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STATE OF WASHINGTON

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NO. 34145-0-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

HARRY VERN FOX,

Appellant,

v.

STATE OF WASHINGTON,

Respondent.

RESPONDENT'S BRIEF

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I. ISSUES PRESENTED

1. Whether the trial court correctly applied amended RCW 71.09.090 to Mr. Fox's request for a new commitment trial, where the statute mandated that new commitment trials not be held unless the clarified requirements were met.
2. Whether application of amended RCW 71.09.090 violated Mr. Fox's due process rights.
3. Whether application of amended RCW 71.09.090 violated Mr. Fox's right to equal protection.
4. Whether amended RCW 71.09.090 violates the separation of powers doctrine?

II. STATEMENT OF THE CASE

On July 26, 2002, Mr. Fox stipulated to civil commitment as a sexually violent predator (SVP), pursuant to RCW 71.09. CP at 21-64. Mr. Fox stipulated, and the trial court found, that Mr. Fox suffered from mental abnormalities and a personality disorder:

Specifically, he suffers from Pedophilia and Paraphilia, Not Otherwise Specified. The Respondent also currently suffers from a Personality Disorder, Not Otherwise Specified with mixed features, as that term is defined in the DSM-IV-TR. Due to the Respondent's mental abnormality and personality disorder, the Respondent has serious difficulty controlling his sexual behavior.

CP at 24. Mr. Fox further stipulated, and the trial court found, that his mental abnormalities and personality disorder make him likely to commit predatory acts of sexual violence if he is not confined. CP at 24. The court's findings were supported by Dr. Irwin Dreiblatt's SVP evaluation of Mr. Fox. CP at 30-54.

On October 21, 2004, the State submitted Mr. Fox's Annual Review to the court and set a show cause hearing. CP at ____ (Memorandum in Support of Petitioner's Motion for Order to Show Cause, October 21, 2004). The Annual Review, completed by Dr. Jason Dunham, a licensed clinical psychologist at the Special Commitment Center, established that Mr. Fox continued to suffer from Pedophilia and from a Personality Disorder NOS (with antisocial and histrionic features). Dr. Dunham reported that the diagnosis of Paraphilia NOS (Nonconsent) would need to be ruled out, in his opinion. CP at ____ (Memorandum in Support of Petitioner's Motion for Order to Show Cause at 16-19). Dr. Dunham assessed Mr. Fox's risk to sexually recidivate as high. CP at ____ (Memorandum in Support of Petitioner's Motion for Order to Show Cause at 19-21).

In February, 2005, Mr. Fox submitted a response to the State's annual review. CP at 74-108. His response relied upon the attached Declaration of Dr. Richard Wollert. *Id.* at 84-95. Dr. Wollert opined that

Mr. Fox's sexual recidivism risk was about 11 percent, based upon Dr. Wollert's application of "Bayes Theorem" to Mr. Fox's actuarially-derived risk estimate. *Id.* at 92-3. Dr. Wollert further opined that Mr. Fox's mental abnormalities of Pedophilia and Paraphilia Not Otherwise Specified (NOS) "have never been found to 'cause' any sort of predisposition to sexually violent offending." *Id.* at 94.

The trial court granted Mr. Fox's request for a new trial on March 4, 2005. CP at 176-77. SB 5582, which amended RCW 71.09.090, took effect approximately two months later, on May 9, 2005. Based on that new statute, the State moved for summary judgment, because: (1) Dr. Wollert's declaration failed to meet the criteria for a new commitment trial in RCW 71.09.090, as amended by SB 5582; and (2) amended RCW 71.09.090 specifically stated that no new commitment trials could be "held" if the respondent's proof did not meet the amended criteria. CP at 189-90. The trial court granted the State's motion.

III. ARGUMENT

A. Introduction

In 2005, through SB 5582, the Legislature amended the statute providing for annual review of persons committed as SVPs, RCW 71.09.090, in order to correct the statutory interpretations set forth in *In re Young*, 120 Wn. App. 753, 86 P.3d 810, *review denied*, 152 Wn.2d

1035, 103 P.3d 201 (2004) and *In re Detention of Ward*, 125 Wn. App. 381, 104 P.3d 747 (2005). See Legislative Findings, Laws of 2005, ch. 344, § 1 (“The Legislature finds that the decisions in [*Young* and *Ward*] illustrate an unintended consequence of language in chapter 71.09, RCW”). The “unintended consequence” was a proliferation of new commitment trials based solely upon a defense expert’s disagreement with the annual review report or the commitment determination of the original finder of fact. *Young* and *Ward* were, therefore; contrary to the legislative intent that RCW 71.09 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.

Id. As a result, “a new trial ordered under the circumstances set forth in *Young* and *Ward* subverts the statutory focus on treatment and reduces community safety. . . .” *Id.*

Mr. Fox’s request for a new commitment trial fails under the 2005 amendments that were adopted in SB 5582. Dr. Wollert failed to conduct an evaluation of Mr. Fox, and did not provide the court with any diagnosis or clinical observations of him. The trial court, which had ordered a new commitment trial shortly before SB 5582 took effect, properly struck the trial.

Since entry of the order at issue herein, Mr. Fox has not contested the two subsequent annual review orders. He has essentially abandoned the issues herein and rendered this appeal moot, because he does not currently contest his status as an SVP in the trial court below. CP at ___ (Order on Show Cause Hearing, September 30, 2005 Annual Review, dated July 21, 2006, attached as Appendix 1); CP at ___ (Order on Show Cause Hearing, June 15, 2006 Annual Review, dated July 21, 2006, attached as Appendix 2).

B. The Trial Court Correctly Applied Amended RCW 71.09.090 To Mr. Fox's Request For A New Commitment Trial

Mr. Fox argues that the trial court erred by applying amended RCW 71.09.090 retroactively. The trial court's order, however, applied the statutory amendments that address "holding" a trial prospectively, to a trial that had not yet been held.

