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Court of Appeals No. 39490-1-II
Clark County No. 99-2-02774-8

IN RE THE DETENTION OF KEITH ELMORE,
Appellant.

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

I. THE STATE FAILED TO MEET ITS BURDEN TO PROVE THAT MR. ELMORE CONTINUES TO MEET THE DEFINITION OF AN SVP.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

I. THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT RESPONDENT ELMORE CONTINUES TO MEET THE DEFINITION OF A PERSON WHO SHOULD BE INDEFINITELY COMMITTED UNDER RCW 71.09 BECAUSE IT FAILED TO PROVE THAT RESPONDENT ELMORE IS CURRENTLY DANGEROUS.

C. STATEMENT OF THE CASE

i. Background

In October 1994, Respondent Elmore pleaded guilty to kidnapping and assault in the second degree with sexual motivation. *In re Detention of Elmore*, 162 Wn.2d 27, 30, 168 P.3d 1285 (2007). During the offense, Mr. Elmore lured Lolene Clark to his apartment, placed a rope around her neck and told her to remove her clothes. CP 92. She refused. CP 92. Ms. Clark escaped after Mr. Elmore removed the rope from her neck. CP 92. Mr. Elmore waited at his apartment and was arrested without incident. CP 92. In 2001, Mr. Elmore stipulated to that he was a sexually violent predator who should be indefinitely committed. *Elmore* at 31.

On January 12, 2009 a four day non-jury trial commenced, pursuant to RCW 71.09.090 (3) (b) in which the trial court was asked to

determine whether Mr. Elmore should be unconditionally discharged.

Report of Proceedings.

ii. Trial Testimony

Dr. Robert Wheeler testified that he evaluated Mr. Elmore in 1999 for the purpose of determining whether he met the definition of an SVP. RP I, p. 36. Mr. Wheeler diagnosed Mr. Elmore with sexual sadism, the mental abnormality upon which the State relies to justify Respondent Elmore's indefinite incarceration. RP I, p. 41, 120, 138. Dr. Wheeler made this diagnosis in 1999 and had no information or opinion to offer on Mr. Elmore's mental condition after that date. RP I, p. 167. Dr. Wheeler's diagnosis of sexual sadism rested on information provided to him by Mr. Elmore, namely that Mr. Elmore had begun fantasizing during his teenage years about killing and then consuming a woman. RP I, p. 48-49. Dr. Wheeler testified that Mr. Elmore told him that his original plan in luring Ms. Clark to his apartment was to strangle, dismember, and eventually consume her. RP I, p. 49-52. Mr. Elmore also told Dr. Wheeler that he fantasized about killing his wife, and that he had procured a large knife which he kept in his dresser drawer so that it would be available to him should he decide to act on his fantasy. RP I, p. 78. At the time Dr. Wheeler interviewed Mr. Elmore in 1999, Mr. Elmore had not had this "consuming" fantasy for approximately one year. RP I, p. 60.

Dr. Richards of the Special Commitment Center evaluated Mr. Elmore in late 2003 to early 2004. RP II-A, p. 195. Dr. Richards is not a sex offender treatment provider and has never treated Mr. Elmore. RP II-A, p. 262. Dr. Richards testified that Mr. Elmore is in Phase three of the treatment phases at the SCC, of which there are six. RP II-A, p. 240-41, 246. The majority of the residents of the SCC are in Phase three. RP II-A, p. 256. There are three management units at the SCC where offenders live. There is a high maintenance unit for high maintenance residents, a medium maintenance unit for residents who need a moderate level of control (this is where most residents live), and a low maintenance unit for residents who have “good control over their behavior and who require less staff oversight.” RP II-A, p. 257. The residents in the low maintenance unit are residents the staff members trust, and the building has windows that open such that people can enter and leave through the window. RP II-A, p. 257-58. According to Dr. Richards, the doors are routinely left open. RP II-A, p. 258. The building is set up so that the staff cannot see all parts of the building. RP II-A, p. 258. Residents can engage in improper conduct outside the view of the staff. *Id.* Mr. Elmore lives in the low maintenance unit, and had been living there for two years at the time of trial. RP II-A, p. 257. Dr. Richards testified that as the secretary designee for DSHS, he would not support a petition for unconditional release based

on the annual reviews he had read about Mr. Elmore. RP II-A, p. 243. He testified that based on his review of the most recent annual report authored by Dr. McGonagle, and having not interviewed Mr. Elmore himself, he was of the opinion that Mr. Elmore still met the definition of a sexually violent predator. RP II-A, p. 242.

