due to the mental illness. The indefinite commitment of sexually violent predators is a restriction on the fundamental right of liberty, and consequently, the State may only commit persons who meet certain criteria. Foucha v. Louisiana, 504 U.S. 71, 77, 112 S.Ct. 1780, 118 L.Ed.2d 437 (1992); U.S. Const. amend. 14; Wash. Const. article I, section 3.<sup>2</sup> A person may only be involuntarily committed, under either general civil commitment laws

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<sup>2</sup> The Fourteenth Amendment to the United States Constitution provides that no state shall "deprive any person of life, liberty, or property, without due process of law." Article I, § 3, of the Washington Constitution states "No person shall be deprived of life, liberty, or property, without due process of law."

or specific sexual offender laws, if he is *both* dangerous *and* has some mental illness or abnormality. Id.; Kansas v. Hendricks, 521 U.S. 346, 358, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997); In re Detention of Thorell, 149 Wn.2d 724, 731-32, 72 P.3d 708 (2003).

It violates due process to continue to confine a person who is mentally ill but not dangerous to himself or others. O'Connor v. Donaldson, 422 U.S. 563, 574-75, 95 S.Ct 2486, 45 L.Ed.2d 396 (1975). Therefore, "even if [Mr. McCuiston's] confinement was initially permissible, it could not constitutionally continue after that basis no longer existed." Id.; see also Hendricks, 521 U.S. at 364 (upholding sexual offender civil commitment because "Kansas does not intend an individual committed pursuant to the Act to remain confined any longer than he suffers from a mental abnormality rendering him unable to control his dangerousness."); In re Detention of Ambers, 160 Wn.2d 543, 553 n.4, 158 P.3d 1144 (2007) (may be unconstitutional to impose more stringent standard for release at annual review hearing than for original confinement).

While the State may indefinitely confine an individual under a civil commitment scheme, "periodic review of the patient's suitability for release" is essential for the constitutionality the

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confinement. Jones v. United States, 463 U.S. 354, 368, 103 S.Ct. 3043, 77 L.Ed.2d 3043 (1984); see Hendricks, 521 U.S. at 364.

The Supreme Court in Hendricks expressly relied upon the statutory scheme that permits “immediate release upon a showing that the individual is no longer dangerous or mentally impaired,” as the basis for upholding the civil commitment of a sexual offender. Id. at 368-69. If Kansas did not provide for annual review in which the State must demonstrate the continued basis for confinement, the outcome of Hendricks would have been different. Id.

Washington likewise bars the confinement of a person solely based on that person’s dangerousness or due to prior diagnoses of mental illness. State v. Sommerville, 86 Wn.App. 700, 709, 937 P.2d 1317 (1997) (citing Foucha, 504 U.S. at 78). The Sommerville Court rejected the State’s efforts to continue the civil commitment of a person found not guilty by reason of insanity when present psychiatric diagnoses classified Sommerville’s mental illness as “in remission.” Id. at 709. The State argued that the mental illness was chronic and therefore cannot simply disappear.

The court in Sommerville refused to adopt the State’s claim that a purportedly chronic mental illness that did not cause current

symptoms could justify continued civil commitment. Id. at 710.

While the fact of the initial commitment may allow a court to infer basis of the commitment continues, “that inference does not last indefinitely.” Id. Where there is no evidence of a current mental illness, commitment simply may not continue. Id. at 710-11.

b. The Legislature may not bar a person’s release from confinement when the person is not currently mentally ill or dangerous due to that mental illness. In 2005, the Washington Legislature amended the statute providing the procedures for annual review given to all people committed under the SVP laws who request such review. RCW 71.09.090; 2005 Laws ch. 344 (Senate Bill 5882) (full text attached as Appendix B); In re Detention of Petersen, 145 Wn.2d 789, 798-99, 42 P.3 952 (2002).

The statute provides two ways a person may obtain a release trial pursuant to the annual review process: if the State fails to present *prima facie* evidence that the detainee’s condition has not changed, or if the detainee affirmatively presents *prima facie* evidence of a change in his condition. RCW 71.09.090; Petersen, 145 Wn.2d at 798-99. However, due process and the rulings in Young and Ward require a third manner in which a trial can be ordered as a result of the annual review process: if a

detainee is able to present *prima facie* evidence that he currently does not meet the criteria for commitment, regardless of the whether his condition has changed. In re Detention of Young, 120 Wn.App. 753, 763, 86 P.3d 810, rev. denied, 152 Wn.2d 1035 (2004) (“Because current risk assessment techniques suggest Young is not an SVP, denying him a hearing at this point raises due process concerns.”); In re Detention of Ward, 125 Wn.App. 381, 386, 104 P.3d 747, rev. denied, 155 Wn.2d 1025 (2005) (“If a detainee provides new evidence establishing probable cause that he is not currently a sexually violent predator, due process requires a trial on the merits . . .”).<sup>3</sup>

Due process and RCW 71.09.070, therefore, require periodic assessments to determine whether the person currently meets the criteria for commitment, regardless of the reason for the current assessment. An evaluation of whether an individual meets the criteria for confinement must rely on current science, not outdated science. See In re Detention of Fox, 138 Wn.App. 374, 395 n.14, 158 P.3d 69 (2007) (“growing body of research suggests

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<sup>3</sup> The Supreme Court in Ambers “declined” to address the constitutional issues underlying the necessary showing for obtaining an SVP release hearing, because it decided the case on other grounds. 160 Wn.2d 553 n.4, 555 n.7. However, the Court noted it may be unconstitutional to apply a more stringent standard in an annual review hearing than the initial criteria for SVP commitment.

that actuarial risk assessments are more reliable than clinical analyses.”). If the detainee can present *prima facie* evidence based upon scientific literature that shows he is not a sexually violent predator, then a trial on that issue must be ordered.

