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I. ISSUES PRESENTED

1. Whether the trial court correctly ruled the 2005 amendments to RCW 71.09.090 were unconstitutional and, thus, inapplicable to Mr. Reimer at his January 20, 2006 show cause hearing? (Cross assignment of error)
2. Whether Mr. Reimer presented evidence establishing probable cause under both former and amended RCW 71.09.090 to believe his condition had “so changed,” warranting an evidentiary hearing on the issue?¹

II. STATEMENT OF THE CASE

When Mr. Reimer was only thirteen years old, he committed his first sexual offense. CP at 6. After playing catch for some time with a seven-year-old boy, Mr. Reimer and the boy entered nearby bushes together. *Id.* Mr. Reimer began to fondle the boy’s penis, and then proceeded to threaten to report him after the boy expressed his desire to terminate the contact. *Id.* At that point, Mr. Reimer placed the boy’s penis in his own mouth. *Id.* The boy subsequently reported this offense. *Id.* After being convicted of Indecent Liberties, Mr. Reimer spent sixty-five weeks in the Juvenile Rehabilitation Administration (JRA). *Id.*

¹ It is unclear whether Mr. Reimer is arguing the trial court should have granted an evidentiary hearing under former RCW 71.09.090 or under the statute as amended. The State will respond with analysis under both versions of the statute.

Three years later when Mr. Reimer was sixteen years old, he sexually assaulted a thirteen-year-old boy. *Id.* After threatening to cut the boy's throat with a knife, he led the boy behind a shed. *Id.* Mr. Reimer then forced the boy to fellate him. *Id.* After ordering the boy to stand up and turn around, Mr. Reimer urinated on the boy's back and anally raped him, repeating his threat to kill the boy. *Id.* Mr. Reimer subsequently pled guilty to Rape in the First Degree and Assault in the Second Degree. *Id.* At the time of this offense, Mr. Reimer had been released only two weeks earlier for the Indecent Liberties conviction. *Id.*

Mr. Reimer was released again into the community when he was twenty one years old. CP at 7. He then became sexually involved with a twelve-year-old girl, impregnating her. *Id.* For this offense, he was convicted of Child Molestation in the Third Degree. CP at 8. He also has a history of truancy, theft and assault. CP at 6-7.

In 1992 after Mr. Reimer finished his sentence of Child Molestation in the Third Degree, when he was twenty three years old, he was involuntarily civilly committed to the care and custody of the Department of Social and Health Services (DSHS) at the Special Commitment Center (SCC) as a Sexually Violent Predator (SVP). CP at 3. This review concerns the trial court's ruling at a show cause hearing held on January 6, 2006, which encompassed annual reviews dated

January 15, 2002, June 13, 2002, January 31, 2003, December 29, 2003 and April 26, 2005. CP at 46-49.

In November of 2002, the trial court entered an order allowing Mr. Reimer to obtain an evaluation by his own expert pursuant to RCW 71.09.070. CP at 104. On approximately March 13, 2003, the report of that expert, Dr. Lee Coleman, was submitted to the trial court. CP at ____ (Memorandum Regarding Continued Annual Review Hearing, attachment, March 13, 2003). *See also* Appellant's Brief, appendix A. In his report, Dr. Coleman took issue with the initial trial SVP evaluation conducted by Dr. Dreiblatt, arguing that Dr. Dreiblatt inappropriately diagnosed Mr. Reimer by "simply labeling past crimes as a mental disorder." CP at ____ (Memorandum Regarding Continued Annual Review Hearing, attachment pages 2-3, March 13, 2003). Dr. Coleman proceeded in his report to make the same criticism of subsequent SCC evaluators who had completed annual reviews on Mr. Reimer. CP at ____ (Memorandum Regarding Continued Annual Review Hearing, attachment page 3, March 13, 2003). Although Mr. Reimer had not participated in treatment while at the SCC, Dr. Coleman argued that it should be significant to evaluators that Mr. Reimer is taking "a leading role in questioning the SVP programs, [which] could just as likely indicate significant social reform." CP at ____ (Memorandum Regarding Continued Annual Review Hearing, attachment

page 4, March 13, 2003). Dr. Coleman concluded his report by requesting a personal interview with Mr. Reimer, arguing that “if the State of Washington will be relying heavily on the fact that Mr. Reimer refuses to participate in the treatment programs, then Mr. Reimer’s perspective on these issues is one that [Dr. Coleman] need[s] to hear in-person in order to complete [his] work.” CP at ___ (Memorandum Regarding Continued Annual Review Hearing, attachment page 7, March 13, 2003). After a personal interview with Mr. Reimer, Dr. Coleman submitted an additional report to the trial. CP at 171-176. *See also* Appellant’s Brief, Appendix B. His opinions remained as they did in the first report. Of note, Mr. Reimer made clear to Dr. Coleman his intentions to never participate in sex offender treatment while at the SCC. CP at 173-174.