Dr. Amy Phenix was retained by the State to evaluate Mr. Elmore by reviewing his records and conducting a face-to-face interview. RP II-B, p. 301. Dr. Phenix is a licensed clinical psychologist who specializes in evaluating sex offenders for involuntary commitment. RP II-B, p. 295-96. She practices in several states. *Id.* at 295. Most of the evaluations she conducts in Washington result in her recommending commitment. RP II-B, p. 300. After reviewing Mr. Elmore's records and conducting an interview she opined that he suffered from two mental abnormalities: Sexual sadism and personality disorder not otherwise specified (NOS). RP II-B, p. 311. Sexual sadism is a paraphilia. RP II-B, p. 319.

The evidence Dr. Phenix cited to support her diagnosis of sexual sadism was that Mr. Elmore used to have pervasive fantasies, beginning when he was about thirteen, about strangling or killing a woman, dismembering her and consuming her. RP II-B, p. 323. The last time which he was known to have these fantasies was 2000. RP II-B, p. 324. Dr. Phenix parroted much of what was contained in Dr. Wheeler's report,

namely that Mr. Elmore became aroused by the fantasy of instilling fear in his victim and dominating her, and killing and dismembering her, and that he was having these sadistic fantasies 75 to 80% of the time prior to committing the index offense. RP II-B, p. 324. This information, which was obtained back in 1999 per Dr. Wheeler, was cited by Dr. Phenix as overwhelming evidence that Mr. Elmore currently suffers from sexual sadism. RP II-B, p. 325. She also cited two incidents in which Mr. Elmore acted on this fantasy to some degree, the first being when he attempted to strangle his wife in 1993 (he released her but became aroused during the act) and the second being the index offense against Ms. Clark in 1994¹. RP II-B, p. 326-27. Sexual sadism is a paraphilia that is essentially incurable, according to the testimony of Dr. Phenix. RP II-B, p. 340. Because it is chronic and incurable, Dr. Phenix regarded that as further evidence that Mr. Elmore continues to suffer from sexual sadism. RP II-B, p. 339-40. Regarding Mr. Elmore's volitional control, Dr. Phenix opined that sexual sadism impairs Mr. Elmore's volitional control because he has acted on his fantasies, again citing to the incident with his wife in 1993 and his crime against Lolene Clark in 1994. RP II-B, p. 334-35. She concluded "So what we can see is in the free community when he

¹ Mr. Elmore was never charged in the incident involving his wife.

had access to victims that he had very, very poor volitional controls.” RP II-B, p. 335.

Dr. Phenix opined that Mr. Elmore was more likely than not to commit a future sexually violent act. RP II-B, p. 371. Dr. Phenix refused to utilize any recognized actuarial instruments, such as the Static-99 or the MINOST-R to try and predict Mr. Elmore’s risk of future offense. RP II-B, p. 371-83. Instead, Dr. Phenix used an unpublished instrument called the Stable 2007, which purports to utilize “dynamic risk factors,” to assess Mr. Elmore’s risk of future offense. RP II-B, p. 385. This instrument is not published and was developed using offenders on community supervision. RP II-B, p. 389-90.

Dr. Phenix testified that in her opinion, based on the notes in the records, Mr. Elmore had low motivation for treatment and had failed to adequately journal his sexual fantasies. RP III-A, p. 425-427. She also testified that Mr. Elmore needed to be confined at the SCC because his period of community supervision for the index offense is not long enough. RP III-A, p. 442-44.

Dr. Richard Wollert testified on behalf of Mr. Elmore. RP III-B, p. 607. Dr. Wollert is a licensed clinical psychologist and certified sex offender treatment provider. RP III-B, p. 609. He has done numerous evaluations to determine whether someone qualifies as an SVP. RP III-B,

p. 610. Dr. Wollert has been involved in Mr. Elmore's case since 2000 and has interviewed him several times, as well as reviewed Mr. Elmore's treatment and DOC records. RP III-B, p. 614-18. Dr. Wollert has spent approximately twenty hours interviewing Mr. Elmore. RP III-B, p. 619.

In Dr. Wollert's opinion, Mr. Elmore does not meet the definition of an SVP to a reasonable degree of psychological certainty. RP III-B, p. 620. Dr. Wollert testified that Mr. Elmore is not a sexual sadist, and that furthermore, diagnoses of sexual sadism are incorrect 80% of the time. RP IV-A, p. 748, 776, 787-88, 791. Dr. Wollert testified that personality disorder and gender identity disorder has absolutely no relevance to the diagnosis of SVP or to the risk of recidivism. RP IV-A, p. 792-96. The research on sexual sadism has developed substantially since Mr. Elmore stipulated to indefinite confinement under 71.09 back in 2001. RP IV-A, p. 797. Dr. Wollert testified that Mr. Elmore is the only person he has ever encountered at the SCC with only one conviction. RP IV-A, p. 804. Dr. Wollert criticized Dr. Phenix's opinion on Mr. Elmore's purported volitional impairment, noting that the factors she looked at are not distinguishable from regular criminal recidivists. RP IV-A, p. 804. Specifically, lack of empathy, knowledge of legal sanctions, and knowledge that the behavior is socially unacceptable are traits exhibited by all persons in the sane criminal class. RP IV-A, p. 814.