Assuming, for the sake of argument, that the trial court retroactively applied amended RCW 71.09.090, the court did not err because the legislature indicated its intent for that retroactive application, and Mr. Fox had no vested or unalterable right to a new commitment trial.

1. Purpose and Procedure of the RCW 71.09.090 Show Cause Hearing

The purpose of the annual review show cause hearing is to determine:

whether probable cause exists to warrant a hearing on whether: (i) The person's condition has so changed that he

or she no longer meets the definition of a sexually violent predator; or (ii) conditional release to a less restrictive alternative would be in the best interest of the person and conditions can be imposed that would adequately protect the community.

RCW 71.09.090(2)(a). An annual review show cause hearing does not automatically come before the court. It is required only if a respondent requests it, petitions for a hearing, or otherwise refuses to affirmatively waive his right to a show cause hearing. RCW 71.09.090(2)(a).

The purpose of the show cause hearing is not to “re-commit” the Respondent, but to ensure that there is a continuing basis for the commitment. RCW 71.09.090(2)(a). Commitments are indefinite, persisting “until such time as the person’s mental abnormality or personality disorder has so changed that the person is safe either (a) to be at large, or (b) to be released to a less restrictive alternative as set forth in RCW 71.09.092.” *In re Petersen*, 138 Wn.2d 70, 78, 980 P.2d 1204 (1999) (*Petersen I*). As a result, the scope of the hearing is limited:

The show cause hearing is in the nature of a summary proceeding wherein the trial court makes a threshold determination of whether there is evidence amounting to probable cause to hold a full hearing. The show cause hearing is an expression of the Legislature’s wish that judicial resources not be burdened annually with full evidentiary hearings for sexually violent predators absent at least some showing of probable cause to believe such a hearing is necessary.

Id. at 86. Like a summary judgment proceeding, it is limited to the submission of affidavits or declarations. RCW 71.09.090(2)(b).

At the show cause hearing, the trial court determines whether a new trial addressing either the commitment or LRA question must be ordered. RCW 71.09.090(2)(c). There are two statutory avenues for a court to find probable cause for an evidentiary hearing under RCW 71.09.090(2): (1) by deficiency in the State's proof, or (2) by sufficiency of proof by respondent. *Detention of Petersen v. State*, 145 Wn.2d 789, 798-799, 42 P.3d 952 (2002) (*Petersen II*).

The State must present prima facie evidence that respondent continues to meet the criteria for civil commitment, and that there is no feasible less restrictive alternative (LRA). RCW 71.09.090(2)(c)(i). "If the State cannot or does not prove this prima facie case, there is probable cause to believe continued confinement is not warranted and the matter must be set for a full evidentiary hearing." *Petersen II*, 145 Wn.2d at 798-99.

Once the State satisfies its prima facie burden, a new trial may be ordered only if respondent's proof establishes probable cause:

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 less restrictive alternative would be in the best interests of the person and conditions can be imposed that would adequately protect the community.

RCW 71.09.090(2)(c)(ii) (emphasis added), If the respondent makes that showing, a new trial addressing either the commitment or LRA issues must be ordered. RCW 71.09.090(2)(c), (3). There is no dispute that the State made the prima facie showing necessary to preserve Mr. Fox's indefinite commitment. This case concerns evaluation of Mr. Fox's minimal evidence that he had aged, a showing that is insufficient under the amendments to RCW 71.09.090(2)(c).

2. SB 5582 Clarified When It Is Appropriate to Order a New Trial due to Respondent's Proof

SB 5582 preserves the State's constitutional requirement to present prima facie proof of a continuing basis for the commitment. However, it clarifies the level of proof necessary to obtain a new trial revisiting respondent's *indefinite* civil commitment.¹

In a clear statement of its intent, the Legislature rejected the approach endorsed by the *Young* and *Ward* cases:

The legislature finds that the decisions in [*Young AR* and *Ward*] illustrate an unintended consequence of language in chapter 71.09, RCW.

[RCW 71.09.090 addresses] 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,

¹ Although Mr. Fox did not move for habeas relief, that avenue remains open to him for challenging his commitment.

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 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.

Laws of 2005, ch. 344, § 1. Plainly, the Legislature intended to re-focus the annual review process around the "irrefutable" compelling state

interests “both in treating sex predators and protecting society from their actions.” *In re Young*, 122 Wn.2d 1, 26, 857 P.2d 989 (1993).

In order to maintain focus on those interests, SB 5582 clarified the specific probable cause showing that is necessary to revisit an indefinite commitment over a showing by the state of a continuing basis for the commitment:

(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.

RCW 71.09.090(4) (emphasis added). In this way, the Legislature restored the focus on a *change* in the person's *mental condition* and the centrality of sex offender treatment before a new commitment trial is warranted. Moreover, these purposes for the amendments are entirely consistent with the plain language that applies it to Mr. Fox's request for such a trial.

3. The Trial Court Properly Applied Amended RCW 71.09.090 Prospectively, Where Mr. Fox Was Unable To Show Any Relevant Change In His Condition

As the State argued below, "the statute by its plain language demonstrates that it applies prospectively to trials that have been ordered, but not yet held." CP at ____ (Petitioner's Reply on Motion for Summary Judgement, October 31, 2005, at 1-2). RCW 71.09.090(4)(b) provides, in pertinent part:

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[.]

(Emphasis added). This language is clear and unambiguous and does not need to be interpreted or construed. *State ex. rel. Anderson v. Chapman*, 86 Wn.2d 189, 191, 543 P.2d 229 (1975). Amended RCW 71.09.090 clearly prohibits a court from holding new commitment trials that have been previously ordered but for which there is no adequate basis.

