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No. 66822-6-I

WASHINGTON COURT OF APPEALS
DIVISION I

In re the Detention of
ELMER CAMPBELL

STATE'S RESPONSE BRIEF

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I. INTRODUCTION

In Elmer Campbell's 1995 annual review, the trial court determined that parts of RCW 71.09.090 were unconstitutional and that Campbell was entitled to a post-commitment trial proceeding addressing conditional and unconditional release due to supposed deficiencies in the State's proof. Throughout his brief, Campbell refers to this annual review order as a "final order" that could not be altered by the trial court. *E.g.* Opening Br. at 1. However, the Washington Supreme Court has definitively determined that RCW 71.09.090 annual review orders are "interlocutory" in nature and subject to discretionary review only. *In re Petersen*, 138 Wash.2d 70, 88, 980 P.2d 1204, 1214 (1999). Because Washington trial courts are empowered to correct their own interlocutory orders and subsequent case law made it apparent that the trial court erred in its prior annual review order, the trial court acted correctly in vacating its prior order. The State requests that this court re-designate Campbell's "appeal" to a motion for discretionary review and deny discretionary review, or in the alternative, accept discretionary review and affirm the trial court.

II. ISSUES

A. Is an order entered after a show cause hearing under RCW 71.09.090 interlocutory in nature and subject to review only under RAP

2.3? Yes.

B. Did the trial court err by correcting a error of law in an interlocutory order? No.

III. PROCEDURAL AND LEGAL BACKGROUND

Campbell is currently committed under RCW 71.09 as a sexually violent predator. A jury previously found that Campbell is a sexually violent predator and that he is not appropriate for a less restrictive alternative. The verdict and order of commitment were affirmed in *In re Campbell*, 139 Wn.2d 341 (1999) *cert. denied* 531 U.S. 1125 (2001). A later published opinion affirms a grant of summary judgment due to legal insufficiencies in Campbell's less restrictive alternative (LRA) release plan. *In re Detention of Campbell*, 130 Wash.App. 850, 856, 124 P.3d 670, 673 (2005).

Although Campbell has been at the Special Commitment Center (SCC) since 1993, CP 1, his treatment participation has been spotty and he has failed to complete the program. Campbell suffers from a particularly severe mental abnormality that has caused his rapid reoffense in the past:

Wolfe diagnosed Campbell as having a mental abnormality and a personality disorder that pointed towards the likelihood of Campbell committing future acts of a sexually violent and predatory nature. Wolfe evaluated Campbell as suffering from the condition of "paraphilia." Paraphilia is characterized as having repetitive urges, impulses, and sexually arousing fantasies of rape.

Wolfe testified that paraphilia is not curable through the passage of time alone; cure requires intensive intervention. In fact, Campbell admitted to his own mental health expert that he had formed rape fantasies in his mind subsequent to his last conviction. Campbell's criminal history also demonstrated that, in the past, he committed sexually aggressive acts shortly after he was released from custody.

139 Wn.2d at 356. Given Campbell's pattern of treatment in fits and starts, it is not surprising that he remains in the SCC since his "paraphilia is not curable through the passage of time alone; cure requires intensive intervention." *Id.*

Following Campbell's commitment by unanimous jury verdict in 1994, CP 10-11, the matter returned to the trial court in 1995 for an annual review under RCW 71.09.090. In *Petersen*, the Supreme Court explained the annual review process as it existed in the mid-1990s:

Washington's sexually violent predator law requires an evaluation of the committed person's mental condition at least once every year to determine suitability for release. RCW 71.09.070. Based on such evaluation, and if the secretary of DSHS so authorizes, the committed person may petition in superior court for release. RCW 71.09.090(1). Even if the secretary fails to authorize a petition, the committed person may still petition the superior court for release, as Petersen did in this case. RCW 71.09.090(2) states:

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 *82 person's right to petition the court for conditional release to a less restrictive alternative or unconditional discharge over the secretary's objection. The **1211 notice

shall contain a waiver of rights. The secretary shall forward the notice and waiver form to the court with the annual report. If the person does not affirmatively waive the right to petition, the court shall set a show cause hearing to determine whether facts exist that warrant a hearing on whether the person's condition has so changed that he or she is safe to be conditionally released to a less restrictive alternative or unconditionally discharged. The committed person shall have a right to have an attorney represent him or her at the show cause hearing but the person is not entitled to be present at the show cause hearing. If the court at the show cause hearing determines that probable cause exists to believe that the person's mental abnormality or personality disorder has so changed that the person is not likely to engage in predatory acts of sexual violence if conditionally released to a less restrictive alternative or unconditionally discharged, then the court shall set a hearing on the issue. At the hearing, 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 attorney 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 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. The burden of proof at the hearing shall be upon the state to prove beyond a reasonable doubt that the committed person's mental abnormality or personality disorder remains such that the person is likely to engage in predatory acts of sexual violence if conditionally released to a less restrictive alternative or unconditionally discharged.

[9] Thus, the statutory scheme of chapter 71.09 RCW provides for commitment of a sexually violent predator for an indefinite period, until that person's condition has changed sufficiently that he or she is safe to be either at large or in a less restrictive setting. The statute provides at least annually for reviews of the committed

person's condition,*83 but these annual reviews do not transmute a commitment of indefinite duration into a series of fixed, one-year commitments. Moreover, the show cause hearing called for in RCW 71.09.090(2) does not in itself provide a committed person any relief. It is a summary proceeding designed to determine if an evidentiary hearing on the merits as to the person's condition is warranted. *Young*, 122 Wash.2d at 43-47, 857 P.2d 989.

138 Wash.2d at 81-83 (footnote omitted).

In 1995, annual reviews under RCW 71.09.090 were largely uncharted territory. The State initiated the 1995 annual review by filing a motion and memorandum for a show cause hearing. Supp. CP ___ (Sub no. 194).¹ Attached to the State's pleading was a four page report from the SCC discussing Campbell's progress in treatment, and his continuing difficulties with sexual deviancy. The report notes that it "is our opinion that Mr. Campbell requires sex offender treatment in a secure placement such as that provided by the Special Commitment Center." *Id.*

The court set the matter on for a show cause hearing. Supp. CP ___ (Sub Nos. 196-197). At the hearing, the defense presented various arguments challenging the constitutionality of the annual review statute, RCW 71.09.090, under due process and equal protection. Supp. CP ___ (Sub. No. 217). Although not required by former RCW 71.09.090, Campbell also claimed that the annual review report was insufficient

¹ The State has filed a supplemental designation of Clerk's Papers with this

because it did not provide "proof of current mental illness causing the type of dangerousness required by [RCW 71.09]." *Id.* The court determined to take the matter under advisement. Supp. CP ____ (Sub. No. 217A).

On March 26, 1996, following further briefing on the constitutionality of former RCW 71.09.090, the trial court orally declared portions of the statute unconstitutional and deemed the SCC annual review report insufficient to meet the State's constitutional burden (as interpreted by the trial court). Supp. CP ____ (Sub. No. 226 (attaching transcript of trial court's ruling)). In making this determination, the trial court made several errors in its constitutional analysis that would prove incorrect through later case law. For example, the trial court ruled that Campbell's equal protection analysis was governed "under the heightened scrutiny standard." *But see In re Turay*, 139 Wn.2d 379, 410, 986 P.2d 790 (1999) (applying rational basis test and rejecting heightened scrutiny). The trial court held that the State would bear the burden of proving a continuing basis for the commitment and that Campbell could obtain a post-commitment trial proceeding by "rais[ing] material deficiencies in the State's report which would indicate that the report does not make the affirmative showing that he is still a sexually violent predator" or if

brief.