Dr. Wollert scored Mr. Elmore's future risk of reoffense using the Static-99 with 2006 Experience Table, and found that he has a 5% chance of reoffending according to that actuarial. RP IV-A, p. 825, 830. The Static-99 is an actuarial tool that is regularly used and recognized in the psychological community. RP IV-A, p. 825-26. Dr. Wollert testified that the Stable 2007 has no relevance to Mr. Elmore's case because it is based on offenders who live in the community. RP IV-A, p. 871.

The Court entered the following findings of fact and conclusions of law to which Mr. Elmore assigns error:

Findings of Fact:

8. Having compared the testimony of Drs. Phenix and Wollert, the Court concludes that Respondent suffers from Sexual Sadism, a condition that is chronic and long term, as well as Personality Disorder, Not Otherwise Specified (NOS), with Borderline and Dependent features.

13. The Court, in weighing the evidence provided by the experts, finds the State's evidence more persuasive than [sic] that evidence presented by the Respondent on the issues of diagnosis, loss of volitional control, and the likelihood of recidivism, the effect of advancing age and as to whether Respondent's condition has "so changed" since the original commitment.

14. Specifically, on the issue of predictability of future re-offenses, while the Court recognizes that the actuarial method of prediction is admissible in Washington Courts, this Court, upon review of the evidence in this case, gives little or no insight to the actuarial data, for the reasons set forth in this Court's ruling on January 27, 2009.

Conclusions of Law:

4. The Respondent suffers from a mental abnormality as that term is defined in RCW 71.09.020 (8), namely sexual sadism.

6. The Respondent's Sexual Sadism and Personality Disorder NOS with Borderline and Dependent features cause him serious difficulty controlling his sexually violent behavior.

7. The combination of the following is sufficient to conclude that the Respondent's mental disorders cause him serious difficulty controlling his sexually violent behavior: Respondent's Sexual Sadism, Personality Disorder NOS with Borderline and Dependent features, the Respondent's prior sexually violent behavior, and the testimony of Dr. Phenix linking the Respondent's mental disorders to a serious difficulty controlling his behavior.

8. The Respondent's mental abnormality and personality disorder make him likely to engage in predatory acts of sexual violence unless he remains confined to a secure facility.

9. The evidence presented at the Respondent's trial proves beyond a reasonable doubt that the Respondent continues to be a sexually violent predator, as that term is defined by RCW 71.09.020 (16), and that this condition has not so changed that he is no longer a sexually violent predator.

CP 114-119.

The trial court held that Mr. Elmore continues to be a sexually violent predator as defined in RCW 71.09.020 (16). CP 118. The trial court ordered that Mr. Elmore remain committed to the custody of DSHS in a secure facility indefinitely. CP 118. This timely appeal followed. CP 90.

D. ARGUMENT

I. THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT RESPONDENT ELMORE CONTINUES TO MEET THE DEFINITION OF A PERSON WHO SHOULD BE INDEFINITELY COMMITTED UNDER RCW 71.09 BECAUSE IT FAILED TO PROVE THAT RESPONDENT ELMORE IS CURRENTLY DANGEROUS.

The Fourteenth Amendment provides that no state "shall deprive any person of life, liberty, or property without due process of law." U.S. Const. Amend. XIV. A statute that infringes a fundamental right—such as freedom from restraint—is constitutional only if it furthers a compelling state interest and is narrowly tailored to further that interest. *In re*

Albrecht, 147 Wn.2d 1, 7, 51 P.3d 73 (2002). A statute is narrowly drawn only if it is the least restrictive means of protecting the government interest. See, e.g., *Ariz. Right to Life PAC v. Bayless*, 320 F.3d 1002, 1011 (9th Cir. Ariz. 2003). As the U.S. Supreme Court has explained, “[t]he term ‘narrowly tailored’ so frequently used in our cases... may be used to require consideration of whether lawful alternative and less restrictive means could have been used.” *Wygant v. Jackson Bd. of Education*, 476 U.S. 267, 280 n. 6, 106 S. Ct. 3320, 92 L. Ed. 2d 728 (1986).