In this case there was no basis for holding a new commitment trial for Mr. Fox. Mr. Fox represented that, if appointed, Dr. Wollert would conduct a “forensic psychosexual evaluation.” CP at 71. Dr. Wollert traveled to the Special Commitment Center and interviewed Mr. Fox. CP at 90. He then submitted a declaration that did not include any diagnoses or specific information regarding the history or treatment of Mr. Fox, except to quote Mr. Fox’s assertion that he was “committed to no more offenses against children.” CP at 93. Dr. Wollert either did not perform a forensic psychosexual evaluation of Mr. Fox, or failed to report any results from his evaluation. Instead, he presented his novel theories on adjusting risk estimates to account for age, and disagreed with the commitment order on the consequences of Mr. Fox’s mental abnormalities. Dr. Wollert’s evidence was not adequate to meet the statutory requirements.

This Court recently decided a case that presented facts remarkably similar to the instant case. *In re Detention of Elmore*, No. 31769-9-II, slip. op. (Wn. App. Aug. 8, 2006). In *Elmore*, this Court applied amended RCW 71.09.090 to reverse a trial court’s pre-SB 5582 decision to grant an SVP a new trial:

In May 2005, after the trial court ruled in this case, the legislature amended RCW 71.09.090. Laws 2005, c 344, § 1. Laws 2005 c 344 § 4. In its notes, the legislature said it intended to “clarify the ‘so changed’ standard.” Laws 2005 c 344 § 1. We therefore read these recent statutory amendments as a clarification of the legislature’s intent and not as a substantive change in the law. We use the statute’s

current version to resolve this case because it expresses the legislature's intent more clearly and completely. *See State v. Cooper*, 156 Wash.2d 475, 479, 128 P.3d 1234 (2006) (statutory interpretation requires courts to give effect to the legislature's intent and purpose in passing a law).

Elmore, slip. op. at 8.

Mr. Elmore had been granted a new trial based upon a declaration by the same Dr. Richard Wollert. *Elmore*, slip. op. at 4-6. Just as in the instant case, Dr. Wollert reduced Mr. Elmore's actuarially-derived risk estimates, based upon age and Dr. Wollert's novel theories.² *Id.* at 5-6. And, as in this case, Dr. Wollert disputed the significance of Mr. Elmore's commitment diagnoses. *Id.* at 4.

This Court concluded that, under amended RCW 71.09.090, Dr. Wollert's declaration failed to establish probable cause that Mr. Elmore's condition had changed sufficiently to justify a new commitment trial. *Elmore*, slip. op. at 12-15. This Court applied the amended statute notwithstanding the fact that SB 5582 became effective after the trial court had ordered a new trial, and after the State had submitted its briefing on appeal. *Elmore*, slip. op. at 12. The *Elmore* rationale applies in this case, as well.

² In *Elmore*, Dr. Wollert arbitrarily reduced the risk assessment by 4 percent per year. *Elmore*, slip. op. at 5. In this case he adopts yet a new approach, applying "Bayes Theorem" to lower Mr. Fox's risk level. CP at 92-3. He testified in his deposition that he doesn't know of anyone else who uses this method. CP at ____ (Petitioner's Reply on Motion for Summary Judgement, October 31, 2005, Exhibit 1, at 29).

4. **To The Extent The Application Of The Statute Is Characterized As Retroactive, It Is Permissibly Retroactive**

Even if the trial court's decision constituted retroactive application of the legislative amendments, it is permissible under the circumstances of this case:

With regard to the retroactive application . . . a new, retroactive law must be applied by appellate courts when reviewing judgments on appeal, even if the new law alters the outcome Although the legislature may not retroactively overrule a decision of the State's highest court, the legislature may clarify a law in response to an administrative adjudication or trial court decision Thus, if the legislature clearly intended chapter 210 to be retroactive, then the legislation may impact pending cases.

Port of Seattle v. Pollution Control Hearings Bd., 151 Wn.2d 568, 627, 90 P.3d 659 (2004) (citations omitted). The Legislature, by including the words "or held," clearly intended the amendments to apply to trials that have already been ordered and are pending. If this is retroactive application, it is clearly permissible. Just as in *Port of Seattle*, the legislature here has clarified the means for obtaining a new trial in response to a court decision, and the legislation by its own terms applies to cases that have been previously ordered.

Mr. Fox, however, argues that he had a vested right to a trial. Amendments can be applied retroactively so long as they do not affect vested rights. *In re F.D. Processing, Inc.*, 119 Wn.2d 452, 462, 832 P.2d 1303 (1992). A vested right is legal or equitable title (1) to the present or future enforcement of a demand or (2) to the present or future exemption

from a demand made by another. Black's Law Dictionary 809 (Abridged 5th ed. 1983); *Godfrey v. State*, 84 Wn.2d 959, 963, 530 P.2d 243 (1975) (holding that a defendant has no vested right to a tort defense). A vested right is more than a party's expectation that current law will continue unaltered. *Id.*, at 963. No one has a vested right in "existing law" such that the Legislature cannot amend or repeal that law. *Id.*

Mr. Fox does not have a vested right to a new commitment trial. *See also In re Commitment of Frankovitch*, 211 Ariz. 370, 121 P.3d 1240 (2005), *review denied* (discussing difference between vested and contingent rights in context of new SVP commitment trials). In effect, Mr. Fox argues that he has a right to hold the State to a mistaken interpretation of a rule of evidence. However, there is no vested right in a rule of evidence, mistaken or otherwise. *Superior Asphalt & Concrete Co. v. Department of Labor and Indus.*, 19 Wn. App. 800, 805, 578 P.2d 59 (1978) (holding that an amendment regarding the admissibility of evidence does not involve any vested rights . . . but is merely a rule of evidence).

Courts have also concluded that vested rights did not exist, in cases involving not just clarifications, but actual changes in existing law. *See e.g., Haddenham v. State*, 87 Wn.2d 145, 149, 550 P.2d 9 (1976) (holding that an amendment totally eliminating a tort cause of action did not affect a vested right); *State ex rel. Sowle v. Britnich*, 7 Wis. 2d 353, 96 N.W.2d 337, 342, (1959) (holding that a change in the standard of proof in a paternity action did not impair a vested right).