Dr. Carole DeMarco, a psychologist employed by DSHS, authored the April 26, 2005, annual review from the SCC.² CP at 2. Pursuant to court order, Mr. Reimer submitted to a personal interview with Dr. DeMarco for purposes of this annual review. CP at 17. After reviewing Mr. Reimer’s treatment plan, prior psychological evaluations, progress notes, and interviewing residential and treatment staff at the SCC as well as

² Although the annual review hearing encompassed numerous annual reviews, the arguments in both party’s briefs focus on Dr. DeMarco’s annual review as it is the most recent. Prior evaluators expressed the same expert opinions as Dr. DeMarco did, that Mr. Reimer’s condition had not so changed that he no longer met the definition of SVP or that release to an LRA would be in his best interest and conditions could be put in place to adequately protect the community.

Mr. Reimer himself, Dr. DeMarco noted that Mr. Reimer should remain at the SCC. She opined that he continues to meet the definition of an SVP, that his present mental condition seriously impairs his ability to control his sexually violent behavior, and that there was no appropriate less restrictive alternative (LRA) available to ensure community safety. CP at 38. In her report, Dr. DeMarco noted that Mr. Reimer does not participate in treatment of any kind at the SCC, and he is currently in phase one, the beginning phase, of the six-phase inpatient sex offender treatment program. CP at 11, 37. He is also unfamiliar with Relapse Prevention Plans, the treatment model that teaches a sex offender how to identify the cycle that led to sex offending in the past and how to interrupt it in the future. CP at 37. This treatment model is a vital tool Mr. Reimer needs in order to manage his future risk of sexual and violent assaults. Furthermore, Dr. DeMarco outlined a number of behavioral incidents in which Mr. Reimer yelled at staff and failed to follow their directives. CP at 13-17. She pointed out he is currently at a privilege level one, the lowest privilege level based on conduct within the confines of the SCC, most likely due to his behavioral outbursts. CP at 37. Dr. DeMarco concluded,

At this time Mr. Reimer demonstrates risk factors that suggest he is a poor candidate for any less restrictive alternative. Since Mr. Reimer has not participated in

treatment, it is the opinion of the undersigned that it is not in his best interest to be moved to a less restrictive alternative, as it could not provide the intensity of treatment he requires. Additionally, it is not felt that a less restrictive alternative placement is available that could adequately protect the community.

Id.

On January 20, 2006, the trial court conducted the show cause hearing, addressing all annual reviews submitted since and including the January 15, 2002 annual review.³ CP at 46, 240. Pursuant to the statute, the State relied upon the annual reviews to meet its burden at the show cause hearing. Mr. Reimer relied upon the two reports submitted by Dr. Coleman to argue he should receive a new commitment trial.

In May 2005, just prior to the show cause hearing at issue, the legislature amended RCW 71.09.090, clarifying its intent regarding the “so changed” language of the statute. CP at 204-212. Specifically, the legislature added a subsection to the statute which reads:

(4)(a) Probable cause exists to believe a person’s condition has “so changed,” under subsection (2) of this section, only when evidence exists, since the person’s last commitment trial proceedings, of a substantial change in the person’s

³ The prior order on show cause was entered on April 4, 2001. CP at 46. There was an extended period of time between show cause hearings in this case due to the time it took in securing an expert (ultimately, Dr. Coleman) for Mr. Reimer, getting an interview of Mr. Reimer with Dr. Coleman, and allowing the state’s expert an interview with Mr. Reimer as well. At one point, Mr. Reimer refused to meet with the State’s expert which furthered the delay. CP at ___ (Memorandum in Support of Petitioner’s Motion for Order to Show Cause, April 13, 2004). Additionally, Mr. Ammons, Mr. Reimer’s attorney, at one point requested a delay due to a death in his family. CP at ___ (Motion for Continuance of Show cause hearing, September 12, 2005).

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 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 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 responses to continuing participation in treatment which indicates that the person meets the standard for conditional release to a less restrictive alternative or that the person would be safe to be at large if unconditionally released from commitment.

(c) For purposes of this section, a change in a single demographic factor, without more, does not establish probable cause for a new trial proceeding under subsection (3) of this section. As used in this section, a single demographic factor includes, but is not limited to, a change in the chronological age, marital status, or gender of the committed person.