Campbell presents his own evidence raising a "material issue of fact" on whether Campbell continues to meet criteria for civil commitment. *Id.*

Because it was announcing a new standard for the annual review, the trial court allowed SCC 30 days to file a report in compliance with the court's order. *Id.*

The State filed a revised annual review report from the SCC dated April 26, 1996 by Dr. George Nelson. Supp. CP ____ (Sub. No. 231). Rather than the initial 4 page effort initially submitted by the SCC, the revised report was 9 pages long. It addressed the court's concerns and the facts of Campbell's progress in treatment in detail. *Id.* After a detailed factual review, the report concludes that "Elmer Campbell has been found to meet the criteria of RCW 71.09 as a Sexually Violent Predator and it is our opinion that he continues to meet this criteria." *Id.* the report notes that "[t]hough Mr. Campbell made some encouraging initial steps in treatment, the modest progress he made could not be expected to have a meaningful effect in the face of this overwhelming deviant sex drive." *Id.* "In conclusion, we believe that Mr. Campbell has not demonstrated such progress in treatment to alter the conclusion that he is at high risk to commit predatory sexual assaults against strangers if he were released to the community." *Id.*

At a June 11, 1996 hearing, the trial court made an initial oral ruling granting Campbell a new trial. Campbell immediately waived the trial date until October 7, 1996. Supp. CP ____ (Sub. No. 241). The parties filed substantial reconsideration briefing.

Prior to a final written decision from the trial court, the State also submitted a June 14, 1996 annual review report from the SCC. Supp. CP ____ (Sub. No. 239). As with the April 26 report, the June 14 report found that Campbell continued to meet criteria for civil commitment under RCW 71.09. After detailing the supporting facts, the annual review report concludes that Campbell continues to meet the criteria for civil commitment as a sexually violent predator. *Id.* The report observes that Campbell has been diagnosed "with Paraphilia NOS, Rape, as well as Exhibitionism and Antisocial Personality Disorder," stating that "these are chronic conditions that are resistant to change and are particularly likely to persist in the absence of extensive involvement in treatment." *Id.* The authors of the report state that "[i]t is our opinion that Mr. Campbell continues to suffer from Paraphilias of Rape, Exhibitionism, and from Antisocial Personality Disorder." *Id.*

Following reconsideration of its rulings, on August 6, 1996, the trial court affirmed its decision to grant Campbell a post-commitment trial

proceeding addressing conditional and unconditional release through a written order. Supp. CP ____ (Sub. No. 243). In written memorandum decision, the trial court holds that the April 25, 1996 report authored by Dr. George Nelson did not contain an "explicit current diagnosis of mental illness, abnormality, or personality disorder as defined in the statute." The court's order makes no reference to the June 1996 report.

As noted in Campbell's opening brief, the post-commitment trial addressing conditional and unconditional release has never been held. Initially, Campbell caused the trial to be continued for a number of reasons, including his desire to await the Supreme Court's eventual decision in *Kansas v. Hendricks*, 521 U.S. 346 (1997) (affirming SVP law), various discretionary review actions, and Campbell's violation of an order mandating a mental examination.

As the matter progressed into 2001, Campbell started to focus his efforts on treatment. As Campbell notes in his opening brief, additional stays were granted in order to allow Campbell's participation in the SCC treatment program. Campbell was unable to progress in the SCC treatment program to placement in the DSHS half-way house. Instead, he sought to create his own LRA placement in Oklahoma.

The State sought and obtained summary judgment on the

conditional release issue. The parties agreed to allow review of the summary judgment issue under CR 54(b) and RAP 2.2(d). Supp. CP ____ (Sub. No. 446). The matter was also certified for discretionary review by agreement of the parties. *Id.* The unconditional release trial remained stayed in the trial court while the conditional release/LRA issue was considered on appeal. This court affirmed the trial court's grant of summary judgment in *In re Detention of Campbell*, 130 Wash.App. 850, 856, 124 P.3d 670, 673 (2005).

Following conclusion of the conditional release appeal, the unconditional release matter was again set for trial. Campbell then moved to continue the trial date after evidence was discovered that he possessed child pornography at the SCC. Supp. CP ____ (Sub. No. 466). After the difficulty of doing civil discovery during a pending criminal case became apparent, the matter was stayed. Supp. CP ____ (Sub. No. 529).