In summary, the trial court's order was a prospective application of amended RCW 71.09.090. The trial court properly struck a trial that would have violated the legislature's intent that new trials be based upon a showing of a demonstrable change in the condition of the SVP, in response to treatment or by incapacitation. However, even if the trial court arguably applied the amended statute retroactively, that fulfills the intent of the Legislature and Mr. Fox has no right to preventing the court from vacating its order for a new commitment trial.

C. Applying Amended RCW 71.09.090 Did Not Violate Mr. Fox's Due Process Rights.

Civil commitments under RCW 71.09 are indefinite in nature. A person is civilly committed as an SVP "for control, care, and treatment until such time as . . . [t]he *person's condition has so changed* that the person no longer meets the definition of a sexually violent predator."

RCW 71.09.060(1) (emphasis added). Such commitments

are not subject to any rigid time limit. Rather, *the commitment is tailored to the nature and duration of the mental illness.*

Young, 122 Wn.2d at 39 (emphasis added).

1. Due Process Is Satisfied By The Annual Review Processes

In *Petersen I*, the court held that:

[o]ur sexually violent predator statute *unequivocally contemplates an indefinite term of commitment*, not a series of fixed one-year terms with continued commitment having

to be justified beyond a reasonable doubt *annually* at evidentiary hearings where the State bears the burden of proof.

Petersen I, 138 Wn.2d at 81 (emphasis added). Indeed, “[t]he term of commitment under Washington’s statute is potentially indefinite because it depends on the cure or elimination of the person’s sexually violent predilections.” *Id.* at 81 n.7. Because the treatment needs of the SVP population are long-term and the mental conditions are chronic, “the statute contemplates a prolonged period of treatment.” *Id.* at 78.

Continuation of Mr. Fox’s indefinite commitment is; therefore, consistent with due process if the State comes forward periodically with prima facie evidence of a continuing basis for the commitment. *Petersen II*, 145 Wn.2d at 798-799. Because the statute imposes this requirement through RCW 71.09.070 and .090, it satisfies the constitutional requirements described in case law and nothing more is required to maintain the indefinite commitment previously determined by the court, upon Mr. Fox’s stipulation. Here, the State met its prima facie constitutional burden with Dr. Dunham’s report.

That the constitution requires only minimal periodic review in order to maintain an indefinite civil commitment is established also in cases from the United States Supreme Court and other jurisdictions. *See Foucha v. Louisiana*, 504 U.S. 71, 112 S. Ct. 1780 (1992). In

Williams v. Wallis, 734 F.2d 1434 (11th Cir. 1984), the court held that the dangerousness of insanity committees justified a difference in release provisions from standard mentally ill patients:

Binding precedent in this circuit holds . . . that differences in release procedures based on dangerousness are constitutionally permissible. *See Powell v. Florida*, 579 F.2d 324, 333 & n.15 (5th Cir. 1978) (dangerousness of insanity acquittee “justifies treating such a person differently from ones otherwise civilly committed for purposes of deciding whether the patient should be released.”). Thus, Alabama’s release procedures do not violate equal protection.

Williams, 734 F.2d at 1437. Likewise, the dangerousness of SVPs justifies indefinite commitment with annual review procedures, rather than the semi-annual recommitment trials found in RCW 71.05. *Petersen I*, 138 Wn.2d at 78-81 (statute provides for indefinite commitment with periodic reviews, not periodic determinate commitments).

The Wisconsin Supreme Court has also rejected the need for heightened review procedures when addressing indefinite civil commitment under the Wisconsin SVP statute. In *State v. Post*, 197 Wis.2d 279, 541 N.W.2d 115, 132 (1995), *cert. dismissed*, 138 L.Ed.2d 1011 (1997), the court noted that “the increased likelihood of accurate initial [SVP] commitment decisions reduces the need for some of the recommitment procedures that act as a safety net in [Wisconsin’s RCW 71.05]”. By providing for heightened commitment

procedures in the sex predator statute, it is constitutionally unnecessary to offer the same procedures on annual review as the recommitment procedures provided under the standard involuntary commitment statute, which allows for initial commitment on a lesser showing. *Accord In re Commitment of Paulick*, 213 Wis. 2d 432, 570 N.W.2d 626, 628 (1997).

Therefore, the review provisions of RCW 71.09 fully satisfy due process requirements as described in controlling case law. Whether periodic review and release provisions comport with due process must be determined by reference to the factors originally summarized in *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L.Ed.2d 18 (1976):

First, the private interest that will be effected by the official action; second, the risk of erroneous deprivation of such interest through the procedures used, and the probative value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Williams, 734 F.2d at 1438 (quoting *Mathews*); *accord Parham v. J.R.*, 442 U.S. 584, 599-600, 99 S. Ct. 2493, 61 L.Ed.2d 101 (1979). In applying these factors, the Supreme Court has cautioned:

As with most medical procedures, Georgia's are not totally free from risk of error in the sense that they give total or absolute assurance that every child admitted to a hospital has a mental illness optimally suitable for institutionalized

treatment. But it bears repeating that “*procedural due process rules are shaped by the risk of error inherent in the truth-finding process as applied to the generality of cases, not the rare exceptions.*”

Parham, 442 U.S. at 612-13 (emphasis added; quoting *Mathews*).

The private interests of Mr. Fox and other SVPs in avoiding continued commitment are mixed. On the one hand, “[i]ndeterminate commitment does raise a serious due process issue since the patient’s basic personal liberty is affected.” *Matter of Harhut*, 385 N.W.2d 305, 311 (Minn. 1986). On the other hand, these individuals suffer from a mental abnormality or personality disorder and therefore potentially “benefit from the continued treatment.” *Williams*, 734 F.2d at 1440. Further, confinement at the special commitment center prevents the commission of further criminal acts of sexual violence – acts which could place the individual in prison for a life term under the Washington criminal code.