Id. Those amendments took effect immediately. *Id.* In addition to relying upon Dr. Coleman's reports to request a new trial, Mr. Reimer also argued that the 2005 amendments to the statute were unconstitutional. CP at ___. (Supplemental Memorandum Regarding Annual Review Show Cause, September 28, 2005). Consequently, the trial court ruled the 2005 amendments to RCW 71.09.090 unconstitutional on the basis that they violated the "principles of due process, equal protection of the laws, and

the right to a jury trial . . .” CP at 240-241. The court then proceeded to conduct the show cause hearing using the former RCW 71.09.090 standard, ruling that the State had met its burden and that Mr. Reimer had failed to present sufficient evidence, through Dr. Coleman, that his condition had so changed that an evidentiary hearing was warranted. *Id.*

III. ARGUMENT

A. **The 2005 Amendments to RCW 71.09.090 Are Constitutional and the Trial Court’s Denial of Mr. Reimer’s Request for an Evidentiary Hearing Should Be Affirmed.**

Pursuant to Rules of Appellate Procedure 2.4(a), the State respectfully requests this Court consider as error the trial court’s ruling that amended RCW 71.09.090 is unconstitutional. The State asks for review of this ruling in the proceeding below because its repetition on remand would be prejudicial to the State.

1. **SB 5582 Clarified When it is Appropriate to Order a New Trial Due to Respondent’s Proof.**

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”). In *Ward*, a committed SVP was granted a new trial based upon a psychological report that stated he no longer met criteria due to “changes in diagnostic practice.” *In re Detention of Ward*, 125 Wn.App. at 389-390. In *Young*, a committed SVP obtained a new trial by presenting a psychological report stating that due to his “advanced age” alone, he no longer met criteria. *In re Young*, 120 Wn.App. at 763-764. The “unintended consequence” of these two cases 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.

Laws of 2005, ch. 344, § 1. 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.*

The legislature, through its amendments, clearly intended to re-focus the annual review process around the “irrefutable” compelling state interests in treating sex offenders and protecting the community.

In re Young, 122 Wn. 2d 1, 26, 857 P.2d 989 (1993). In support of these interests, the legislature pointed out that “the mental abnormalities and personality disorders that make a person subject to commitment under chapter 71.09, RCW are severe and chronic and do not remit due solely to advancing age or changes in other demographic factors.” Laws of 2005, ch. 344, § 1.

These provisions are intended only to provide a method of revisiting the indefinite commitment due to a relevant change in a 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.

Id.

2. The RCW 71.09.090 Annual Review Hearing Is a Probable Cause Hearing, Not a Re-Commitment Trial.

The purpose the annual review show cause hearing is:

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 show cause hearing is not a yearly requirement that the State “re-commit” the Respondent, but its purpose is 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 the 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 the 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). The 2005 amendments set out what is meant by "so changed," that is, evidence since the respondent's last commitment trial of "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 . . .” or “a change in the person’s mental condition brought about through positive response to continuing treatment” Legislative Findings, Laws of 2005, ch. 344, § 2. 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). However, a change in a “single demographic factor,” such as age, is not sufficient. RCW 71.09.090(4)(c).

3. Amended RCW 71.09.090 Comports with Due Process.

Mr. Reimer argued at the show cause hearing that the 2005 amendments to RCW 71.09.090 violated his due process rights. The 2005 amendments are constitutional, they do not violate due process, and the trial court erroneously ruled them to be unconstitutional.

This Court has already heard and rejected the argument that SB 5582 violates due process in *In re Detention of Fox*, 138 Wn.App. 374, 396-400, 158 P.3d 69, 80-81 (2007).⁴ There, three SVPs argued that RCW 71.09.090 as amended violates due process because it prevents them from showing that they are unlikely to be a

⁴ The State is in the process of filing motions in the Washington State Supreme Court asking that the three cases consolidated as *In re Fox*, all of which have petitions for review currently pending before that court, be reversed and remanded pursuant to *In re Elmore* ___ Wn.2d ___, 168 P.3d 1285 (Oct. 18, 2007). In *Elmore*, the court determined that the 2005 amendments could not be applied to persons whose show cause/probable cause hearings occurred prior to the effective date of those amendments, that is, May of 2005. The *Elmore* court did not consider the constitutionality of those amendments, and as such, the portions of *Fox* dealing with that issue are untouched by that decision.

danger to the community upon release, regardless of their continued mental abnormalities. They asserted that their expert's testimony would show that, based on their age classifications or other actuarial data, they would now present a lower risk to the community than they did at their original commitment, primarily because they are now older. They also argued that, under *Petersen*, an SVP deserves a full evidentiary hearing if he can show that he no longer poses a threat to the community despite his continued mental abnormality or personality defect. *Id.* at 398-99. This Court rejected those arguments, noting:

Again, the Legislature amended the statute to clarify that the standard for the probable cause hearing is **whether the SVP's condition has so changed as to render him significantly less dangerous to the community than he was at the time of his commitment**. Nothing in the statutory amendments prevents the SVP from demonstrating that he has either comported with his behavioral treatment or that he no longer poses a danger to society. Rather, the only change in the statute is the Legislature's clarification that a single demographic factor cannot be the only basis for demonstrating that a person's condition has changed enough to lower his danger to the community...