The present version of RCW 71.09.090 limits the type of evidence that may be used to demonstrate a person is entitled to a release hearing. RCW 71.09.090(4)(b) provides that a court may order a new trial proceeding 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 the person would be safe to be at large if unconditionally released from commitment.

RCW 71.09.090(4)(b).

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Id.

c. The annual review statute is unconstitutional to the extent it bars an individual from obtaining a release hearing even when the person does not have a mental disorder or is not dangerous. In the case at bar, the State alleged that the 2005 amendments to the annual review hearing statute, RCW 71.09.090, strictly prohibit an individual's right to a release hearing unless the person shows a specific physical incapacity or proves that participation in treatment has caused the person to no longer be mentally disordered or dangerous to others. CP 493-97 (State's Response to Memorandum Regarding Annual Review).

In Ambers, the Washington Supreme Court rejected the State's claim that the 2005 amendments to RCW 71.09.090 placed more stringent requirements on a person seeking release from total confinement than the standards in place at the original commitment hearing. 160 Wn.2d at 553. The Ambers Court ruled that a person must merely show that he or she no longer meets the definition of an SVP in order to obtain further review of the commitment order. 160 Wn.2d at 552-57 (determining that issue at annual review hearing remains whether petitioner "meets the definition of an SVP").

In Fox, a two-judge majority rejected several constitutional challenges to the 2005 amendments to RCW 71.09.090.<sup>4</sup> 138 Wn.App. at 393-402. The majority in Fox ruled that a person may still seek and obtain release by showing he or she is no longer a danger to society or has completed behavioral treatment, so long as that finding is not based on a single demographic factor, thereby complying with due process requirements. 138 Wn.App. at 399.

Judge Armstrong wrote a sharp dissent in Fox. Judge Armstrong argued that it violates the right to due process of law to limit a person's ability to obtain a release hearing when that person is not dangerous or mentally disordered as required by the initial commitment procedure. 138 Wn.App. at 407-08 (Armstrong, J. dissenting). The 2005 amendments to RCW 71.09.090 bar a person from making a *prima facie* case he or she is entitled to release based on certain evidence. Id. at 407. Yet a person may be able to show he or she has lost desire or interest in violent sexual acts, or has attained a significant measure of control over those receding impulses, even if he or she has not suffered

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<sup>4</sup> A petition for review is pending in Fox. The Washington Supreme Court heard argument in May 2007 in State v. Elmore, 134 Wn.App. 402, 139 P.3d 1140 (2006), *rev. granted*, 152 Wn.2d 1025 (2007), regarding the sufficiency of evidence needed for a release hearing. See <http://www.courts.wa.gov/appellate>

paralysis or has not made significant gains in the State's treatment program. Id. at 407-08. By denying a release hearing even if the person no longer meets the basic dangerous or mentally ill requirements of a civil commitment, the statute violates due process. Id.

d. Principles of due process and equal protection bar the State from solely relying upon past evaluations or criminal history in order to involuntarily confine an individual. Proof of current mental illness is a constitutional requirement of continued detention. O'Connor, 422 U.S. at 574-75; Sommerville, 86 Wn.App. at 709. Under RCW 71.09.070, the State must provide a person committed as an SVP, "a current examination of his or her mental condition . . . at least once a year."

Yet under RCW 71.09.090, a person may obtain a release hearing only upon proof he or she has "so changed" due to treatment progress or physical incapacity. Because the statute does not require the State to present regular proof of continued mental illness, but instead limits the State's responsibility to determining whether the individual has "so changed." RCW

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[\\_trial\\_courts/supreme/issues/?fa=atc\\_supreme\\_issues.display&fileID=2007May#P547\\_36066](#) (last viewed August 8, 2007).

71.09.090(1), the scheme does not comply with the basic due process requirements articulated above.

For example, in the case at bar, the State offered two psychologist's reports which repeated past evaluations and diagnoses. While Mr. McCuiston did not participate in Dr. DeMarco's 2004 evaluation, Dr. van Dam interviewed him for over three hours before preparing the 2005 evaluation. CP 6; CP 50. Even with this lengthy interview, Dr. van Dam believed that Mr. McCuiston's criminal history alone would establish both his mental illness and likelihood of future dangerousness. CP 66 ("Mr. McCuiston's criminal history alone would confirm the compulsion to engage in such violence against women, and would suffice to meet the criteria for this diagnosis."). The failure to require and offer opinions of Mr. McCuiston's current mental disorder is further example of the due process and equal protection violations underlying Mr. McCuiston's continued involuntary confinement.

e. Due process standards require the court to grant a release hearing upon nonfrivolous evidence setting forth grounds for release. Procedural due process can only be satisfied where the Court considers 1) the private interests that will be affected by the official action; 2) the risk of an erroneous deprivation of such

interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and 3) finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. In re Young, 122 Wn.2d 1, 43-44, 857 P.2d 989 (1993) (citing Mathews v. Eldridge, 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976)). "Due process requires an opportunity for a hearing appropriate to the nature of the case." In re M.B., 101 Wn.App. 425, 470-71, 3 P.3d 780 (2000) (citing Mathews v. Eldridge, 424 U.S. at 335).