The risk of erroneous deprivation of liberty through improperly continued commitment continues to be minimized by the procedures provided in RCW 71.09.090. Not only is an SVP guaranteed an annual review through the report procedure, RCW 71.09.070, there are two independent methods through which an SVP can obtain a new commitment trial.

First, Mr. Fox can obtain a new commitment trial through the recommendation of the Secretary of Department of Social and Health Services. RCW 71.09.090(1). Each year the Secretary is required to submit a report to the court evaluating the mental condition and dangerousness of the committed SVP. RCW 71.09.070. If an SVP's condition changes so as to justify release or less restrictive confinement, the Secretary is under a statutory duty to authorize a new commitment trial where the State bears the full burdens of the original commitment trial. RCW 71.09.090(1). The existence of this independent review mechanism, initiated by the agency responsible for the care and treatment of the SVP, "significantly reduces the risk of an erroneous decision denying release." *Williams*, 734 F.2d at 1440.

Second, Mr. Fox has the right to independently petition the committing court for a new commitment trial. RCW 71.09.090(2). At the show cause hearing, the petitioner has a right to an attorney. *Williams*, 734 F.2d at 1440. He also has a right to retain an expert to examine and evaluate him. RCW 71.09.070. A new commitment hearing shall be granted if "probable cause exists to believe that the person's condition has so changed." RCW 71.09.090. Under the 2005 amendments, the provision allows a new commitment trial if the person's mental condition

– the source of his sexually violent behavior – has substantially changed through treatment or other relevant means.

In fact, due process likely requires less of an annual review procedure than currently afforded SVPs under RCW 71.09.090. In *Parham*, a child commitment case, the Supreme Court recognized that there is a “continuing need for [the] commitment [to] be reviewed periodically” *Parham*, 442 U.S. at 607. The Supreme Court determined that the due process requirement of periodic review was satisfied when the commitment decision was reviewed by a “neutral factfinder.” *Id.* “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.* Instead, for due process purposes, “a staff physician will suffice.” It was 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.”³ *Id.*

Similarly, in *Williams*, the eleventh circuit held that “[d]ue process does not always require an adversarial hearing.” *Williams*, 734 F.2d at

³ The Court held that “we do not believe the risks of error in that process would be significantly reduced by a more formal judicial-type hearing.” *Parham*, 442 U.S. at 613.

1438 (quotation omitted). Due process was satisfied merely through non-adversarial reviews of the committee's current condition by hospital staff:

Alabama's non-adversarial procedures do not create an undue risk of erroneous deprivation of this liberty interest. Hospitals and their medical professionals certainly have no bias against the patient or against release. Therefore we can safely assume they are disinterested decision-makers. In fact, the mental health system's institutional goal--i.e., transfer to a less restrictive environment and eventual release--favors release. Other factors also favor release, including a perennial lack of space and financial resources, which militates against any motivation to unnecessarily prolong hospitalization, and including the medical professional's pride in his own treatment. The frequency of the evaluations also reduces the risk that the patient will be confined any longer than necessary.

Williams, 734 F.2d at 1438. The court continued:

The probative value of the additional safeguard of adversary hearings is slight To impose an adversarial atmosphere upon the medical decision making process would have a natural tendency to undermine the beneficial institutional goal of finding the least restrictive environment, including eventual release. *Instead of an additional safeguard, the adversarial intrusion might very probably prove counterproductive to the interests of acquittees.*

Williams, 734 F.2d at 1438-39. The court concluded that the "nonadversary periodic review satisfies due process under the *Mathews v. Eldridge* balancing test." *Williams*, 734 F.2d at 1439. The periodic review undertaken by the Department of Social and Health Services under RCW 71.09.070 satisfies this concern.

In *Harhut*, 385 N.W.2d at 311, the Minnesota Supreme Court rejected equal protection and due process challenges brought by a mentally retarded person challenging her indefinite civil commitment. Similar to RCW 71.09, a Minnesota statute provided mentally retarded committees the right to an annual medical assessment and the right to petition the committing court for release or a less restrictive placement. *Harhut*, 385 N.W.2d at 309-10. Also, “no mentally retarded person indeterminately committed is without counsel and . . . periodic medical reports are always sent to the attorney representing the patient.” *Id.* at 311. The *Harhut* court held that “indeterminate commitment of mentally retarded patients does not violate due process as long as the patient is continuously represented by an informed attorney and the additional safeguards outlined below are followed.” *Id.* at 311. The additional safeguards required by the court were that all periodic medical reviews must be sent to the court and to the patient’s counsel of record, and that there would be a “judicial review of a mentally retarded patient’s status at least once every three years after the patient has been indeterminately committed.” *Id.* The “judicial review” envisioned by the court was not a full-blown commitment trial with all the procedural protections of the initial commitment, but rather a procedure closely resembling current RCW 71.09 review procedures:

This does not mean that the commitment period automatically ends and the state must petition again for continued commitment, as it must under section 253B.13 for mentally ill or chemically dependent persons; nor is this review always to be the equivalent of a section 253B.17 hearing, which may still be brought at any time by the patient or other interested person. Instead, this is to be an automatic periodic review, *the extent of which will vary at the sound discretion of the trial court.*

Harhut, 385 N.W.2d at 311-12 (emphasis added). Presumably, although Washington meets or exceeds the above protections,⁴ *Mathews* would not require this level of protection for SVPs, who are generally better equipped to handle their own affairs than the mentally retarded.