Id. (emphasis added). This Court went on to hold that the amendments do not infringe on safeguards that allow SVPs to challenge their commitments. *Id.* SVPs, the Court observed, “retain their right to an annual review, where they may present evidence, have an attorney represent them, and challenge the State's evidence. They may present both

clinical and actuarial data so long as the SVP's case is not based *solely* on his having grown older, getting married, or undergoing a gender change.”

Id.

Merely because Dr. Coleman opines Mr. Reimer does not meet SVP criteria does not give rise to a new commitment trial. Mr. Reimer must show a positive response to treatment, a physiological change that renders him unable to sexually reoffend, or present an LRA plan that is appropriate. Dr. Coleman's report shows none of these. At the show cause hearing, the evidence from *both* parties demonstrated that Mr. Reimer's condition has remained exactly the same since his commitment in 1992. He has not participated in treatment, his health is good and his diagnostic condition remains unchanged.

Finally, the State's interest in the continued treatment of SVPs would be harmed by repeated unconditional release trials that are unrelated to treatment progress. Treatment providers and their patients - those committed as SVPs - would necessarily be involved in these unconditional release trials, interrupting the consistent treatment needed to ameliorate the risk of sexually violent recidivism stemming from the committed persons' mental disorders. As the Supreme Court has recognized, the presence of treatment providers “in courtrooms and hearings [is] of little help to patients.” *Parham v. J.R.*,

442 U.S. 584, 605 - 06, 99 S.Ct. 2493, 61 L.Ed.2d 101 (1979) (rejecting argument that due process requires adversarial hearings for children sought to be civilly committed to State's custody by their parents).

The legislature's chosen release procedures do not violate due process. The trial court erroneously ruled amended RCW 71.09.090 unconstitutional on this basis.

4. Amended RCW 71.09.090 Does Not Violate Mr. Reimer's Equal Protection Rights.

Mr. Reimer argued at the show cause hearing that the 2005 amendments to RCW 71.09.090 violated his right to equal protection. The 2005 amendments do not violate these rights, and the trial court erroneously ruled them to be unconstitutional on this basis.

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*, 149 Wn.2d 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*, 149 Wn.2d 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 at 749, (quoting *Heller*, 509 U.S. at 320). The burden rests with the party challenging the classification to show it is purely arbitrary. *Id.*

As this Court points out in *In re Detention of Fox*, there is clearly a rational basis for the legislature providing different protections to those who have been adjudicated SVPs from those who have not.

In re Detention of Fox, 138 Wn.App. at 401. Different standards of proof apply to each of the proceedings, different sections of the statute govern, and each stage focuses on different purposes. *Id.* At the commitment trial, the State bears the burden beyond a reasonable doubt to prove a respondent is an SVP. By the time a respondent reaches the show cause hearing, he or she is viewed as an SVP and the focus of the hearing is any change in the respondent's condition since the most recent commitment trial. *Id.* "At this stage, it is rational that something more than mere general demographic information is required to show a change in a specific SVP's dangerousness and to show this particular SVP's readiness for release back into the community." *Id.*

Mr. Reimer presumably intends to suggest that people who have participated in years of intensive treatment, including physiologic testing of current arousal levels, are similarly situated to those who, like Mr. Reimer, have instead chosen to refuse all treatment or who argue that opposition to the SCC and its treatment program is itself a form of treatment. This argument is frivolous on its face. The legislature's chosen release procedures do not violate the equal protection clause. The trial court erroneously ruled amended RCW 71.09.090 unconstitutional on an equal protection basis.

5. Absent a Showing of Change, Mr. Reimer Has no Right to a Jury Determination of Factual Issues.

The trial court also ruled the amendments to RCW 71.09.090 unconstitutional on the basis that it violated Mr. Reimer's right to a jury trial. This ruling was erroneous.

