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SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DAVID MCCUISTION,

Petitioner.

RESPONDENT'S SUPPLEMENT BRIEF

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A. Introduction

This Court should withdraw the initial opinion in this case and confirm the constitutional validity of the 2005 amendments to RCW 71.09. Because individuals committed as Sexually Violent Predators (“SVPs”) are subject to comprehensive evaluations annually where the State is required to show that the SVP continues to be both mentally ill and dangerous based on all relevant facts and valid scientific methods, substantive due process is satisfied under the controlling authority of *Young, Hendricks, and Foucha v. Louisiana*.¹ The commitment remains constitutional as long as the “nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed.” *Jones v. United States*.² Here, substantive due process is met because the individual has been found beyond a reasonable doubt to be an SVP, and the annual review confirms to a reasonable degree of psychological certainty the continuing basis of the commitment, and because there is no fundamental right to a new trial.

¹ *Foucha v. Louisiana*, 504 U.S. 71, 112 S. Ct. 1780, 118 L. Ed. 2d 437 (1992); *In re the Personal Restraint of Andre Young*, 122 Wn.2d 1, 25-42, 857 P.2d 989 (1993); *Kansas v. Hendricks*, 521 U.S. 346, 356-60, 117 S. Ct. 2072, 138 L. Ed. 2d 501 (1997).

² *Jones v. United States*, 463 U.S. 354, 368, 103 S. Ct. 3043, 77 L. Ed. 2d 694 (1983).

B. Committed Sexually Violent Predators Have No Fundamental Right to a New Trial After the Annual Review Confirms the Basis for Commitment Merely Because They Submit an Expert Opinion that Disagrees with the Commitment.

Substantive due process does not require a new trial here simply because McCuiston's expert offered an opinion that contradicts the finding that he is an SVP. This view of substantive due process is erroneous because McCuiston's fundamental liberty has been severely limited since the day he was committed as an SVP --indeed no one would argue that he has the right to be free from restraint after the verdict is returned. The limitations on mechanisms that can trigger a new trial do not violate substantive due process because there is no fundamental right to a new trial; substantive due process is met by the original standards for commitment and the annual review that confirms a continuing basis for commitment.

1. A Claim To A Fundamental Right Must Be Carefully Assessed Based On The Specific Right Claimed.

Substantive due process protects individuals from "government interference with certain fundamental rights and liberty interests." *Washington v. Glucksberg*, 521 U.S. 702, 720, 117 S. Ct. 2258, 138 L. Ed. 2d 772 (1997). However, substantive due process is a "wonderfully malleable concept". *Stop the Beach Renourishment, Inc. v. Florida Dept. of Environmental Protection*, 130 S. Ct. 2592, 2608, 177 L. Ed. 2d 184

(2010) (plurality). As the Court in *Glucksberg* noted, ““guideposts for responsible decision making in this unchartered area are scarce and open-ended.”” *Glucksberg*, 521 U.S. at 720, quoting *Collins v. Harker Heights*, 503 U.S. 115, 125, 112 S. Ct. 106, 117 L. Ed. 2d 261 (1992). The danger inherent in employing substantive due process is that a court will substitute its policy preferences for those of the legislature. *Glucksberg*, 521 U.S. at 720, quoting *Moore v. City of East Cleveland, Ohio*, 431 U.S. 494, 502, 97 S. Ct. 1932, 52 L. Ed. 2d 531 (1977). “The doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field.” *Janet Reno v. Jenny Lisette Flores*, 507 U.S. 292, 302, 113 S. Ct. 1439, 123 L. Ed. 2d 1 (1993).