As Campbell notes, a criminal trial has yet to be initiated. Although the State statute of limitations has run, Campbell remains in potential jeopardy for criminal charges because there is no federal statute of limitations.

With this uncertain status quo, Campbell sought to set a trial date. CP 171. The State opposed this motion, arguing that the trial court's

original annual review order was entered in error. Supp. CP ____ (Sub. No. 560). The State argued that the court's prior order granting Campbell a post-commitment trial misapprehended the burden faced by the State. Subsequent case law, including *In Re Detention of Jacobson*, 120 Wn. App 770, 780-81, 86 P.3d 1202 (2004), demonstrated that the court's prior ruling was in error. *Id.* The State further argued that the trial court had missed or failed to account for the June 14, 1996 SCC report, which came out well prior to the court's August 1996 written ruling. *Id.* The State also pointed out that Campbell had delayed the matter for some 15 years. *Id.*

The trial court agreed with the State and refused to set a new trial date, thereby effectively vacating its prior orders allowing an unconditional release trial. The court noted that since the trial court's prior orders allowing Campbell an unconditional release trial under RCW 71.09.090, "both the statutory and court-made law concerning the sexually violent predator statute . . . have changed." CP 452. Under Washington Supreme Court precedent, "due process requires only that the State annually present only a prima facie case that a [SVP] respondent continues to meet the criteria for commitment." *Id.* The court noted that under *Jacobson*, it was "not permitted to weigh the evidence." The court later denied reconsideration. CP 460.

Campbell filed a "notice of appeal." CP 461. The State later sought to redesignate the notice of appeal to a notice of discretionary review. The merits of that position will be addressed in this brief.

IV. LEGAL ARGUMENT

A. THE TRIAL COURT'S ANNUAL REVIEW ORDER GRANTING CAMPBELL A POST-COMMITMENT TRIAL WAS INTERLOCUTORY AND SUBJECT ONLY TO DISCRETIONARY REVIEW

Campbell's claim that he has a right to appeal an annual review order granting him a post-commitment trial is directly contrary to *In re Petersen*, 138 Wn.2d 70, 980 P.2d 1204 (1999). It is well established in Washington that orders arising from an RCW 71.09.090 annual review proceeding are interlocutory in nature and subject only to discretionary review.

1. Annual Review Orders are Interlocutory

In *Alwood v. Aukeen Dist. Court*, 94 Wn.App. 396, 400, 973 P.2d 12 (1999), this court contrasted the difference between an interlocutory order and a final judgment.

Provisional; interim; temporary; not final. Something intervening between the commencement and the end of a suit which decides some point or matter, but is not a final decision of the whole controversy. An interlocutory order or decree is one which does not finally determine a cause of action but only decides some intervening matter pertaining to the cause, and which requires further steps to be taken in order to enable the court to

adjudicate the cause on the merits.

400 (*quoting* Black's Law Dictionary 815 (6th ed.1990)). In essence, an interlocutory order is any order that is entered prior to a final judgment.

Id.

Campbell's current position that the annual review order granting him a new trial "was a final order that cannot be vacated or superseded" by the trial court finds no support in the case law. By definition, annual review orders are interlocutory.

In *In re Mitchell*, 160 Wn. App. 669, 249 P.3d 662 (2011), a sexually violent predator tried to use CR 60 to vacate a prior annual review order. The appellate court affirmed the trial court's denial of the motion to vacate.

The *Mitchell* opinion explains that under Petersen, an annual review order is "interlocutory, not a" final judgment:"

In *In re Det. of Petersen*, 138 Wash.2d 70, 83–84, 980 P.2d 1204 (1999), our Supreme Court addressed whether SVPs are entitled to appeal as a matter of right under RAP 2.2(a) from a trial court's post commitment order following an annual review hearing. Petersen argued that he was entitled to such an appeal because a post commitment order **665 following an annual review hearing is a "final judgment" under RAP 2.2(a)(1) or a "final order" under RAP 2.2(a)(13).FN7 *Petersen*, 138 Wash.2d at 84, 980 P.2d 1204. But the court reasoned that " '[a] final judgment is a judgment that ends the litigation, leaving nothing for the court to do but execute the judgment.' " *Petersen*, 138 Wash.2d at 88, 980 P.2d 1204 (*quoting Anderson & Middleton Lumber Co. v. Quinault Indian*