For example, the summons procedure for involuntary civil commitment under RCW 71.05.150 violates constitutional safeguards of procedural due process. In re Harris, 98 Wn.2d 276, 287, 654 P.2d 109 (1982). Before a summons may issue, a judicial finding of "probable dangerousness" is required. Id. at 287. Such an impartial judicial third party will help ensure (1) probable dangerousness is present; (2) sufficient investigation has occurred; and (3) commitment is the least restrictive alternative. Id. at 287-88.

The United States Supreme Court ruled as early as 1967 that whether denominated "civil" or "criminal", sex offender

commitment proceedings are subject to the equal protection clause of the Fourteenth Amendment and to the due process clause. Specht v. Patterson, 386 U.S. 605, 608, 87 S.Ct. 1209, 18 L.Ed.2d 326 (1967). The Supreme Court held that a person confronted with indefinite confinement is entitled to all the safeguards and fundamental rights essential to a fair trial, including the right to confront and cross-examine witnesses against him and the right to offer evidence of his own to a jury. Id. at 610.

The procedure utilized in the instant case was constitutionally inadequate and denied Mr. McCuiston due process based on the three factors enunciated in M.B. : (1) the private interests affected by the proceeding; (2) the risk of error created by the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and (3) the countervailing governmental interest supporting use of the challenged procedure.

Under factor (1), Mr. McCuiston's fundamental liberty interest is affected by the proceeding and a denial of a hearing leaves Mr. McCuiston with indefinite and continued confinement with little chance of release. Under factor (2), the risk of error created by the procedures used and the probable value, if any, of additional or substitute procedural safeguards, is easily met in the

instant case because Mr. McCuiston simply seeks a hearing. Lastly, under factor (3) listed above, the countervailing governmental interest supporting use of the challenged procedure cannot overcome Mr. McCuiston's interest in having a hearing to regain his freedom.

Mr. McCuiston was denied due process and equal protection of the laws when the superior court denied him an evidentiary hearing and summarily dismissed his petition despite his presenting evidence he did not currently have a mental disorder and was able to control sexually violent his behavior. The statutory framework that bars a court from ordering a new hearing unless the petition for release is based on treatment success or physical incapacity violates the fundamental rights to due process and equal protection of the laws.

2. BY LIMITING THE TYPE OF EVIDENCE A COURT MAY CONSIDER BEFORE A NEW SVP RELEASE HEARING, THE LEGISLATURE VIOLATED THE CONSTITUTIONAL SEPARATION OF POWERS

The judicial power of the State is vested in the Supreme Court, and other authorized courts, by the Washington Constitution. Wash. Const. Article IV, section 1; State v. Fields, 85 Wn.2d 126,

129, 530 P.2d 284 (1985). The Supreme Court has authority to dictate court procedures pursuant to this constitutional provision, as well as under RCW 2.04.190, which states that the Supreme Court has authority to prescribe the mode and manner of taking and obtaining evidence. See State v. Ryan, 103 Wn.2d 165, 178, 691 P.2d 197 (1984) (court rule supercedes procedural statute).

The separation of powers doctrine bars the legislature from making or changing judicial determinations. Tacoma v. O'Brien, 85 Wn.2d 266, 272-73, 534 P.2d 114 (1975) (courts "carefully preserve[ ] judicial functions from legislative encroachment"). The Legislature may not enact statutes that threaten the independence of the judiciary. Fox, 138 Wn.App. at 393.

On the other hand, RCW 71.09.090 not only sets forth the procedures to be used when an SVP detainee asks for an evidentiary hearing to determine the legality of the continuing detention, but also dictates the type of evidence that will allow a person to obtain a full hearing. For example, at an initial SVP commitment trial, the State proves the individual offender's future dangerousness by actuarial risk assessment, which is increasingly recognized as more accurate than a clinician's individual judgment. Thorell, 149 Wn.2d at 753; Fox, 138 Wn.App. at 395 n.14 ("A

growing body of research suggests that actuarial risk assessments are more reliable than clinical analyses.”)

RCW 71.09.090 provides in part:

A change in a single demographic factor, without more, does not establish probable cause for a new trial . . . . As used in this section, a single demographic factor includes, but is not limited to, a change in chronological age, marital status, or gender of the committed person.

RCW 71.09.090(4)(c). The initial SVP commitment trial places no restriction on the type of evidence or persuasive weight of evidence that may be offered, but instead rely upon the Washington Rules of Evidence as do all other civil and criminal trials in Washington.

RCW 71.09.090(4)(b) prohibits a court from ordering a new trial proceeding unless a licensed professional provides evidence of (i) an identified permanent physiological change, such as paralysis, that renders the person physically unable to commit a sexually violent act; or (ii) change in mental condition if “brought about through positive response to continuing participation in treatment . . . .” Consequently, changes that are not directly due solely to physical incapacity or continued treatment progress may not be grounds to release, even if the person is otherwise found by an expert to not meet the criteria for civil commitment.