A substantive due process claim must be analyzed using a two-step analysis. First, the asserted fundamental right must be “carefully” described in as specific a manner as possible. *Glucksberg*, 521 U.S. at 721.³ Once the asserted right has been precisely described, the court must determine if such a right is “‘deeply rooted in this Nation’s history and tradition,’ . . . and ‘implicit in the concept of ordered liberty,’ such that ‘neither liberty nor justice would exist if [it] were sacrificed.’” *Andersen v. King County*, 158 Wn.2d 1, 25, 138 P.3d 963 (2006) (plurality), quoting

³ The *Glucksberg* Court rejected a broad statement of the right at issue as a “‘right to die,’” and appropriately narrowed the issue to whether there is a “‘right to commit suicide which itself includes a right to assistance in doing so.” *Id.* at 722-23.

Glucksberg, 521 U.S. at 720-21.⁴ Unless there is a specific and carefully described due process right, there is no need for the court to require "more than a reasonable relation to a legitimate state interest to justify the action," nor is there "the need for complex balancing of competing interests in every case." *Glucksberg*, 521 U.S. at 721-22. The relevant authority demonstrates that after a person is civilly committed, all that the constitution requires is a periodic examination by a qualified professional to ensure he or she continues to meet commitment criteria, and review of that decision in a non-adversarial setting. RCW 71.09 exceeds these requirements.

2. There is No Fundamental Right To A Yearly New Trial For Individuals Committed due to Mental Illness And Dangerousness.

This Court's initial opinion did not carefully describe a substantive right. Under *Glucksberg*, if substantive due process is to apply, in isolation, to the procedures in RCW 71.09.090(4), then the threshold issue is whether a person who has been found beyond a reasonable doubt to be mentally ill and dangerous, and thus civilly committed, and whose annual review evaluation by a qualified professional finds to a reasonable degree of psychological certainty that he or she continues to be both mentally ill

⁴ *Anderson* narrowed the inquiry from the broader "right to marry" to reject a claim of a fundamental "right to marry a person of the same sex." *Id.* at 30.

and dangerous, has a fundamental right to a new trial whenever the individual disputes the commitment and annual review findings.

Therefore, applying substantive due process to the provisions allowing for a new trial requires an examination of "our Nation's history, legal traditions, and practices." *Glucksberg*, 521 U.S. at 721-22. The long history of indefinite civil commitment demonstrates no fundamental right to a new trial based on a conflicting report.⁵ Only minimal periodic review is required in order to maintain an indefinite civil commitment. The fact that annual review of civil commitment is typically treated as a procedural due process question also refutes the current claim of a substantive due process right.

⁵ Similarly, in the criminal system there is no substantive due process right to a new trial anytime the convicted person wants a new trial. Criminal defendants have limited constitutional rights after conviction. *State v. Fisher*, 145 Wn.2d 209, 226-31, 35 P.3d 366 (2001). "[G]iven a valid conviction, the criminal defendant has been constitutionally deprived of his liberty." *In re PRP Ayers*, 105 Wn.2d 161, 164, 713 P.2d 88 (1986) quoting *Meachum v. Fano*, 427 U.S. 215, 224, 96 S. Ct. 2532, 2538, 49 L. Ed. 2d 451 (1976). Defendants seeking postconviction relief face a heavy burden and are in a significantly different situation than a person facing trial. *State v. Riofta*, 166 Wn.2d 358, 369-70, 209 P.3d 467 (2009) citing *Schlup v. Delo*, 513 U.S. 298, 326 n. 42, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995) (a convicted person claiming innocence as the basis for postconviction relief must overcome a strong presumption of guilt); *Herrera v. Collins*, 506 U.S. 390, 399, 400, 113 S. Ct. 853; 122 L. Ed. 2d 203 (1993) (a petitioner claiming innocence "does not come before the Court as one who is 'innocent,' but, on the contrary, as one who has been convicted by due process").

3. Indefinite Commitment Schemes Have Been Used Historically To Protect The Public From The Mentally Ill And Dangerous And Do Not Violate Substantive Due Process.