Nation, 79 Wash.App. 221, 225, 901 P.2d 1060 (1995), affirmed, 130 Wash.2d 862, 929 P.2d 379 (1996)). The court observed that former RCW 71.09.090(3) (1995) provided a trial court with continuing jurisdiction over an SVP until the SVP's unconditional release and that a post commitment order on an annual review hearing under former RCW 71.09.090(2) "dispose[d] only of the petition before the trial court and achieve[d] no final disposition of the [SVP]." Petersen, 138 Wash.2d at 88, 980 P.2d 1204. Thus, our Supreme Court held that a post commitment order on an annual review hearing is "still an interlocutory order," not a "final judgment" or "final order" under RAP 2.2(a)(1) *677 or RAP 2.2(a)(13). Petersen, 138 Wash.2d at 87-88, 980 P.2d 1204. It also held that the appropriate method for seeking review is a request for discretionary appellate review under RAP 2.3(b) and, furthermore, that the discretionary review procedure satisfies due process. Petersen, 138 Wash.2d at 88-90, 980 P.2d 1204.

In re Detention of Mitchell, 160 Wash.App. 669, 676-677, 249 P.3d 662, 664 - 665 (2011) (footnotes omitted). Because an annual review order is considered "interlocutory" in nature, the provisions of CR 60(b) are not available to challenge the prior annual review order, because the "plain language of CR 60(b) applies only to final judgments, orders, and proceedings." 160 Wn.App. at 677.

2. Annual Review Order Are Subject to Discretionary Review Only

Because annual review orders are interlocutory in nature, they are subject only to discretionary review. As the Supreme Court held in

Petersen:

In light of the nature of the show cause hearing required by RCW 71.09.090(2), we hold an appellate court reviews the annual

decision regarding change in a committed sexually violent predator's condition under the provisions of RAP 2.3(b).

138 Wash.2d at 95.

The Washington Supreme Court confirmed this holding in *In re Turay*, 139 Wn.2d 379, 986 P.2d 790 (1999), where Turay sought to "appeal" a post commitment order by the trial court. The court held that the order was not subject to an appeal as of right because a post-commitment order (short of a dismissal order) does not constitute a "final judgment."

The only subsection of RAP 2.2(a) arguably applicable to the post commitment order at issue is RAP 2.2(a)(1), which provides that a party may appeal from a "final judgment entered in any action or proceeding." (Emphasis added.) However, a "final judgment" is one that settles all the issues in a case. *See Rhodes v. D & D Enters., Inc.*, 16 Wash.App. 175, 178, 554 P.2d 390 (1976); *see also* CR 54(a)(1) (providing that a "judgment is the final determination of the rights of the parties in the action"). Pursuant to RCW 71.09.090(3), the superior court has continuing jurisdiction over a civilly committed individual until he or she is unconditionally discharged. In our judgment, the post commitment order was not a "final judgment" because it did not constitute a final determination of Turay's rights, nor did it settle all of the issues in the case. *Cf. In re Detention of Petersen*, 138 Wash.2d 70, 88, 980 P.2d 1204 (1999)*393 ("A decision under RCW 71.09.090(2) finding no probable cause is not a final order after judgment in light of the court's continuing jurisdiction over the committed persons until their unconditional release."). Because the May 9, 1996 order was not a "final judgment," we grant the State's motion to designate the portion of Turay's appeal seeking review of that order as a "notice for discretionary review."

In re Detention of Turay, 139 Wash.2d 379, 392-393, 986 P.2d 790,

797 (1999).