Due process does not confer upon Mr. Reimer a right to a jury trial absent some sort of preliminary showing of a change in circumstances. Because there is no right to a trial at all, there can be no violation of any "right" to have a jury determine all factual issues. Indeed, if Mr. Reimer were able to make the requisite showing of change, he would of course be entitled to present all relevant evidence of any factor that contributes to this change, including age, sex change, etc. The statute does not make such evidence inadmissible. Rather, it makes clear that a trial will not be granted absent 1) a permanent, identified physiological change to the person that renders him unable to commit a sexually violent act; or 2) a change in the person's mental condition "brought about through positive response to continuing participation in treatment" which renders the person safe to be conditionally or unconditionally released. RCW 71.09.090(4)(b)(ii).

6. Mr. Reimer Was Not Entitled to an Evidentiary Hearing Under Amended RCW 71.09.090.

Despite the fact the trial court erroneously ruled the 2005 amendments to be unconstitutional at the show cause hearing, the trial court correctly ruled that Mr. Reimer did not make the required showing

to receive a new evidentiary hearing. That ruling should be affirmed under RCW 71.09.090 as it was amended in 2005 by the legislature.

a. The State Met Its Burden at the Show Cause Hearing for Continued Commitment Under Amended RCW 71.09.090.

In accord with RCW 71.09.090(2) and *In re Petersen II*, Dr. DeMarco's April 2005 annual review presents prima facie evidence that Reimer's mental condition and danger to the community continue to satisfy commitment criteria.⁵ In the form of a sworn declaration, Dr. DeMarco states her opinions to a reasonable degree of psychological certainty that Mr. Reimer continues to meet the definition of a sexually violent predator and that his placement in a less restrictive alternative would neither be in Mr. Reimer's best interests nor adequate to protect the community. CP at 38. In her 35- page report, which is based on prior and current observations of Reimer, Dr. DeMarco explains her reasoning. CP at 1-38.

In *In re Petersen I*, this 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

⁵ By statute, each predator is entitled to "a current examination of his or her mental condition." RCW 71.09.070. These annual review reports examine whether treatment or other factors have eliminated or changed the respondent's mental abnormality and personality disorder. As noted in *Young*, "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." 122 Wn.2d at 39 (emphasis added). See also *In re Rogers*, 117 Wn. App. 270, 272, 71 P.3d 220 (2003) ("A person civilly committed under the sexually violent predator statute is entitled to an annual review of his or her mental condition").

commitment having to be justified beyond a reasonable doubt *annually* at evidentiary hearings where the State bears the burden of proof.” 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 (emphasis added). Because the treatment needs of the sexually violent predator population are long-term and the mental conditions are chronic, “the statute contemplates a prolonged period of treatment.” *Id.* at 78.

Mr. Reimer argues that under *Foucha v. Louisiana*, the State has not met its burden to show both a current mental illness and dangerousness. *See Foucha v. Louisiana*, 504 U.S. 71, 112 S. Ct. 1780 (1992). The State carried its burden of proof at the annual review to justify continued confinement by presenting prima facie evidence through Dr. DeMarco’s report that Mr. Reimer currently suffers from Sexual Sadism, Paraphilia Not Otherwise Specified (NOS) (Nonconsent), Pedophilia, Sexually Attracted to Both, Nonexclusive Type (Rule Out), Alcohol Abuse in Remission in a Controlled Environment, and Antisocial Personality Disorder. CP 31-35. Furthermore, Dr. DeMarco noted that he was in the high risk category to reoffend considering the actuarial tools and dynamic risk factors commonly used in SVP evaluations. CP 35-37. She noted Mr. Reimer’s “combination of mental abnormalities and personality disorder, in addition to his abuse of alcohol, impairs Mr. Reimer’s ability to control his behavior and places him at high risk

for sexually violent offenses in the absence of any therapeutic or other intervention.” CP at 37. Under the *Foucha v. Louisiana* holding, “continued confinement” is permissible following such a showing of “mental illness and dangerous.” *Young*, 122 Wn.2d at 36-37 (discussing *Foucha* holding with regard to RCW 71.09). The State has made this showing.

b. Mr. Reimer Did Not Present Evidence Establishing Probable Cause To Believe His Condition Has “So Changed” Under Amended RCW 71.09.090.