Case law involving civil commitment and other detention statutes demonstrates there is no deeply rooted historical tradition of requiring a new trial whenever a person committed pursuant to appropriate procedures offers an opinion that contradicts the verdict. Indeed, no court in any jurisdiction has ever allowed such evisceration of the commitment in this way to require new trials every year. To the contrary, indefinite commitment schemes have routinely been upheld, as has RCW 71.09. (See *Young*, 122 Wn.2d 1, and *In re Petersen*, 138 Wn.2d 70, 81, 980 P.2d 1204 (1999).

The State has not just a legitimate, but a compelling interest in protecting the public from mentally ill and dangerous persons, and civil commitment of such persons is deeply rooted in our history. This history dates back to at least 1788, as the U.S. Supreme Court noted in a seminal SVP case: "It thus cannot be said that the involuntary civil confinement of a limited subclass of dangerous persons is contrary to our understanding of ordered liberty." *Kansas v. Hendricks*, 521 U.S. 346 at 357.⁶ Although the

⁶ Citing 1788 N.Y. Laws, ch. 31 (Feb. 9, 1788) (permitting confinement of the "furiously mad"); A. Deutsch, *The Mentally Ill in America* (2d ed. 1949) (tracing history of civil commitment in the 18th and 19th centuries); and G. Grob, *Mental Institutions in*

Hendricks Court was discussing initial commitment determination, the State's interest in protecting its citizens from the dangerously mentally ill is actually more compelling in the post-commitment context. This is because the person has already been found beyond a reasonable doubt to be mentally ill and dangerous -- a conclusion that has been sustained by annual review evaluation finding the committed person continues to meet commitment criteria.⁷

This Court implicitly recognized the lack of a fundamental right to a new trial for persons properly committed as an SVP when it rejected the argument that persons are entitled to an annual *de novo* determination beyond a reasonable doubt of their SVP status. *Petersen*, 138 Wn.2d at 81. *Petersen* held that the commitment scheme was indefinite, subject to the annual review processes. *Id.*

McCuiston claims he currently has a fundamental right to liberty. But this is belied by the fact that his liberty has been severely curtailed by

America: Social Policy to 1875 (1973) (discussing colonial and early American civil commitment statutes).

⁷ RCW 71.09.070 reads in part: Each person committed under this chapter shall have a current examination of his or her mental condition made by the department of social and health services at least once every year. The annual report shall include consideration of whether the committed person currently meets the definition of a sexually violent predator and whether conditional release to a less restrictive alternative is in the best interest of the person and conditions can be imposed that would adequately protect the community. The department of social and health services shall file this periodic report with the court that committed the person under this chapter. The report shall be in the form of a declaration or certification in compliance with the requirements of RCW 9A.72.085 and shall be prepared by a professionally qualified person as defined by rules adopted by the secretary.

the commitment itself. This curtailment is constitutional because it lasts as long as the State can show that he is mentally ill and dangerous. When the State cannot make the showing that he continues to meet criteria, the statute provides him with a new trial with all procedural safeguards in place.⁸ Under the Statute, the substantive reason for confinement remains consistent with the approved standards from *Hendricks* and *Young*.

Washington courts have long acknowledged the truncated rights of convicted sex offenders and sexually violent predators. “In Washington, “[p]ersons found to have committed a sex offense have a reduced expectation of privacy because of the public's interest in public safety and in the effective operation of government.” *In re Detention of Campbell*, 139 Wn.2d 341, 355-56, 986 P.2d 771 (1999) (citing *State v. Ward*, 123 Wn.2d 488, 502, 869 P.2d 1062 (1994)) (quoting Laws of 1990, ch. 3, section 116). The rights of a person who has been committed as an SVP are fundamentally different than a person facing commitment. SVP's do not have the same 4th amendment protections as ordinary citizens. *In re Personal Restraint of Paschke*, 80 Wn. App. 439, 447, 909 P.2d 1328 (1996), *remanded on other grounds*, 156 Wn.2d 1030, 131 P.3d 905 (2006) (internal citations omitted); *Jones*, 463 U.S. at 367-68 (civil