2. Due Process Does Not Restrict The Legislature's Power To Refine The Provisions For A New Trial Where Conditions Have Changed

The remaining route to a new commitment trial for Mr. Fox is through the “condition has so changed” test in RCW 71.09.090(2). *Petersen II*, 145 Wn.2d at 798. Fox asserts that the 2005 amendments to the statute violate due process. But due process only requires proof of a continuing basis for the commitment, which was satisfied by Dr. Dunham’s annual review evaluation. Having satisfied and preserved that obligation, the Legislature has discretion in providing additional

⁴ The review provisions of RCW 71.09.090 and RCW 71.09.070 exceed the protections required by *Harhut* in that judicial review occurs every year, rather than every third year. If a SVP committee does not waive his right to a show cause hearing, one must be scheduled. *Harhut* clearly does not require that the judicial review of a commitment be accompanied by all the procedural protections afforded at the initial commitment.

means for a new trial, and to clarify that advancement in age alone is not sufficient for a new trial.

RCW 71.09.090(2) allows a new trial only where there is evidence that the person's mental "condition has so changed that . . . he no longer meets the definition of a sexually violent predator." There are two important aspects to this language. The 2005 amendments clarify the type and quantum of change that is necessary to justify the expense and disruption to treatment of a new commitment trial.

The additional procedures in RCW 71.09.090 for a new commitment trial based on respondent's proof of a change in his mental condition are available, however, only because the Legislature has created this additional route to encourage sex offender treatment.

There are substantial state interests favoring the current system that, absent a recommendation of the Secretary, requires the committed person to establish probable cause that his condition has so changed. The *Parham* Court remarked: "it is incumbent on courts to design procedures that protect the rights of the individual *without unduly burdening the legitimate efforts of the states to deal with difficult social problems.*" 442 U.S. at 608 n.16 (emphasis added).

With regard to those committed following an insanity acquittal, one court recognized that "[t]he state's interest in preventing the

premature release of individuals who have already proven their dangerousness to society by committing a criminal act is substantial.” *Williams*, 734 F.2d at 1439. The same comment applies with equal force to SVPs. The State faces a high burden of proof -- beyond a reasonable doubt -- in both the initial commitment hearing and in any new commitment hearings ordered as a result of an annual review. The risk of erroneously releasing an SVP increases dramatically if the state is forced to resubmit its case to a different jury once every year, regardless of whether the committee’s mental condition has changed, or whether the person has even engaged in treatment for his condition. Due process does not support injecting additional random chance into the release decision when there is no minimal showing of a “changed condition,” as currently required by RCW 71.09.090(2).

The administrative costs of requiring the State to conduct new commitment trials based solely on an individual expert’s novel scientific theories would be tremendously high. Presently, SVP trials are hard-fought affairs usually lasting longer than a week. The State generally pays for attorneys and expert witnesses on both sides. With attendant motions and discovery issues, these cases consume substantial judicial resources. The fact-finder’s decision is almost guaranteed to result in an appeal. In short, while the probative value of trials based on novel method’s like

Dr. Wollert's is minimal, imposing such a requirement would quickly overwhelm the State's resources.

In evaluating whether a particular procedure is due, it is appropriate to consider the "financial burden" on the state. *Williams*, 734 F.2d at 1439. In rejecting the same type of relief requested by Fox, the *Harhut* court observed that:

Determinate commitment and yearly petition renewal is a substitute procedural safeguard, but the fiscal and administrative burden on the state would be heavy.

Harhut, 385 N.W.2d at 311.

Another important state interest is to avoid disruptions in the treatment of SVPs caused by unnecessary recommitment trials:

One factor that must be considered is the utilization of the time of psychiatrists, psychologists, and other behavioral specialists in preparing for and participating in the hearings rather than performing the task for which their special training has fitted them. Behavioral experts in courtrooms and hearings are of little help to patients.

Parham, 442 U.S. at 605-06. The Court cautioned against "increasing the procedures the state must provide." *Id.* at 606. A "direct consequence" of such an increase is "that mental health professionals will be diverted even more from the treatment of patients in order to travel to and participate in – and wait for – what could be hundreds – or even thousands – of hearings each year." *Id.* The relative ease with which a respondent could obtain a

new commitment trial under the *Young* decision also interferes with efforts to encourage Fox and others like him to submit to sex offender treatment.

In short, the vague due process requirement claimed by Mr. Fox to allow new commitment trials based on Dr. Wollert's novel opinions does not exist. It is fundamentally inconsistent with the approval of indefinite commitment with annual review procedures in *Young* and *Petersen I*. When combined with the necessity of the State establishing a periodic prima facie case supporting a continuing basis for the commitment, the statutory requirement that there must be probable cause of a change in the person's mental condition before a new commitment trial may be ordered ensures a fair and meaningful process for a committed person.

D. Applying Amended RCW 71.09.090 Did Not Violate Mr. Fox's Right to Equal Protection.

Mr. Fox argues that amended RCW 71.09.090 violates his right to equal protection, because the procedures adopted by the legislature for annual review hearings differ from the procedures of an initial commitment trial. There are, however, no equal protection issues raised by the legislature's chosen annual review procedures, because the constitution requires minimal periodic review processes following commitment. Mr. Fox's equal protection argument lacks merit.

The right to equal protection under the law is derived from the fourteenth amendment to the United States Constitution. *In re Detention of Thorell*, 149 Wn.2d 724, 745, 9, 72 P.3d 708 (2003) (treating SVPs

differently from those committed under RCW 71.05 does not violate equal protection). Equal protection “does not require that all persons be dealt with identically, but it does require that a distinction made have some relevance to the purpose for which the classification is made.” *Thorell*, at 745-6 (quoting *Baxstrom v. Herold*, 383 U.S. 107, 111, 86 S. Ct. 760, 15 L.Ed.2d 620 (1966)).

An equal protection claim is reviewed under the rational basis standard. *Thorell*, at 748-9 (citing *In re Detention of Turay*, 139 Wn.2d 379, 409-10, 986 P.2d 790 (1999)). The court determines whether the legislature has pursued a “legitimate governmental objective and a rational means of achieving it.” *Thorell*, 149 Wn.2d 724. This review is “highly deferential to the legislature.” *Id.* Legislative classifications are upheld unless they are based upon “grounds wholly irrelevant to the achievement of legitimate state objectives.” *Id.* (citing *Turay*, 139 Wn.2d at 410). Disagreement with the legislature’s methods is irrelevant:

[a]s long as [the State] “rationally advances a reasonable and identifiable governmental objective, we must disregard” the existence of alternative methods of furthering the objective “that we, as individuals, perhaps would have preferred.”