The Fox Court found that the legislature has the prerogative “to clarify the definition of when a committed SVP’s mental or physical condition has substantially changed such that he or she is no longer a danger to the community and may be released.” 138 Wn.App. at 394. However, this legislation not only clarifies the statutory definitions, it intrudes upon the province of the fact-finder and bars the court from considering otherwise reliable, admissible, scientifically valid evidence that would cast doubt on the legality of continued commitment.<sup>5</sup> It infringes upon the court’s authority to weigh evidence and prohibits the court from considering a valid expert opinion as to whether a person is dangerous. RCW 71.09.090 strips the judiciary of its independence, invades the province of the fact-finder in weighing relevant and admissible evidence, and violates the principle of separation of powers.

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<sup>5</sup> The Fox Court found that the evidentiary restrictions in RCW 71.09.090 do not impermissibly require an SVP prove their changed condition is due to physical alterations or treatment. 138 Wn.App. at 395-96. Mr. McCuiston respectfully disagrees with this assessment, as the statute essentially bars a person from obtaining an evidentiary release hearing unless he or she is physically incapacitated or succeeds in State-run treatment, which in and of itself is not considered a scientifically-proven antidote for sexually offending. These extreme limitations go far beyond the Legislature’s role in setting procedures for continued SVP commitment.

3. BECAUSE MR. MCCUISTION PRESENTED *PRIMA FACIE* EVIDENCE THAT HIS CONDITION HAD SO CHANGED SUCH THAT HE WAS NO LONGER A SEXUALLY VIOLENT PREDATOR, A TRIAL SHOULD HAVE BEEN ORDERED.

- a. Mr. McCuistion had the minimal burden of making a *prima facie* showing that his condition had changed such that he was no longer a sexually violent predator. Persons committed to the SCC have the right to an annual review of their continued confinement. RCW 71.09.070, .090. The detained person is evaluated by SCC clinical staff. *Id.* The evaluator is required to render an opinion as to whether the person continues to meet the criteria of a sexually violent predator, and whether the person's release to a less restrictive alternative would be appropriate. RCW 71.09.070.

The committed person may then challenge the findings of the evaluator, and may present evidence of his own, by exercising his right to an annual review hearing. RCW 71.09.090. At an RCW 71.09.090(2) annual review hearing, the trial court must determine, in part, whether "probable cause exists to warrant a [trial] on whether . . . [the committed person's] condition has so changed that he . . . no longer meets the definition of a sexually

violent predator . . .” The same standard is articulated in RCW

71.09.090(2)(c)(ii)(A), which states, in part:

If the court at the show cause hearing determines that either: (i) The state has failed to present *prima facie* evidence that the committed person continues to meet the definition of a sexually violent predator . . . ; or (ii) probable cause exists to believe that the person’s condition has so changed that . . . the person no longer meets the definition of a sexually violent predator . . . then the court shall set a [trial] on [the] issue.

The Petersen Court stated that "probable cause" is a very low standard, and it “exists if the proposition to be proven has been *prima facie* shown.” Id. at 797. When evaluating the respondent's evidence, the trial court must determine whether the evidence, “if believed” meets the standard. Id. The Court was clear that the trial court must not weigh the State’s evidence against that of the respondent. Id. at 803. Appellate courts review the probable cause determination *de novo*. Id. at 799.

The Young Court applied this same standard. 120 Wn.App. at 759. The Young Court ruled that “[a]n annual show cause hearing is not the proper venue to challenge and weigh the evidence.” When a qualified expert asserts that scientific data supports the SVP detainee’s lack of current dangerousness, he has

demonstrated a *prima facie* case for a new release hearing. Id. at 763.

Notably, the Legislature did not disagree with Young or alter the present evidentiary standards on this point. While the Legislature amended RCW 71.09.090 in reaction to Young, it did not increase the detainee's threshold of proof at a show cause hearing. See Fox, 138 Wn.App. at 395 n.12 (recounting legislative intent to alter RCW 71.09.090 in reaction to Young and Ward.). Under the governing probable cause standard, the trial court does not weigh evidence when considering whether there is some evidence supporting the petitioner's release from total confinement.

In Ambers, the court affirmed the trial judge's limited role in weighing an expert evaluation when deciding whether an individual confined as an SVP has met the minimal burden at a show cause hearing. 160 Wn.2d at 553. The trial court has discretion to disregard an expert's opinion only if it finds the expert is unqualified or the offered opinion would not be admissible under the Rules of Evidence. Id. at 553 n.5.

In the case at bar, the trial court did not dispute Dr. Coleman's credentials or qualifications to state his opinion. CP

585. The court did not disregard Dr. Coleman's opinion on the grounds that his opinion would be inadmissible at trial. Id.

The trial court refused Mr. McCuistion a new hearing based on Dr. Coleman's evaluation because Dr. Coleman's disagreement "with past examiners and fact-finders does not, itself, make his opinion the correct one." CP 585 (Finding of Fact 6). Additionally, the court found evidence indicating Mr. McCuistion's lack of behavioral problems at SCC "relevant" but did not constitute "persuasive evidence that would compel a finding that a further hearing is required . . ." regarding whether Mr. McCuistion may be indefinitely confined. CP 585 (Finding of Fact 8).

These findings demonstrate the trial court denied Mr. McCuistion's petition based on an incorrect application of the law. See e.g., Ambers, 160 Wn.2d at 553 n.5. Mr. McCuistion did not need to convince the court that Dr. Coleman's opinion was the correct one, or even that it was as equally credible as the opinions offered by the State. As in Young, Mr. McCuistion simply bore the burden of presenting some evidence that, if believed, would show he did not meet the criteria for SVP commitment. 120 Wn.App. at 759. "The State will have an opportunity to challenge Dr. [Coleman's] opinion, and a trier of fact will have the opportunity to

weigh his opinion against the State's evidence in a proper venue--a new commitment hearing.” Id. at 760. The court’s comments indicate it weighed the evidence, rather than determining whether Mr. McCuiston offered a *prima facie* case. Id.