⁸ RCW 71.09.090(3)(a) provides in part that at the new trial “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.”

committees do not enjoy the same degree of rights attendant to a criminal proceeding.) (See also *In re PRP of Bush*, 164 Wn.2d 697, 702, 193 P.3d 103 (2008) citing *Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1, 7, 99 S. Ct. 2100, 60 L. Ed. 2d 668 (1979) (confirming that a conviction extinguished the liberty interest derived directly from the constitution.) If convicted offenders have “a remaining liberty interest, it must arise from state law or policy.” *Bush*, 164 Wn.2d at 702.

Given the utter lack of any historical support for the creation of a new fundamental right to a new trial for committed SVPs based solely on a defense expert opinion, substantive due process is not the appropriate analysis. McCuiston has thus failed to establish his “carefully described” “deeply rooted” right to a new trial, and the provisions of RCW 71.09.090(4) should be upheld.

In the absence of a specific and carefully described fundamental right, there is no need for a court to require “more than a reasonable relation to a legitimate state interest to justify the action.” *Glucksberg*, 521 U.S. at 721-22. Furthermore, as shown below, the broader question of whether SVP confinement meets substantive due process was already answered by the court in *Young*, because the commitment and annual review limited confinement to individuals proven to be both mentally ill and dangerous.

C. The Amendments Surpass All Constitutional Requirements and Should be Upheld.

Even if the Court evaluates the 2005 amendments based on a right to liberty that an individual had *before* commitment, the amendments satisfy substantive due process. Under substantive due process, the indefinite civil commitment of sexually violent predators is permitted whenever there is clear and convincing evidence that a person is both mentally ill and dangerous. *Young*, 122 Wn.2d at 25-42; *Kansas v. Hendricks*, 521 U.S. at 356-60. The indefinite commitment remains constitutional as long as the “nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed.” *Jones*, 463 U.S. at 368.⁹

The 2005 amendments do not alter the relevant provisions leading to the holding in *Young*, which held that the substantive due process was satisfied by the periodic review conducted annually by the Department of Social and Health Services (DSHS).¹⁰ *In re Young*, 122 Wn.2d at 37- 39. Thus, substantive due process is satisfied by RCW 71.09 *before* the

⁹ Given this Court’s prior finding that RCW 71.09 is narrowly tailored to the State’s twin compelling interests of treatment and community protection, it should not be difficult to conclude that tying additional release mechanisms to treatment or physiological risk reductions is rationally related to those interests.

¹⁰ This is not to say that the legislature may not provide additional rights in the post-commitment context that go beyond the constitutional floor, as the Washington Legislature has done for persons committed as SVPs. RCW 71.09.070. However, such *statutorily* created private interests do not create fundamental rights. Instead, the *statutorily* created interests are subject to the *Mathews* balancing test of procedural due process as discussed in Section E, *supra*. *See Bush*, 164 Wn.2d 697.

mechanisms in the 2005 amendments are even implicated. The amendments merely provide additional procedural paths for the individual to earn a new trial after the State makes it showing, and thus remain consistent with *Young*.

The Court's prior opinion in this case, however, is inconsistent with these substantive due process holdings because it applied a substantive due process requirement to one of the component procedures of the annual review statute in isolation, wrongly assuming that a separate fundamental right to new trial existed.

1. The Holding In *Foucha* Is Not Violated by the 2005 Amendments Because RCW 71.09 Compels a New Trial If the Annual Review Does Not Find That the Individual Meets the Definition of an SVP.