Freedom from bodily restraint is a fundamental and core liberty interest protected by the due process clause of the Fourteenth Amendment to the United States Constitution. *In re Detention of Thorell*, 149 Wn.2d 724, 732, 72 P.3d 708 (2003); U.S. Const. Amend. 14. Commitment for any reason constitutes a significant deprivation of liberty triggering due process protection. *Foucha v. Louisiana*, 504 U.S. 71, 80, 112 S. Ct. 1780, 118 L. Ed. 2d 434 (1992).

Involuntary civil commitment is a “massive curtailment of liberty.” *In re Harris*, 98 Wn.2d 276, 279, 654 P.2d 109 (1982) (quoting *Humphrey v. Cady*, 405 U.S. 504, 509, 92 S.Ct. 1048, 31 L.Ed.2d 394 (1972)). Because the civil commitment statute interferes with a fundamental right, it must be narrowly tailored to achieve a compelling government purpose. *Albrecht, supra*. The Supreme Court has held that civil commitment

violates due process unless it is based on proof that the individual is both mentally ill and dangerous. *Albrecht* at 7. To satisfy due process, commitment is allowed only when the state establishes that an individual is currently dangerous; “[c]urrent dangerousness is a bedrock principle underlying the SVP commitment statute.” *In re Detention of Paschke*, 121 Wn.App. 614, 622, 90 P.3d 74 (2008); see also *Albrecht*, at 7; *In re Detention of Marshall*, 156 Wn.2d 150, 157, 125 P.3d 113 (2005).

RCW 71.09 does not explicitly require proof of current dangerousness.

However, the statute is constitutional because:

the “more probably than not” standard in RCW 71.09.020(7) includes a temporal component. For example, if an expert predicts that an alleged SVP will reoffend only in the far distant future, then there is less likelihood that the “more probable than not” standard has been legally satisfied. Whether that standard is satisfied depends on the facts underlying the SVP petition and the expert testimony. It also may depend on the statistical likelihood of reoffending. By properly finding a person to be an SVP, it is implied that the person is currently dangerous.

In re Detention of Moore, 167 Wn.2d 113, 124-25, 216 P.3d 1015 (2009) (footnote omitted).

The Supreme Court’s holding in *Moore* is curious. A review of RCW 71.01.020 (7) reveals no such “temporal component.” RCW

71.09.020 (7) states:

“Likely to engage in predatory acts of sexual violence if not confined in a secure facility” means that the person more probably than not will engage in such acts if released unconditionally from

detention on the sexually violent predator petition. Such likelihood must be evidenced by a recent overt act if the person is not totally confined at the time the petition is filed under RCW 71.09.030.

The Supreme Court appeared to reason, in a circular fashion, that current dangerous is necessarily established whenever the State proves a respondent is an “SVP,” however one cannot be deemed an “SVP” unless the State proves beyond a reasonable doubt that he more probably than not will engage in such [predatory acts of sexual violence] at some unfixed point in the future.

Despite the odd and somewhat truncated reasoning offered in *Moore*, the Supreme Court nevertheless maintained that due process requires proof that a respondent is currently dangerous before he can be committed, or continue to be committed, under RCW 71.09. Here, the State offered insufficient proof that Respondent Elmore is currently dangerous.

In a trial to determine whether a person committed indefinitely pursuant to RCW 71.09 should be unconditionally released pursuant to RCW 71.09.090 (3) (b), the State must prove beyond a reasonable doubt that the committed person’s condition remains such that the person continues to meet the definition of a sexually violent predator. Per RCW 71.09.020 (16), a person is a sexually violent predator when he has been convicted or charged with a crime of sexual violence and he suffers from a

mental abnormality or personality disorder which makes him likely to engage in predatory acts of sexual violence if not confined in a secure facility. Per RCW 71.09.020 (9), a “predatory” act means an act directed towards: (a) Strangers; (b) individuals with whom a relationship has been established or promoted for the primary purpose of victimization; or (c) persons of casual acquaintance with whom no substantial personal relationship exists. Per RCW 71.09.020 (7), “Likely to engage in predatory acts of sexual violence if not confined in a secure facility” means that the person more probably than not will engage in such acts if released unconditionally from detention on the sexually violent predator petition. Such likelihood must be evidenced by a recent overt act if the person is not totally confined at the time the petition is filed under RCW 71.09.030. Per RCW 71.09.020 (8), a mental abnormality means a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to the commission of criminal sexual acts in a degree constituting such person a menace to the health and safety of others.