Mr. Reimer’s request for a new commitment trial fails under amended RCW 71.09.090.⁶ In applying the criteria of RCW 71.09.090(4), it is more important to examine what Dr. Coleman *fails* to say than to fully understand what he in fact *says*. The statute allows a new trial only where there is “a *substantial change* in the person’s physical or mental condition.” RCW 71.09.090(4)(a). The “substantial change” required by the statute is limited to “an identified physiological change in the person, such as paralysis, stroke, or dementia . . .” or “a change in the person’s mental condition brought about through

⁶ The Washington Supreme Court recently ruled in *In re the Detention of Elmore*, 168 P.3d 1285 (Wash. 2007), that although the 2005 amendments cannot apply retroactively, it noted that the triggering event for application of the amended statute is the “initial probable cause determination,” or the show cause hearing. *Id.* at 1289 n. 7. Because the 2005 amendments went into effect prior to Mr. Reimer’s January 20, 2006 show cause hearing, the amendments applied to his hearing.

positive response to continuing participation in treatment.”
RCW 71.09.090(4)(b).

Although Dr. Coleman complains about Dr. DeMarco’s methods of risk assessment—indeed, he complains about all methods of risk assessment that have been used on Mr. Reimer—nowhere does he address the relevant statutory criteria. Certainly, there is no claim that Reimer has suffered “an identified physiological change in the person, such as paralysis, stroke, or dementia. . .” Indeed, there is no suggestion anywhere in Dr. Coleman’s report that Mr. Reimer’s medical condition renders him “unable to commit a sexually violent act.”
RCW 71.09.090(4).

Nor does Dr. Coleman’s declaration meet the “change through treatment” prong of RCW 71.09.090(4). While the word “treatment” appears frequently in Dr. Coleman’s declaration, he does not claim a change in Reimer’s mental condition due to treatment. Rather, he admiringly refers to Mr. Reimer’s longstanding refusal to participate in treatment as “sincere and principled,” going on to say that “*there is absolutely no basis for making*” any link between participation in treatment and future recidivism.” CP at 175. Instead, Dr. Coleman argues that Mr. Reimer’s participation in compiling a “detailed and useful compendium” of “SVP related written material” “is more likely to be a genuine indicator of personal reform than participation in SVP treatment programs.” CP at 175. Should the reader be puzzled as to any plausible link between a reduced risk of sexually violent recidivism and the

compiling of materials critical of the SVP process, one need only refer to Dr. Coleman's first report, where he expands on this theory:

The fact is that other things Mr. Reimer has been doing, such as taking a leading role in questioning SVP programs, could just as likely indicate significant personal reform. Why haven't any evaluators created a profile of an individual who engages in socially relevant advocacy, thereby increasing self-esteem, while lowering the tendency to act-out in socially unacceptable ways? Is there any reason such advocacy might not amount to a sort of "treatment program?" [sic] Such possibilities are, of course, anathema to mental health professionals because their self-importance might be challenged, but this should not be reason to exclude such possibilities from the Court's analysis.

CP at __ (Memorandum Regarding Continued Annual Review Hearing, attachment page 4, March 13, 2003).

It is unclear why Dr. Coleman would believe that Mr. Reimer was ever in need of personal reform at all, in light of the fact that he believes that he never suffered from a mental disorder in the first place: Rejecting Dr. Dreiblatt's original diagnosis of Paraphilia, Sexual Sadism, Dr. Coleman insists that "this label...is in no way a separate finding or an expert conclusion; it is simply a restatement of Mr. Reimer's crimes and as such should not be considered as support for SVP status." CP at __ (Memorandum Regarding Continued Annual Review Hearing, attachment page 2, March 13, 2003). Continuing, Dr. Coleman states that "the psychiatric community, via the APA, is clearly on record that mental health professionals have no special insights into the issue of volitional control, I conclude that Dr. Dreiblatt's completely unsupported opinion on this matter is simply in the service of satisfying the legal requirement

for SVP status.” CP at ___ (Memorandum Regarding Continued Annual Review Hearing, attachment page 2, March 13, 2003). He then goes on to state that every subsequent evaluation/diagnosis (including one made by Dr. Trowbridge, retained by Mr. Reimer’s counsel on Mr. Reimer’s behalf) was without basis, and was simply a re-statement of his behavior, that staff at SCC focuses on Reimer’s behavior at the SCC and refusal to participate in treatment rather than his actual risk to reoffend; and, finally, that both actuarial and clinical methods are entirely unreliable and are of no use in predicting reoffense. CP at ___ (Memorandum Regarding Continued Annual Review Hearing, attachment, March 13, 2003). He then sums up his views, stating, “In conclusion, the methods used by prior evaluators all suffer from flaws that stem from the fact that they are searching for a mental disorder that doesn’t exist, since it was invented by state legislators; trying to make predictions that are beyond the special skills of mental health professionals; and relying on tools that are flawed and misleading.” *Id.* at attachment page 7.