Respondent presents no argument to overcome the controlling authorities of *Petersen* and *Turay*. The provisions of RAP 2.2(a) that are cited by Campbell were rejected in *Petersen* and *Turay*. Importantly, the *Petersen* case holds that a trial court's probable cause determination under RCW 71.09.090 is not a "final judgment" for purposes of RAP 2.2(a). 138 Wn.2d at 88. The *Petersen* decision also rejects application of RAP 2.2(a)(13). *Id.* Campbell is not appealing an "order granting a new trial." The trial court did not order a new initial commitment trial under RCW 71.09, but post commitment trial proceeding to determine if respondent continued to meet criteria for commitment. The *Petersen* and *Turay* cases are contrary to Campbell's broad reading of the RAPs.

The *Jacobson* decision is also instructive. In *Jacobson*, this court reversed a trial court order granting Mr. Jacobson a post-commitment unconditional release trial. In accord with *Petersen* and *Turay*, the case proceeded by way of discretionary review. 120 Wn.App. at 772-773. Because the case law is well-settled that annual review orders are interlocutory, Campbell's request for review should be treated as a request for discretionary review under RAP 2.3.

B. THE TRIAL COURT CORRECTLY CORRECTED A PRIOR ERRONEOUS INTERLOCUTORY ORDER

Because the trial court's orders granting a new post-commitment proceeding remained interlocutory in nature, the trial court possessed full power to correct its orders at anytime prior to a final judgment or appeal. In *Alwood v. Aukeen Dist. Court*, 94 Wn.App. 396, 973 P.2d 12 (1999), a criminal defendant challenged a District Court decision vacating a deferred prosecution for DUI, reckless driving and hit and run. The Commissioner who initially granted the defendant's motion determined to vacate the deferred prosecution because he had lacked initial authority to grant it. The State argued that the trial court had authority to vacate the order of deferred prosecution, in part, because it was not a final judgment. 94 Wn.App. at 399.

In affirming the district court, the appellate court held that "the dispositive question is whether a grant of deferred prosecution is a final judgment or order rather than an interlocutory order." 94 Wash.App. at 399. Here, it is clear under *Petersen* and *Turay* that an annual review order is interlocutory, and thus subject to revision.

Prior to a final judgment, it has long been the law in Washington that a lower court retains the authority to revisit and correct any

interlocutory decision.² As noted in *Alwood*:

In the early case of *Balfour-Guthrie Inv. Co. v. Geiger*, [20 Wash. 579, 56 P. 370 (1899)], our Supreme Court recognized the distinction between an interlocutory order and a final order or judgment for purposes of finality. There, the trial court had initially appointed a receiver to take possession of property during a foreclosure proceeding. The court later vacated its order. On appeal, the Supreme Court concluded that the trial judge was free to correct its “improvident” appointment of the receiver at any time before entry of the final decree of foreclosure. According to the court, “The order [appointing the receiver] was interlocutory, and, until the case terminated in a final judgment, the court retained jurisdiction, which carried with it the right to vacate any previous order improvidently made.” [20 Wash. at 580].

The principle of this case has been unmodified by subsequent case authority.

Id. at 399-400 (emphasis added; footnotes omitted). “A trial court in this state has the power, prior to entry of final judgment, to correct errors in interlocutory orders and proceedings, including erroneous findings of fact and conclusions of law.” *In re Hooper's Estate*, 53 Wash.2d 262, 269, 332 P.2d 1077, 1081 (1958).

The reason for this rule is that “because interlocutory orders are not automatically appealable, permitting a trial court to correct any mistakes

² Moreover, the *Alwood* court rejected a due process challenge to reinstatement of the DUI and reckless driving case. The court found that there was no due process violation because the hearing was on the record and no admissions generated by the fact of the prior deferred prosecution were available for use in subsequent criminal proceedings. *Alwood*, 94 Wn.App. at 402.

prior to entry of final judgment serves the interests of judicial economy." *Id.* at 400-401. See also *Washburn v. Beatt Equip. Co.*, 120 Wash.2d 246, 300-01, 840 P.2d 860 (1992) (partial grant of summary judgment that was not properly certified is not a final order; thus, the trial court had authority to modify it at any time prior to final judgment); *Herrmann v. Cissna*, 82 Wash.2d 1, 3, 507 P.2d 144 (1973) (denial of a motion to dismiss or for summary judgment is not a final order); *In re Estate of Hooper*, 53 Wash.2d 262, 269, 332 P.2d 1077 (1958) (prior to entry of final judgment, trial court had authority to vacate erroneous findings of fact and conclusions of law, which were interlocutory in character).