The Court's initial opinion assumed that SVPs have a substantive due process right to a *new trial* simply because there is an established substantive due process right to an *initial commitment trial*. The Court held that the 2005 change to the statute violated the standard in *Foucha*. *In re McCuiston*, 169 Wn.2d 633, 643, 238 P.3d 1147 (2010). The Court's reliance on *Foucha* in this regard is misplaced. There, the State of Louisiana conceded that Mr. Foucha was not mentally ill, with the two evaluating doctors recommending his release, but he was returned to the facility nonetheless. *Foucha*, 504 U.S. at 74-75, 80. The statute was

deemed constitutionally lacking because individuals who were admittedly not dangerous as a result of a mental illness were able to remain in continued detention under the Louisiana law. *Id.* at 77-80, 86. In contrast, any time the DSHS annual review does not find *both* mental illness and danger, a new trial is automatic pursuant to RCW 71.09.090(1)—a trial at which the State would be required to prove beyond a reasonable doubt that the individual is both mentally ill and dangerous, regardless of whether or not the individual submits a defense expert report.¹¹ The same review that confined *Foucha* in Louisiana would compel a new trial under RCW 71.09, and release when the State did not meet its burden. The Court's reliance on *Foucha* is also inconsistent with this Court's prior ruling:

The Statute here withstands the scrutiny required in *Foucha*. ... Although the period of confinement is not predetermined, the Statute's release provisions provide the opportunity for *periodic review* of the committed individual's current mental condition and continuing dangerousness to the community.

¹¹ RCW 71.09.090(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.

In re Young, 122 Wn.2d 1, 37-39 (1993) (Emphasis added). It is the “periodic review” that distinguishes *Foucha* and the 2005 amendments retain that feature.

Furthermore, this Court’s initial opinion is inconsistent with *Young* because it gives no weight to the DSHS annual review. However, the annual review—a comprehensive mental examination that considers all relevant facts and uses valid scientific methods—is “presumptively correct.” *Young*, 122 Wn.2d at 34. Because the DSHS evaluation confirms the continuing need for commitment, McCuiston’s liberty interest in avoiding unnecessary confinement is not infringed. (See, e.g., *Vitek v. Jones*, 445 U.S. 480, 491-92, 100 S. Ct. 1254, 1262-63, 63 L. Ed. 2d 552 (1980).

2. 71.09 Annual Review Standards Are In Excess of Other Due Process Decisions and Procedures Governing Release Of Individuals Committed As Mentally Ill and Dangerous.

The U.S. Supreme Court and other courts confirm that a new trial is not compelled by substantive due process. In *Parham v. J.R.*, 442 U.S. 584, 599-600, 995 S. Ct. 2493, 61 L. Ed. 2d 101 (1979), which involved the indefinite commitment of a developmentally disabled child, the Court recognized that there is a “continuing need for [the] commitment [to] be reviewed periodically. Nonetheless, the due process requirement of

periodic review was satisfied when the commitment decision was reviewed by a "neutral factfinder." *Id.* at 606 "Due process has never been thought to require that the neutral and detached trier of fact be law trained or a judicial or administrative officer." *Id.* at 607. Instead, for due process purposes, "a staff physician will suffice." *Id.* It is not even necessary to hold a formal or quasi-formal hearing: "A state is free to require such a hearing, but due process is not violated by use of informal traditional medical investigative techniques." *Id.*¹²

Nothing in *Foucha* or any other authority construes substantive due process to provide a new trial to an indefinitely committed sexually violent predator anytime he is able to submit a defense expert opinion.¹³ Instead, *Foucha* is satisfied when the State every year shows the continued existence of the basis for commitment. Notably, this requirement must be met before the provisions of the 2005 amendments are even implicated. Thus *Foucha* was satisfied here *before* McCuiston submitted an expert

¹² See also *In re GRH*, 711 N.W.2d 587, 597 (2006 ND 56) (consistent with due process for agency director to determine least restrictive treatment placement); *Porter v. Knickrehm*, 457 F.3d 794, 799 (8th Cir. August 8, 2006) (non-judicial review of commitment sufficient to protect chronic adult population); *Williams v. Wallis*, 734 F.2d 1434, 1438 (11th Cir. 1984), ("[d]ue process does not always require an adversarial hearing.")