Thorell, 149 Wn.2d 724 (citing *Heller v. Doe by Doe*, 509 U.S. 312, 330, 113 S. Ct. 2637, 125 L.Ed.2d 257 (1993)). Even “rational speculation unsupported by evidence or empirical data” provides a basis for upholding the classification under this level of review. *Thorell*, 149 Wn.2d 724,

(quoting *Heller*, 509 U.S. at 320). The burden rests with the party challenging the classification to show it is purely arbitrary. *Thorell*, 149 Wn.2d 724.

There is clearly a rational basis for the Legislature to have provided different protections to those who have been adjudicated an SVP, from those who have not. As argued in Sec. III(C)(1) above, continuation of Mr. Fox's indefinite commitment is constitutionally permitted based solely on the requirement that the State come forward periodically with prima facie evidence of a continuing basis for the commitment. *Petersen II*, 145 Wn.2d at 798-799. Nothing more is required; the constitution demands only minimal periodic review in order to maintain an indefinite civil commitment. *Foucha*, 504 U.S. 71. The additional procedures in RCW 71.09.090 for a new commitment trial based on respondent's proof of a change in his mental condition are available only because the Legislature has created an additional route to freedom in order to encourage sex offender treatment.

The Legislature's chosen release procedures do not violate the equal protection clause. Mr. Fox's constitutional challenge is without merit.

E. Amended RCW 71.09 Does Not Impermissibly Encroach Upon the Judicial Branch.

Mr. Fox asserts that amended RCW 71.09.090 violates the separation of powers doctrine. His argument should be rejected because the Legislature acted within its power to clarify the means by which an SVP can obtain a new commitment trial. It has done so with a law of general application appropriate to establishing policies in the subject of commitment of an SVP.

The separation of powers doctrine, which appears in neither the state nor the federal constitutions, is presumed from the division of government into different branches. *Carrick v. Locke*, 125 Wn.2d 129, 134-5, 882 P.2d 173 (1994). It does not demand that the branches be “hermetically sealed” from each other because they must “remain partially intertwined” to function properly. *Id.* at 135. The doctrine is “grounded in flexibility and practicality, and rarely will offer a definitive boundary beyond which one branch may not tread.” *Id.* (citing *Matter of Salary of Juvenile Director*, 87 Wn.2d 232, 240, 552 P.2d 163 (1976)).

The Legislature, as it has now clarified, never intended that a change in marital status or an advance of a few years in age, coupled with a defense expert’s novel opinions, would precipitate a new commitment trial. The Legislature has now set out the specific grounds by which a

person already adjudicated as an SVP can obtain a new trial. This is no more than what it routinely does in other areas, such as when it establishes the permissible defenses to a criminal charge. The Legislature has provided a framework for the court to follow.

For example, the Legislature has plenary power to set terms of punishment for the crimes that it has defined. *State v. Thorne*, 129 Wn.2d 736, 767, 921 P.2d 514 (1996). It has the power to provide the structure within which a court can exercise its discretion, such as in sentencing. *State v. Ammons*, 105 Wn.2d 175, 181, 718 P.2d 796 (1986). It can even totally exclude the court's discretion. *Thorne*, 129 Wn.2d at 767; *State v. Fuller*, 89 Wn. App. 136, 142, 947 P.2d 1281 (1997).

It is because of circumstances exactly like those presented in this case and *Elmore*, where a respondent can rely upon a witness who utilizes novel and questionable methods to circumvent the treatment and “so changed” aspects of RCW 71.09, that the legislature amended RCW 71.09.090 to clarify its intent. In doing so, it has not unacceptably encroached upon judicial authority.

CONCLUSION

For the foregoing reasons, the State requests that this Court affirm the trial court's order on summary judgment, which struck Mr. Fox's new commitment trial.

RESPECTFULLY SUBMITTED this 28th day of August, 2006.

ROB MCKENNA
Attorney General

A handwritten signature in black ink, appearing to read "Malcolm Ross", written over a horizontal line.

MALCOLM ROSS, WSBA #22883
Assistant Attorney General
Attorneys for Petitioner State of Washington

APPENDIX 1

1 **FINDINGS OF FACT**

2 1. The Respondent was committed to the care and custody of the Department of
3 Social and Health Services (DSHS) as a sexually violent predator on July 26, 2002.

4 2. On June 15, 2006, DSHS submitted a written annual review of the Respondent's
5 mental condition to this Court.

6 **CONCLUSIONS OF LAW**

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

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

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

12 b. The Respondent's condition remains such that any proposed less restrictive
13 alternative placement is not in the best interest of the Respondent, nor can conditions be
14 imposed that would adequately protect the community.

15 3. Pursuant to *Detention of Petersen v. State*, 145 Wn.2d 789, 42 P.3d 952, 958
16 (2002), the Respondent did not present prima facie evidence that:

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

19 b. His condition has so changed that release to a less restrictive alternative is in his
20 best interest, and conditions can be imposed that would adequately protect the community.

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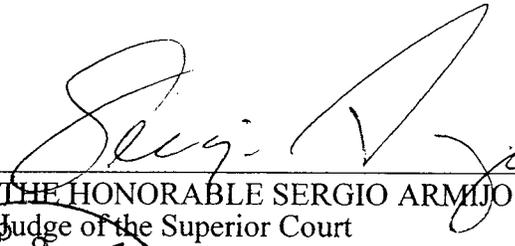
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1 Based on the foregoing Findings of Fact and Conclusions of Law, the Court now enters
2 the following:

3 **ORDER**

4 This Court's order civilly committing the Respondent to the custody of DSHS as a
5 sexually violent predator shall continue until further order of the Court.