Dr. Coleman is essentially attempting to re-hash arguments rejected first by our State Supreme Court in *In re Young*, 122 Wn. 2d 1. 857 P.2d 989 (1993) and then again by the United States Supreme Court in *Kansas v. Hendricks*, 521 U.S. 346, 117 S. Ct. 2072, 138 L. Ed. 2d 501(1997). Again, his reports are a thinly disguised attempt at a collateral attack on his initial commitment and are based on his fundamental disagreement with the statutory criteria that form the basis of Mr. Reimer’s commitment. The legislative findings for the

amendments to RCW 71.09.090 specifically address such an approach, stating that “[t]hese 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.” Laws of 2005, ch. 344, § 1

Whatever his beliefs regarding the need for persons adjudicated as sexually violent predators to participate in treatment, the legislature has made abundantly clear that treatment, in the absence of an incapacitating physical condition, is a precondition for release. Dr. Coleman’s report does not address any of the relevant statutory criteria for release and as such, the report cannot support a new trial.

Mr. Reimer attempts to further his argument by comparing Dr. Coleman’s conclusions to those found sufficient to establish probable cause in *In re Detention of Young*, 120 Wn. App. 753, 86 P.3d 810 (2004) and *In re Detention of Ward*, 125 Wn. App. 381, 104 P.3d 747 (2005). In *Young*, the Court of Appeals considered the case of 61-year-old Andre Brigham Young, who had been committed as a Sexually Violent Predator 12 years earlier. In support of his request for a new trial, Mr. Young presented the declaration of Dr. Howard Barbaree, a professor in the Psychiatry Department at the University of Toronto who had authored 22 book chapters and over 50 peer-reviewed journal articles

about the assessment, diagnosis and supervision of sex offenders. *Young*, 120 Wn. App. 753, 762, n.13. Pointing to documents and procedures that were “of a kind reasonably relied on by psychologists completing forensic evaluations,” Dr. Barbaree determined that, by age 60, “the recidivism rate falls to zero percent.” *Id.* at 761. In assessing his qualifications and the quality of the data upon which he relied, the court noted:

Dr. Barbaree is a qualified expert in applying actuarial risk analysis and studies on age and recidivism, and his opinions and analyses are endorsed in other experts’ scientific literature. He personally reviewed and evaluated *Young*, reviewed all relevant file materials from the last 12 years, and conducted the Static 99 and age adjustment actuarial analysis. We recognize that it is undisputed among sex offender experts that age is an important factor in determining risk, of reoffense, particularly for rapists.

The court also took issue with the State’s assertion that Dr. Barbaree’s actuarial age study implicitly suggested that *Young* was never an SVP at all, noting that “Dr. Barbaree did not state that *Young* was never an SVP. Nor does he state that he would have rendered that opinion in 1991. Rather, he presumes *Young* was an SVP in 1991 and clearly states in his report that *Young no longer* meets that definition because of his advanced age.” *Id.* at 762. *Young*’s was a case in which “current risk assessment techniques suggest *Young* is not currently an SVP” *Id.* at 763 (emphasis added). Dr. Barbaree’s report then

indicated that Mr. Young's condition had indeed changed since his initial commitment.

Bradley Ward had been committed to DSHS as an SVP in 1991, after having stipulated to commitment. Twelve years later, having never had a trial on the merits of the State's petition, he petitioned for release under RCW 71.09.090. His expert, Dr. Richard Wollert, submitted a report concluding that he was no longer an SVP. He backed up that conclusion with a 50-page report including, "detailed facts regarding Ward's history of sexual violence and treatment, diagnostic tests, and scientific literature." *Ward*, 125 Wn. App. At 387. Like Dr. Barbaree in *Young*, Dr. Wollert noted that previous examinations of Ward had been flawed because they were not based on actuarial tests. *Id.* at 388. He also noted that those prior examinations had not taken into account Mr. Ward's brain injury, which he indicated "created a tendency for him to confabulate and exaggerate the stories about his [sexual] conduct." *Id.* Finally, he assigned Mr. Ward a diagnosis of "dementia due to a general medical condition," "based on testing, interviews with Ward, and current diagnostic practices using 'DSM-IV-TR' decision trees." *Id.* at 388.