¹³ Washington courts have declined to grant criminal defendants a new trial on the basis of new expert opinion under a variety of circumstances. See, e.g., *State v. Evans*, 45 Wn. App. 611, 613-15, 726 P.2d 1009 (1986), *review denied*, 107 Wn.2d 1029 (1987) (denying a new trial based on new expert opinion: "...this strikes us as a classic case: the defendant loses, then hires a new lawyer, who hires a new expert, who examines the same evidence and produces a new opinion. We cannot accept this as a basis for a new trial.")

opinion; indeed, he was not required to submit any evidence at all. When viewed in the context of the original commitment and annual review, the Court's concern that the 2005 amendments "authorize the State to detain individuals who are no longer mentally ill and dangerous" is unwarranted. *McCustion*, 169 Wn.2d at 643. If the State had not made this showing in McCustion's case, he would not have had to do anything to obtain a new trial; a new trial would simply have been ordered. Substantive due process requires nothing more.

The Court's belief that a person who no longer meets criteria would nonetheless be subject to commitment is flawed because it assumes the truth of the defense report and gives no weight to the commitment verdict and the continuing annual reviews. *Foucha* is met because there is continuing evidence of the basis for civil commitment. The Court also stated its concern that a "single demographic" such as age is excluded from consideration under the amendments. *Id.* This, too, ignores the obligation present in RCW 71.09.070 of the annual review which considers any and all relevant factors in the evaluation. The 2005 amendments limit only what may be considered when the SVP seeks a new trial *after* the DSHS evaluation has concluded the individual continues to be mentally ill and dangerous. This limitation is different than restricting the type of evidence to be considered in the annual review or

the subsequent trial itself. These additional procedures adopted by the Legislature ensure fairness above the constitutional requirements and enable an individual to petition for release hearing if they advance in treatment mid-way through the department's annual review period. Or, if they suffer a debilitating stroke or paralysis right after the annual review hearing; under *Foucha*, no new "periodic review" would be required until the following year, but the statute authorizes a mechanism for the individual to petition earlier. Indeed, the constitutional protections of substantive due process are fully satisfied when the DSHS evaluation concludes that the SVP continues to meet full statutory criteria. In creating mechanisms allowing petitions after the review confirms the basis for commitment, the Legislature afforded more process than was due.

In summary, the 2005 amendments do not touch on, much less violate, the requirements of *Foucha*. Instead, Washington law has exceeded *Foucha* by creating additional avenues for a new trial. In doing so, the Legislature properly requires some evidence of treatment-based change or physiological change. These *additional* procedures granted by the legislature after the constitutionally mandated review do not violate substantive due process because they exceed the minimum level of constitutional protection afforded to civilly committed individuals.

3. The Legislature Has Compelling Reasons to Require A Change in Condition if the Annual Review Finds The Individual Meets Criteria.

The Washington Legislature stated that RCW 71.09.090 was intended to provide a mechanism for a previously committed SVP to demonstrate a change in condition, potentially justifying reconsideration of continuing commitment, *rather than an opportunity to attack the initial commitment collaterally*. 2005 c. 344 § 1. The Legislature cited *In re Detention of Young*¹⁴ and *In re Detention of Ward*¹⁵, cases where committed persons were granted new trials despite any evidence in change in their underlying conditions, as misapplications of its legislative intent in enacting RCW 71.09.090. 2005 c. 344 § 1.¹⁶

The prior opinion did not consider how the amendments serve the important legitimate purpose of the Legislature of encouraging treatment, and granting those who participated in treatment additional mechanisms for release. Thus, the 2005 amendments advance the legitimate goal of

¹⁴ 120 Wn. App. 753, 86 P.3d 810, *review denied*, 152 Wn.2d 1035, 103 P.3d 201 (2004).

¹⁵ 125 Wn. App. 381, 104 P.3d 747, *review denied*, 155 Wn.2d 1025, 126 P.3d 820 (2005).