Instead of asking whether there was some evidence, if believed, that would serve as grounds for release, the court misapplied the pertinent legal threshold. Young, 120 Wn.App. at 759. Mr. McCuiston did not need to “rebut” the State’s evidence, but rather offer information that, if believed, would warrant a new hearing. CP 585. The court’s failure to afford Mr. McCuiston a new hearing when there was some admissible evidence indicating that Mr. McCuiston no longer met the criteria for commitment must be reversed.

b. Mr. McCuiston presented *prima facie* evidence that his condition has changed such that he was no longer a sexually violent predator. Mr. McCuiston presented an expert’s evaluation stating that he did not meet the criteria for commitment as he did not suffer from a mental disorder. Dr. Coleman disputed the State’s experts’ opinions that he suffered from a mental disorder. CP 614-24. He contradicted the State psychologists’ evaluations which repeated his criminal history and found that

based upon that history alone, he necessarily met the criteria for indefinite commitment. CP 615-618. Dr. Coleman argued that these diagnoses are flawed and not scientifically supported. CP 614-24. The trial court did not find this evidence inadmissible at trial or the expert unqualified to render his opinion.

The court also found that, "Mr. McCuiston is a very capable and well-regarded man within the confines of the SCC." CP 570 (Finding of Fact 7). "He has proven himself to be a hard worker and received several very positive reviews by staff." Id. These findings reflected the four affidavits SCC supervisors filed on Mr. McCuiston's behalf. CP 637-648. These four supervisors, three of whom were women, attested to their regular contact with Mr. McCuiston over many years at SCC, as well as their knowledge of his SCC records, and swore that they had never heard of or seen Mr. McCuiston engaging in or threatening any inappropriate sexual or violent behavior. Id. Each of the four supervisors stated they had consistently positive interactions with Mr. McCuiston and observations of his behavior. Id.

Even the State's psychologist who interviewed Mr. McCuiston for the show cause hearing described him as having "no overt indications to suggest problems with attention,

concentration, or with cognition.” CP 63 (Van Dam Report, p.14). Psychologist DeMarco listed every negative progress note written about Mr. McCuistion since his confinement at SCC began in 1998, and despite the involuntary commitment and daily supervision under close quarters, Mr. McCuistion had only a few instances of being disagreeable with staff members and the majority of his negative interactions with staff had occurred at the start of his commitment in 1999, with only six notes indicating any disagreements with staff members after 2000. CP 16-18. As Mr. McCuistion told psychologist van Dam, he had grown older, lost his impulsiveness, and changed his behavior in reaction to the 12 years of involuntary, indefinite confinement. CP 62 (Van Dam Report, p. 13).

Mr. McCuistion also offered updated scientific analysis regarding the accuracy of risk assessment tests that were used by the State’s experts. CP 650-64. He offered a recent study documenting the low recidivism rates found in a detailed Washington study of felony offenders compared to other offenses. CP 678. He also offered a recent study documenting the markedly higher recidivism rates for perpetrators of male pedophilia as compared to other sexual offenders, and since Mr. McCuistion is

not suspected of engaging in male pedophilia, he demonstrated that risk assessment predictions are likely lower for him. CP 611-12 (summarizing Harris and Hansen study in attachment G).

An essential element of SVP commitment is a person's inability to control his behavior due to a mental disorder. Mr. McCuiston offered evidence indicating he had controlled his behavior throughout the lengthy period of time he had been at SCC. While the State argued that good behavior in a controlled environment does not prove control over behavior while in a less restrictive setting, the question before the court was whether Mr. McCuiston presented prima facie evidence that he was no longer either mentally disordered or unable to control his dangerous behavior. The trial court disregarded the evidence of Mr. McCuiston's good behavior on the grounds that "the change of behavior within the confines of a secure facility does not demonstrate that his mental disorder had been changed in any way." CP 585 (Finding of Fact 7). This finding is unsupported by the record, because the maturation and control over behavior that Mr. McCuiston displayed despite the disagreeable nature of his involuntary confinement demonstrates a degree of volitional control that undercuts the risk of violence required for continued total

confinement. Mr. McCuiston showed that he could and had developed substantial control over his behavior.

Based on the expert evaluation, testimonial support, and recent scientific evidence further explaining risk predictions, Mr. McCuiston presented *prima facie* evidence that he no longer met the criteria for continued total confinement.

c. The trial court's findings are not supported by substantial evidence. A trial court's findings of fact must be supported by substantial evidence in the record, and must, in turn, support the trial court's conclusions. See In re C.B., 79 Wn.App. 686, 692, 904 P.2d 1171 (1995), rev. denied, 128 Wn.2d 1023 (1996). In Findings of Fact 6 and 8, the court found that Mr. McCuiston had not proven his expert's opinion was the "correct one" and that evidence documenting his lengthy history of good behavior did not amount to "persuasive evidence" that would "compel" a new hearing. In Finding of Fact 10, the court concluded that Mr. McCuiston "had not presented any evidence that rebuts the evidence" presented by the State. CP 585. Based upon the evidence presented in Mr. McCuiston's motion for a show cause hearing as discussed above, these findings are not supported by

substantial evidence, are based on a failure to apply the correct legal standard, and must be disregarded.