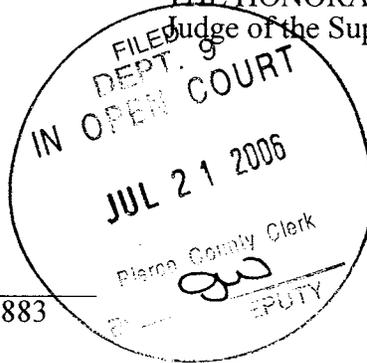
6 DATED this 21st day of July, 2006.

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9 
THE HONORABLE SERGIO ARMIJO
Judge of the Superior Court

10 Presented by:

11 ROB MCKENNA
12 Attorney General

13 
14 MALCOLM ROSS, WSBA #22883
15 Assistant Attorney General
16 Attorneys for Respondent



17 Copy received; Approved as to form:

18 
19 JAMES A SCHOENBERGER JR, WSBA #33603
20 Attorney for Respondent

APPENDIX 2

ORIGINAL



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STATE OF WASHINGTON
PIERCE COUNTY SUPERIOR COURT

In re the Detention of:

HARRY VERN FOX,

Respondent.

NO. 01-2-07150-1

ORDER ON SHOW CAUSE
HEARING

THIS MATTER came before the Court on July 21, 2006, to determine whether the Respondent is entitled to a trial to determine whether, based upon the September 30, 2005 Special Commitment Center Annual Review, or evidence presented by Respondent, he should be unconditionally released or released to a less restrictive alternative. At the hearing, the Petitioner was represented by Assistant Attorney General MALCOLM ROSS. The Respondent was not present, but was represented by his counsel, JAMES A SCHOENBERGER JR. In reaching a decision in this matter, the Court considered the pleadings filed in this matter, the evidence presented at the show cause hearing, and the argument of counsel. Based upon all of this, the Court enters the following Findings of Fact, Conclusions of Law, and Order:

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1 **FINDINGS OF FACT**

2 1. The Respondent was committed to the care and custody of the Department of
3 Social and Health Services (DSHS) as a sexually violent predator on July 26, 2002.

4 2. On September 30, 2005, DSHS submitted a written annual review of the
5 Respondent's mental condition to this Court.

6 **CONCLUSIONS OF LAW**

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

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

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

12 b. The Respondent's condition remains such that any proposed less restrictive
13 alternative placement is not in the best interest of the Respondent, nor can conditions be
14 imposed that would adequately protect the community.

15 3. Pursuant to *Detention of Petersen v. State*, 145 Wn.2d 789, 42 P.3d 952, 958
16 (2002), the Respondent did not present prima facie evidence that:

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

19 b. His condition has so changed that release to a less restrictive alternative is in his
20 best interest, and conditions can be imposed that would adequately protect the community.

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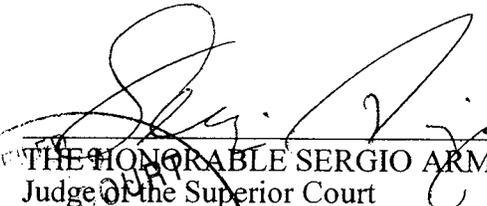
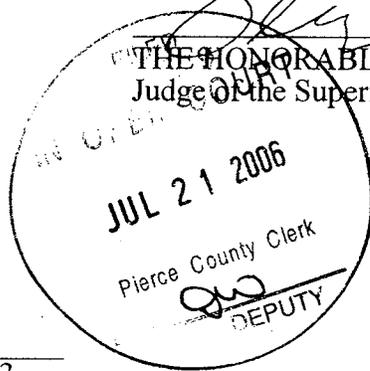
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1 Based on the foregoing Findings of Fact and Conclusions of Law, the Court now enters
2 the following:

3 **ORDER**

4 This Court's order civilly committing the Respondent to the custody of DSHS as a
5 sexually violent predator shall continue until further order of the Court.

6 DATED this 21st day of July, 2006.

7
8
9 
10 THE HONORABLE SERGIO ARMIJO
11 Judge of the Superior Court
12
13 

10 Presented by:

11 ROB MCKENNA
12 Attorney General

13 
14 MALCOLM ROSS, WSBA #22883
15 Assistant Attorney General
16 Attorneys for Respondent

17 Copy received; Approved as to form:

18 
19 JAMES A SCHOENBERGER JR
20 WSBA #33603
21 Attorney for Respondent

FILED
COURT OF APPEALS
DIVISION II

06 AUG 30 PM 12: 28

NO. 34145-0-II

STATE OF WASHINGTON

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

HARRY VERN FOX,

Appellant,

v.

STATE OF WASHINTON,

Respondent.

DECLARATION OF
SERVICE

GRACE M. SUMMERS declares as follows:

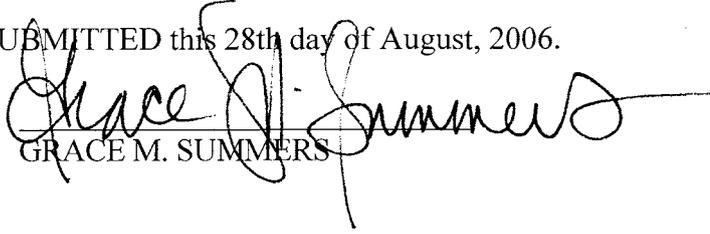
On August 28, 2006, I sent by United States mail, postage prepaid,
addressed as follows:

SHERI L. ARNOLD
ATTORNEY AT LAW
P. O. BOX 7718
TACOMA, WA 98406-0718

a copy of the following documents: RESPONDENT'S BRIEF and
DECLARATION OF SERVICE.

I declare under penalty of perjury under the laws of the State of
Washington that the foregoing is true and correct.

RESPECTFULLY SUBMITTED this 28th day of August, 2006.


GRACE M. SUMMERS