Here, the trial court correctly noted that its earlier decisions allowing Campbell a post commitment trial proceeding conflicted with later case law. The April 1996 report clearly stated, based on substantial facts, that Campbell "continues to meet" the criteria for being a sexually violent predator. Supp. CP ____ (Sub. No. 231). This means that Campbell suffered from a mental abnormality or personality disorder that made him more likely than not to reoffend. RCW 71.09.020. Likewise, the June 1996 SCC report, which was apparently overlooked by the trial court, indicated that Campbell continued to meet criteria and suffered from

the same chronic paraphilia diagnoses. Supp. CP. ____ (Sub. No. 241).

Given subsequent case law, the trial court's earlier decisions granting a post-commitment trial based on "deficiencies" in either SCC report was error. As this court has explained, the State need only make a "prima facie showing:"

In *In re Detention of Petersen*, [145 Wn.2d 789, 796, 42 P.3d 952 (2002)] the Washington Supreme Court held that the State has the burden of proof at a show cause hearing.^{FN12} The standard of proof is probable cause, which the State satisfies by making a prima facie showing.^{FN13} The State makes the required showing by coming forth with evidence that, if believed, shows the committed person still meets the criteria for commitment. Conversely, there is probable cause to proceed to a full *965 evidentiary hearing if the State's proof is deficient, or if the committed person's proof is sufficient to meet the standard set out in RCW 71.09.090(2)(c).

In re Detention of Brock, 126 Wash.App. 957, 964-965, 110 P.3d 791, 795 (2005). A trial court's role at an annual review "is to simply determine whether the factual assertions are sufficient and whether, when taken as true, the evidence establishes probable cause." *In re Jacobson*, 120 Wash.App. 770, 780-781, 86 P.3d 1202, 1207 - 1208 (2004). A trial court is not permitted to weight the evidence or comment on the credibility of the expert opinion. *Id.*

The 1996 orders from the trial court exceeded the authority granted it by RCW 71.09.090. Rather than accept the opinion provided in the April or June 1996 SCC reports, the court weighted the credibility of those

reports. Rather than impose a prima facie burden on the State, the trial court imposed a much higher standard of proof. Although the trial court's actions were possibly sustainable in 1996, subsequent case law has made it clear that the trial court's decision was incorrect. As such, the trial court in 2011 committed no error by correcting its prior and erroneous interlocutory orders.

Even if the 2011 trial court committed error, any error is harmless. Under current RCW 71.09.090(3), the trial court could not hold a post commitment unconditional release proceeding because no evidence supported Campbell's position that he was not longer a sexually violent predator:

A new trial proceeding under subsection (3) of this section may be ordered, *or a trial proceeding may be 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.

(Emphasis added).

Under this statute, Campbell's unconditional release trial court not proceed because no expert opinion supported Campbell's position. Absent compliance with RCW 71.09.090, any resulting trial decision would be void. *See In re Skinner*, 122 Wash.App. 620, 628, 94 P.3d 981 (2004) *review denied* ___ Wn.2d ___ (2004) (“A trial court's authority is limited to that found in the statute [RCW 71.09.090], and the court's failure to follow the statute renders the court's action void.”).³

V. CONCLUSION

For the foregoing reasons, the State requests that this court re-designate Campbell's "appeal" to a motion for discretionary review and

³ Any error is also harmless because Campbell has a continuing ability to seek a post-commitment release trial based on expert opinion. Campbell has a motion for a post-commitment trial currently pending before the trial court, supported by the opinion of a forensic psychologist. Supp. CP ___ (Sub. Nos. 525 and 529).

deny discretionary review, or in the alternative, accept discretionary review and affirm the trial court.

Dated this 7th day of October, 2011.

Respectfully submitted,
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By 

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