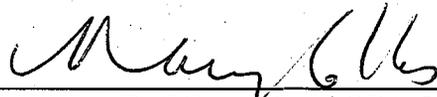
Based upon the diagnostic evidence presented from a licensed professional as well as the evidence of his good behavior and high regard in which he is held by the staff members who interact with him on a regular basis, Mr. McCuiston established probable cause that he no longer suffers from a mental abnormality or personality disorder that renders him unable to control his ability to refrain from committing sexually violent acts in the future. The trial court's refusal to order a new release hearing must be reversed. Young, 122 Wn.App. at 763.

F. CONCLUSION.

For the foregoing reasons, Mr. McCuiston respectfully requests this Court order that he receive a new commitment trial.

DATED this 16<sup>th</sup> day of August 2007.

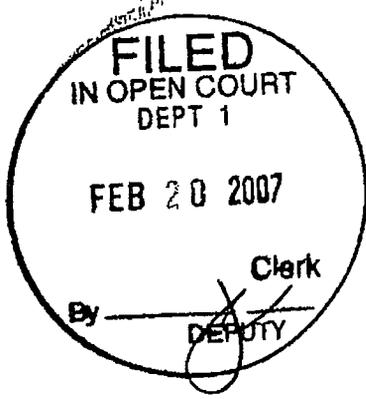
Respectfully submitted,



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NANCY P. COLLINS (WSBA 28806)  
Washington Appellate Project (91052)  
Attorneys for Petitioner

## **APPENDIX A**



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**STATE OF WASHINGTON  
PIERCE COUNTY SUPERIOR COURT**

In re the Detention of:  
  
DAVID MCCUISTION,  
  
Respondent.

NO. 98-2-11149-1  
  
ORDER ON SHOW CAUSE  
HEARING

THIS MATTER came before the Court on October 27, 2006, to determine whether the Respondent is entitled to a trial on the question of whether he should be unconditionally released or released to a less restrictive alternative. At the hearing, the Petitioner was represented by Senior Counsel SARAH B. SAPPINGTON, who appeared telephonically. The Respondent, pro se, appeared telephonically. In reaching a decision in this matter, the Court considered the pleadings filed in this matter, the evidence presented at the show cause hearing, the argument of counsel, and the additional evidence submitted by Mr. McCuiston after the hearing. Based upon all of this, the Court enters the following Findings of Fact, Conclusions of Law, and Order:

**FINDINGS OF FACT**

1. The Respondent was committed to the care and custody of the Department of Social and Health Services (DSHS) as a sexually violent predator on October 3, 2003.
2. On October 31, 2004, DSHS submitted a written annual review of the Respondent's mental condition to this Court covering October 2003 through October 2004.

1           3.     On December 15, 2005, DSHS submitted a written annual review of the  
2 Respondent's mental condition to this Court covering November 2004 through November 2005.

3           4.     This hearing addresses the review periods addressed by the October 31, 2004 and  
4 the December 15, 2005 Annual Reviews submitted by DSHS.

5           5.     Pursuant to RCW 71.09.070, Mr. McCuiston was permitted to retain an expert,  
6 Dr. Lee Coleman, at public expense. Dr. Coleman's report was submitted by Mr. McCuiston as  
7 an attachment to his February 2006 Motion for Show Cause Hearing, and that report was  
8 considered by this Court.

9           6.     Dr. Coleman's report and conclusion are contrary to the conclusions reached by  
10 previous examiners of Mr. McCuiston, and is essentially a re-argument of the original finding  
11 that Mr. McCuiston is a sexually violent predator. That Dr. Coleman disagrees with past  
12 examiners and fact-finders does not, itself, make his opinion the correct one.

13           7.     Mr. McCuiston is a very capable and well-regarded man within the confines of  
14 the SCC. He has proven himself to be a hard worker and received several very positive reviews  
15 by staff. But his refusal to participate in sexual deviancy treatment compounds the issue before  
16 this court. The change in his behavior within the confines of a secure facility does not  
17 demonstrate that his mental disorder has been changed in any way.

18           8.     On or about October 30, 2006, Mr. McCuiston submitted additional evidence  
19 pertinent to the issues before this Court. Those materials have been considered and, although  
20 relevant, do not contain any persuasive evidence that would compel a finding that a further  
21 hearing is required for the consolidated review periods of 2003-2004 and 2004-2005.

22           9.     Mr. McCuiston was offered the opportunity to seek appointment of a psychiatrist  
23 for the 2005-2006 review period, and he has knowingly and voluntarily declined to do so. At  
24 Mr. McCuiston's request, this order shall also encompass the review period of 2005-2006.

25           10.    Mr. McCuiston has not presented any evidence that rebuts the evidence provided  
26 in the above-referenced reports submitted by DSHS.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over the parties and subject matter herein.

2. DSHS's annual review of the Respondent's mental condition provides prima facie evidence of the following:

a. The Respondent's condition remains such that he continues to meet the statutory definition of a sexually violent predator; and

b. Release to any proposed less restrictive alternative placement is not in the best interest of the Respondent, nor can conditions be imposed that would adequately protect the community.