Young and *Ward* are inapposite. Dr. Coleman's disagreement with Mr. Reimer's commitment diagnosis does not establish a change in Mr. Reimer's condition and most certainly does not rely upon "new

research” or recently improved diagnostic procedures. Dr. Coleman, in contrast, rather than applying current diagnostic techniques, or any diagnostic techniques at all, simply rejects the entire SVP law and the mental conditions identified by the legislature. Although he criticizes all methods of risk assessment that have ever been used on Mr. Reimer, nowhere does he indicate that Mr. Reimer’s condition “has so changed” that he no longer meets the definition of an SVP. RCW 71.09.090(2)(a)(i). His reports constitute an attempt at a collateral attack on Mr. Reimer’s initial commitment and are based on his fundamental disagreement with the statutory criteria that form the basis of Mr. Reimer’s commitment. Whatever Dr. Coleman may personally believe about the legitimacy of the SVP statute, it is the law in this state. On its face, therefore, his evaluation is insufficient to establish probable cause to believe Mr. Reimer’s condition has changed.

B. Even if RCW 71.09.090 Had Not Been Amended in 2005, Mr. Reimer Still Failed to Set Forth Evidence Warranting a New Trial.

Even if the 2005 amendments had not occurred, Mr. Reimer failed to present evidence warranting a new trial. As such, this Court should affirm the trial court’s ruling. To find otherwise would be inconsistent with the statute and principles of finality to allow a recommitment trial based solely on a defense expert’s disagreement with the commitment basis.

Under the same analysis as set out in section A(6)(a), the State met its prima facie constitutional burden even under former RCW 71.09.090 with Dr. DeMarco's report. Additionally, under former RCW 71.09.090(2), Mr. Reimer cannot satisfy the statutory recommitment criteria through reference to Dr. Coleman's report. Even before the 2005 amendments to RCW 71.09.090, the statute required a showing by respondents that their "condition has so changed." Former RCW 71.09.090(2). The "so changed" statutory language clearly focuses the annual review inquiry on a change in the person's mental condition. It would render the statute meaningless if Mr. Reimer could establish he had "so changed" by presenting an evaluation that merely disagrees with the commitment and annual review diagnoses. "General rules of statutory construction instruct that: . . . unlikely, absurd or strained results are to be avoided." *Draper Machine Works v. DNR*, 117 Wn.2d 306, 315, 815 P.2d 770 (1991). Mr. Reimer cannot obtain a new commitment trial in this manner.

Dr. Coleman claims that Mr. Reimer cannot be diagnosed with a mental abnormality and, alternatively, if he does have a mental abnormality then it cannot be used as a predictive tool to determine his likelihood to reoffend. Dr. Coleman then proceeds to criticize the SCC regarding their drafting of annual reviews and their opinion that Mr. Reimer's failure to participate in treatment makes his recidivism risk higher. Quite simply, Dr. Coleman's report is void of any details specific to Mr. Reimer's possible change in condition. Dr. Coleman's opinion

that Mr. Reimer never suffered from a mental abnormality and his opinion of the SCC's annual review practice is of no legal relevance to the question of whether Mr. Reimer's condition has "so changed."

If Mr. Reimer can establish probable cause that his condition has "so changed" merely by submitting a new evaluation stating that he does not, and never did, have a mental abnormality, then Dr. Coleman's evaluation would have been sufficient to establish probable cause on *the day after Mr. Reimer was committed*. There also would be no need for appeals or collateral attacks. There would be no finality to the commitment decision and no such thing as "indefinite" commitment. A commitment order, whether by stipulation, bench, or jury determination, could be easily set aside by finding a defense expert who disagrees with the commitment diagnosis.

His reports constitute an attempt at a collateral attack on Mr. Reimer's initial commitment and are based on his fundamental disagreement with the statutory criteria that form the basis of Mr. Reimer's commitment. Whatever Dr. Coleman may personally believe about the legitimacy of the SVP statute, it is the law in this state. On its face, therefore, his evaluation is insufficient to establish probable cause

to believe Mr. Reimer's condition has changed under former RCW 71.09.090.

CONCLUSION

For the foregoing reasons, the State requests that this Court affirm the trial court's order denying Mr. Reimer's request for a new trial. Furthermore, the State requests that this Court find that the 2005 amendments to RCW 71.09.090 constitutional as enacted, that they should have been applied to Mr. Reimer, and reverse the trial court's ruling on the issue.

RESPECTFULLY SUBMITTED this 28th day of December, 2007.


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COURT OF APPEALS
07 DEC 2007
STATE
BY
0010
WASHINGTON STATE COURT OF APPEALS, DIVISION II

In re the Detention of:

JOEL REIMER,

Respondent.

DECLARATION OF
SERVICE

I, Elizabeth Jackson, declare as follows:

On this 20th day of December, 2007, I deposited in the United States mail a true and correct copy of Respondent's Brief, postage affixed, addressed as follows:

Darrel Ammons
1315 14th Avenue
Longview, WA 98632

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

DATED this 20th day of December, 2007, at Seattle, Washington.


ELIZABETH JACKSON