¹⁶ In amending the statute, the legislature emphasized, among other things, its intent that civil commitment pursuant to chapter 71.09 RCW address the “very long-term” treatment needs of the SVP population. S.B. 5582, § 1. Furthermore, the legislature discussed its concern that recent court decisions had subverted “the statutory focus on treatment,” and reiterated the importance of “prolonged treatment in a secure facility followed by intensive community supervision [only] in the cases where positive treatment gains are sufficient for community safety.” S.B. 5582, § 1. *In re Detention of Reimer*, 146 Wn. App. 179, 187, 190 P.3d 74 (2008).

treating disordered sex offenders. *See also* Section D, below discussing the State interests in the context of a *Mathews* analysis. “Where an SVP is committed both to provide treatment and to protect the public, the 2005 amendments that incentivize treatment bear a reasonable relationship to the purpose for the commitment.” (*McCustion*, 169 Wn.2d at 664, Owens, J. dissenting.)

D. The Annual Review And Show Cause Provisions Satisfy Procedural Due Process.

RCW 71.09 has surpassed the strict scrutiny test for the commitment scheme as a whole because, in part, of the numerous procedural protections granted. This Court has recognized that where the basis of a right is not constitutional, but statutory, the proper analysis of a due process claim regarding that right stems from procedural due process. (*See In re PRP of Bush*, 164 Wn.2d at 697; *In re Detention of Harris*, 98 Wn.2d 276, 285, 654 P.2d 109 (1982)).

The procedures of RCW 71.09.090 provide several different paths to a new trial, only one of which involves the limitation imposed by the 2005 changes. First, DSHS must conduct an annual review to determine whether the individual remains mentally ill and dangerous, the statutory obligation that satisfies substantive due process. Then, there is the hearing in RCW 71.09.090(2), which the SVP may pursue at any time and where

the court may consider if there is evidence that an SVP has “so changed” for purposes of ordering a new trial.¹⁷ In this context, RCW 71.09.090(4)(b) directs the trial court to seek evidence of physiological change or change in mental condition caused by treatment.

As the original dissent noted, *McCouston*, 169 Wn.2d at 658-59 (Owens, J. dissenting), the issue presented by this procedural limitation involves a procedural due process to be reviewed under *Mathews v. Eldridge*¹⁸ three prong analysis.¹⁹

As a threshold matter, the 2005 amendments are constitutional because procedural due process does not compel an adversarial adjudicative process for release. In *Parham*, determining that *procedural* due process did not mandate an adversarial hearing, the U.S. Supreme Court weighed the liberty interest of the individual against the legitimate interests of the State, including the fiscal and administrative burdens additional procedures would entail. *Parham*, 442 U.S. at 599-600.

Applying *Mathews* to the 2005 change confirms that the

¹⁷ RCW 71.09.090(2)(a) provides: “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.”

¹⁸ 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976)

¹⁹ *Mathews* requires balancing: 1) the private interest affected by the procedure at issue; 2) the risk of an erroneous deprivation of the private interest through the procedure used, and the probable value, if any, of additional procedural safeguards; and 3) the State's interest, including the fiscal and administrative burdens that the additional procedures would impose. *Mathews*, 424 U.S. at 335; *see also Young*, 122 Wn.2d at 43-44.

procedural limitations imposed satisfy procedural due process. (See State's Supplemental Brief (12/19/08) at 10-18 analyzing *Mathews*.) With regard to the first prong of *Mathews*, the private interest affected is not a new restraint of liberty; it is the interest in receiving a new trial after commitment. While the private interest in a new trial favors providing greater process, in this case the private interest is outweighed by the other two *Mathews* factors.

With regard to the second prong, nothing in the record shows a significant risk of an erroneous deprivation of any private interests. McCuiston already received a full trial at which he was found beyond a reasonable doubt to be an SVP. He received annual reviews showing to a reasonable degree of psychological certainty that he continues to be an SVP. This is in addition to the substantial procedural safeguards during every step.²⁰ Requiring trial courts to order a new trial based on an opinion that is not tied to physiological change or mental change resulting from treatment is not necessary to avoid erroneous denial of retrial, or erroneous holding of an individual who is not an SVP.