3. Pursuant to *Detention of Petersen v. State*, 145 Wn.2d 789, 42 P.3d 952, 958 (2002), the Respondent did not present prima facie evidence that:

a. His condition has so changed that he no longer meets the criteria of a sexually violent predator; or

b. Release to a less restrictive alternative is in his best interest, and conditions can be imposed that would adequately protect the community.

Based on the foregoing Findings of Fact and Conclusions of Law, the Court now enters the following:

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ORDER

For purposes of the 2003-2004, 2004-2005 and 2005-2006 annual review periods, this Court's order civilly committing the Respondent to the custody of DSHS as a sexually violent predator shall continue until further order of the Court.

DATED this 20 day of ~~January~~<sup>Feb</sup> 2007.



THE HONORABLE JAMES R. ORLANDO  
Judge of the Superior Court

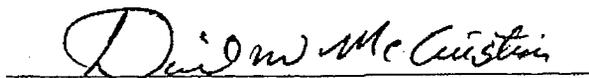
Presented by:

ROBERT M. MCKENNA  
Attorney General

 30867  
SARAH B. SAPPINGTON, WSBA #14514  
Senior Counsel  
Attorneys for Petitioner



Copy received; Approved as to form:

  
DAVID MCCUISTION, Pro Se  
Respondent

## **APPENDIX B**

LEXSTAT RCW 71.09.090

ANNOTATED REVISED CODE OF WASHINGTON  
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\*\*\* Statutes current through all newly enacted legislation \*\*\*  
\*\*\* that is effective through July 21, 2007 \*\*\*  
\*\*\* Annotations current through July 12, 2007 \*\*\*

TITLE 71. MENTAL ILLNESS  
CHAPTER 71.09. SEXUALLY VIOLENT PREDATORS

**GO TO REVISED CODE OF WASHINGTON ARCHIVE DIRECTORY**

*Rev. Code Wash. (ARCW) § 71.09.090 (2007)*

§ 71.09.090. Petition for conditional release to less restrictive alternative or unconditional discharge -- Procedures

(1) If the secretary determines that the person's condition has so changed that either: (a) The person no longer meets the definition of a sexually violent predator; or (b) conditional release to a less restrictive alternative is in the best interest of the person and conditions can be imposed that adequately protect the community, the secretary shall authorize the person to petition the court for conditional release to a less restrictive alternative or unconditional discharge. The petition shall be filed with the court and served upon the prosecuting agency responsible for the initial commitment. The court, upon receipt of the petition for conditional release to a less restrictive alternative or unconditional discharge, shall within forty-five days order a hearing.

(2) (a) Nothing contained in this chapter shall prohibit the person from otherwise petitioning the court for conditional release to a less restrictive alternative or unconditional discharge without the secretary's approval. The secretary shall provide the committed person with an annual written notice of the person's right to petition the court for conditional release to a less restrictive alternative or unconditional discharge over the secretary's objection. The notice shall contain a waiver of rights. The secretary shall file the notice and waiver form and the annual report with the court. If the person does not affirmatively waive the right to petition, the court shall set a show cause hearing to determine whether probable cause exists to warrant a hearing on whether the person's condition has so changed that: (i) He or she no longer meets the definition of a sexually violent predator; or (ii) conditional release to a proposed less restrictive alternative would be in the best interest of the person and conditions can be imposed that would adequately protect the community.

(b) The committed person shall have a right to have an attorney represent him or her at the show cause hearing, which may be conducted solely on the basis of affidavits or declarations, but the person is not entitled to be present at the show cause hearing. At the show cause hearing, the prosecuting attorney or attorney general shall present prima facie evidence establishing that the committed person continues to meet the definition of a sexually violent predator and that a less restrictive alternative is not in the best interest of the person and conditions cannot be imposed that adequately protect the community. In making this showing, the state may rely exclusively upon the annual report prepared pursuant to *RCW 71.09.070*. The committed person may present responsive affidavits or declarations to which the state may reply.

(c) If the court at the show cause hearing determines that either: (i) The state has failed to present prima facie evidence that the committed person continues to meet the definition of a sexually

violent predator and that no proposed less restrictive alternative is in the best interest of the person and conditions cannot be imposed that would adequately protect the community; or (ii) probable cause exists to believe that the person's condition has so changed that: (A) The person no longer meets the definition of a sexually violent predator; or (B) release to a proposed less restrictive alternative would be in the best interest of the person and conditions can be imposed that would adequately protect the community, then the court shall set a hearing on either or both issues.

(d) If the court has not previously considered the issue of release to a less restrictive alternative, either through a trial on the merits or through the procedures set forth in *RCW 71.09.094(1)*, the court shall consider whether release to a less restrictive alternative would be in the best interests of the person and conditions can be imposed that would adequately protect the community, without considering whether the person's condition has changed.

(3) (a) At the hearing resulting from subsection (1) or (2) of this section, the committed person shall be entitled to be present and to the benefit of all constitutional protections that were afforded to the person at the initial commitment proceeding. The prosecuting agency or the attorney general if requested by the county shall represent the state and shall have a right to a jury trial and to have the committed person evaluated by experts chosen by the state. The committed person shall also have the right to a jury trial and the right to have experts evaluate him or her on his or her behalf and the court shall appoint an expert if the person is indigent and requests an appointment.

(b) If the issue at the hearing is whether the person should be unconditionally discharged, the burden of proof shall be upon the state to prove beyond a reasonable doubt that the committed person's condition remains such that the person continues to meet the definition of a sexually violent predator. Evidence of the prior commitment trial and disposition is admissible.