²⁰ At all stages of an SVP proceeding, the detainee has the right to counsel, including appointed counsel. RCW 71.09.050(1). An SVP detainee may request a jury of 12 peers. RCW 71.09.050(3). "Most importantly, at trial the State carries the burden of proof beyond a reasonable doubt, and in a jury trial, the verdict as to whether a detainee is a sexually violent predator must be unanimous." RCW 71.09.060(1). *In re Det. of Stout*, 159 Wn.2d 357, 370-71, 150 P.3d 86 (2007).

Focusing on the third prong, the State's interests in adopting the 2005 limits are compelling and outweigh the SVP's interest in obtaining a new trial based on minimal evidence. *McCouston*, 169 Wn.2d.at 659-61 (Owens, J. dissenting). First, the 2005 changes directly encourage participation in the treatment that is critical to long-term change of an SVP. 2005 Laws, ch.344, § 1; (*see also* Amicus Brief of Cunningham in support of State's Motion For Reconsideration at p. 3, describing significant increase in treatment participation since the adoption of the 2005 amendments.) It is reasonable for the Legislature to tie extra-constitutional procedures for obtaining a new trial to treatment or change in physiological condition, because treating SVPs and protecting society from the heightened risk of sexual violence they present are legitimate State objectives. *In re the Detention of Thorell*, 149 Wn.2d 724, 750, 72 P.3d 708 (2003) *citing In re the Detention of Turay*, 139 Wn.2d 379, 410, 986 P.2d 790 (1999).

The 2005 changes also directly relate to the public's overwhelming interest in keeping the costs of SVP litigation reasonable. *See In re Brock*, 126 Wn. App. 957, 964, 110 P.3d 791 (2005) (recognizing substantial governmental interest in burden imposed by annual review procedures); *see also* King County Prosecutor Amicus Brief in support of State's

Motion For Reconsideration at p. 8, (noting high costs of re-commitment trials.)

The State has a substantial interest in maintaining an indefinite commitment. The administrative costs of requiring the State to conduct recommitment trials based solely on the contrary opinion of a retained defense expert who disbelieves the initial commitment would be tremendously high. The ease of obtaining a new trial under the Court's prior opinion in this case, or the pre-2005 statute, imposes substantial costs on the public. Without the limits provided by the 2005 changes, an SVP can obtain a new trial merely by offering an opinion, with no evidence of change since the commitment, a result that contradicts all criminal standards. This concern is illustrated by the declaration of McCuiston's own expert in this case. *See McCuiston*, 169 Wn.2d at 650-55 (Sanders, J. concurring and attaching expert declaration). If that minimal evidence results in a new trial, the State must pay for experts on both sides, who will be giving the same opinions that had previously been resolved beyond a reasonable doubt. Furthermore, the victims and witnesses who testified in the initial commitment trial will be forced to again take the witness stand. Thus, placing reasonable limits on new trials reflects the public's strong interest in not re-litigating commitment issues. *See Jones*, 463 U.S. at 366 (describing the State's interest in avoiding re-

litigation of initial proceeding and keeping the focus on improving the underlying condition.)

E. Conclusion

The due process clause does not require this Court to abandon its prior rulings affirming indefinite commitment. Yet, this Court's initial opinion in this case will inevitably be used to seek expensive and time consuming new trials every year. The statute is narrowly designed to further both the compelling interests of treating dangerous sex offenders and protecting the community from them, and affords the individuals numerous constitutional protections at every stage. McCuiston has failed to prove RCW 71.09.090(4) is unconstitutional beyond a reasonable doubt and the opinion striking down this provision must be withdrawn.

RESPECTFULLY SUBMITTED this 18th day of March, 2011.

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