(c) If the issue at the hearing is whether the person should be conditionally released to a less restrictive alternative, the burden of proof at the hearing shall be upon the state to prove beyond a reasonable doubt that conditional release to any proposed less restrictive alternative either: (i) Is not in the best interest of the committed person; or (ii) does not include conditions that would adequately protect the community. Evidence of the prior commitment trial and disposition is admissible.

(4) (a) Probable cause exists to believe that a person's condition has "so changed," under subsection (2) of this section, only when evidence exists, since the person's last commitment trial proceeding, of a substantial change in the person's physical or mental condition such that the person either no longer meets the definition of a sexually violent predator or that a conditional release to a less restrictive alternative is in the person's best interest and conditions can be imposed to adequately protect the community.

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

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

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

(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.

(5) The jurisdiction of the court over a person civilly committed pursuant to this chapter continues until such time as the person is unconditionally discharged.

**HISTORY:** 2005 c 344 § 2; 2001 c 286 § 9; 1995 c 216 § 9; 1992 c 45 § 7; 1990 c 3 § 1009.

**NOTES:**

**FINDINGS -- INTENT --** 2005 C 344: "The legislature finds that the decisions in *In re Young*, 120 Wn. App. 753, review denied, Wn.2d (2004) and *In re Ward*, Wn. App. (2005) illustrate an unintended consequence of language in chapter 71.09 RCW.

The Young and Ward decisions are contrary to the legislature's intent set forth in *RCW 71.09.010* that civil commitment pursuant to chapter 71.09 RCW address the "very long-term" needs of the sexually violent predator population for treatment and the equally long-term needs of the community for protection from these offenders. The legislature finds that the mental abnormalities and personality disorders that make a person subject to commitment under chapter 71.09 RCW are severe and chronic and do not remit due solely to advancing age or changes in other demographic factors.

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

The Young and Ward decisions are contrary to the legislature's intent that the risk posed by persons committed under chapter 71.09 RCW will generally require prolonged treatment in a secure facility followed by intensive community supervision in the cases where positive treatment gains are sufficient for community safety. The legislature has, under the guidance of the federal court, provided avenues through which committed persons who successfully progress in treatment will be supported by the state in a conditional release to a less restrictive alternative that is in the best interest of the committed person and provides adequate safeguards to the community and is the appropriate next step in the person's treatment.

The legislature also finds that, in some cases, a committed person may appropriately challenge whether he or she continues to meet the criteria for commitment. Because of this, the legislature enacted *RCW 71.09.070* and *71.09.090*, requiring a regular review of a committed person's status and permitting the person the opportunity to present evidence of a relevant change in condition from the time of the last commitment trial proceeding. These provisions are intended only to provide a method of revisiting the indefinite commitment due to a relevant change in the person's condition, not an alternate method of collaterally attacking a person's indefinite commitment for reasons unrelated to a change in condition. Where necessary, other existing statutes and court rules provide ample opportunity to resolve any concerns about prior commitment trials. Therefore, the legislature intends to clarify the "so changed" standard." [2005 c 344 § 1.]

**SEVERABILITY --** 2005 C 344: "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [2005 c 344 § 3.]

**EFFECTIVE DATE --** 2005 C 344: "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect immediately [May 9, 2005]." [2005 c 344 § 4.]

**RECOMMENDATIONS -- APPLICATION -- EFFECTIVE DATE --** 2001 C 286: See notes following *RCW 71.09.015*.

**SEVERABILITY -- APPLICATION --** 1992 C 45: See notes following *RCW 9.94A.840*.

**EFFECT OF AMENDMENTS.**

2005 c 344 § 2, effective May 9, 2005, substituted "determines that the person's condition has so changed that either: (a)" for "determines that either (a): the person's condition has so changed that" in (1), divided the last sentence of (2)(a) into the last and next-to-last sentences and transferred (i) to the last sentence, inserted "proposed" in the last sentence of (2)(a) and in clause (B) of (c), added (4), and redesignated former (4) as (5).

2001 c 286 § 9, effective May 14, 2001, rewrote the section.

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO**

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IN RE THE DETENTION OF

D.M.,

APPELLANT.

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NO. 35805-1-II

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**CERTIFICATE OF SERVICE**

I, MARIA RILEY, CERTIFY THAT ON THE 16<sup>TH</sup> DAY OF AUGUST, 2007, I CAUSED A TRUE AND CORRECT COPY OF THIS **BRIEF OF PETITIONER** TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] JOSHUA CHOATE, AAG  
OFFICE OF THE ATTORNEY GENERAL  
800 FIFTH AVENUE, SUITE 2000  
SEATTLE, WA 98104

(X) U.S. MAIL  
( ) HAND DELIVERY  
( ) \_\_\_\_\_

[X] DAVID MCQUISTION  
PO BOX 88600  
STEILACOOM, WA 98388-0647  
930 TACOMA AVENUE S, ROOM 110  
TACOMA, WA 98402

(X) U.S. MAIL  
( ) HAND DELIVERY  
( ) \_\_\_\_\_

**SIGNED** IN SEATTLE, WASHINGTON THIS 16<sup>TH</sup> DAY OF AUGUST, 2007.

X \_\_\_\_\_

*[Handwritten Signature]*

FILED  
COURT OF APPEALS  
DIVISION II  
07 AUG 20 AM 9:17  
STATE OF WASHINGTON  
BY *[Signature]* DEPUTY