The criminal standard of review of questions such as sufficiency of the evidence applies in civil commitment proceedings under RCW 71.09. *Thorell* at 744. Due process requires the State to prove that a person is both mentally ill and that illness causes the person to be presently

dangerous before civilly committing him or her. *In re Detention of Young*, 122 Wn.2d 1, 27, 857 P.2d 989 (1993), citing *Addington v. Texas*, 441 U.S. 418, 99 S.Ct. 1804 (1979); see also *Foucha* at 80; *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068 (1970).

Here, the State's evidence of Mr. Elmore's supposed current dangerousness consisted almost exclusively of things Mr. Elmore did or thought between 1993 and 2001. Dr. Phenix's testimony was largely a regurgitation of information contained in Dr. Robert Wheeler's report. Despite several hundred pages of transcript testimony, her opinion that Mr. Elmore is a sexual sadist was based primarily on fantasies Mr. Elmore has not been known to have since 2001, combined with her view that sexual sadism is incurable and essentially untreatable. Based on Dr. Phenix's testimony, it is unlikely she would ever opine that Mr. Elmore is not an SVP because she doesn't believe sexual sadism can be overcome. Likewise, in circular fashion, Dr. Phenix believes that Mr. Elmore lacks emotional and volitional control because he is a sexual sadist who committed an underlying crime of sexual violence. In other words, two of the elements the State was required to prove in order to have Mr. Elmore committed as an SVP, namely that Mr. Elmore suffers from a mental abnormality (in this case, sexual sadism) and that he had a prior conviction

for a crime of sexual violence, are two elements that Dr. Phenix believes renders Mr. Elmore incapable of volitional control.

Dr. Phenix's opinion about Mr. Elmore's impaired volitional control is not supported by the evidence. Dr. Wheeler testified that Mr. Elmore has volitional control and that his sadistic fantasies had diminished over time (RP I, p. 127, 134). The last time Mr. Elmore, whose candor (particularly to Dr. Wheeler) evidently knows no bounds, reported having sadistic fantasies was 2001.² Dr. Richards testified that Mr. Elmore is living in the low management unit, in which he could walk out the door at any time and act on his supposed fantasies. Further, he could have acted out his fantasies on any number of the other residents in light of the freedom and privacy he is evidently afforded in the low management unit. The trial was largely an indictment of Mr. Elmore's treatment progress with regard to journaling his thoughts and his motivation, neither of which was at issue in this proceeding. Contrary to the State's characterization of what the purpose of this trial was, the sole question to be decided by the court was whether the State proved beyond a reasonable doubt that Mr. Elmore's condition remains such that he continues to meet the definition of a sexually violent predator, not whether he pleased had met the

² With the exception of the statements made by Mr. Elmore to his former wife, the State's entire body of evidence about his mental illness and purported sexual sadism comes exclusively from the mouth of Mr. Elmore.

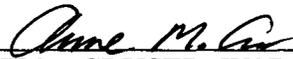
subjective expectations of his treatment providers at the SCC (none of whom, curiously, were called by the State to testify at this trial).

The State proved insufficient evidence of Mr. Elmore's *current* dangerousness, and as such presented insufficient evidence that he continues to meet the definition of an SVP. The order of continued commitment entered by the trial court (CP 118) should be reversed and this case remanded for Mr. Elmore to be unconditionally released.

E. CONCLUSION

The order of continued commitment entered by the trial court (CP 118) should be reversed and this case remanded for Mr. Elmore to be unconditionally released.

RESPECTFULLY SUBMITTED this 20th day of January, 2010.



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APPENDIX

1. RCW 71.09.020

Unless the context clearly requires otherwise, the definitions in this section apply throughout this chapter.

- (1) "Department" means the department of social and health services.
- (2) "Health care facility" means any hospital, hospice care center, licensed or certified health care facility, health maintenance organization regulated under chapter 48.46 RCW, federally qualified health maintenance organization, federally approved renal dialysis center or facility, or federally approved blood bank.
- (3) "Health care practitioner" means an individual or firm licensed or certified to engage actively in a regulated health profession.
- (4) "Health care services" means those services provided by health professionals licensed pursuant to RCW 18.120.020(4).
- (5) "Health profession" means those licensed or regulated professions set forth in RCW 18.120.020(4).
- (6) "Less restrictive alternative" means court-ordered treatment in a setting less restrictive than total confinement which satisfies the conditions set forth in RCW 71.09.092. A less restrictive alternative may not include placement in the community protection program as pursuant to RCW 71A.12.230.
- (7) "Likely to engage in predatory acts of sexual violence if not confined in a secure facility" means that the person more probably than not will engage in such acts if released unconditionally from detention on the sexually violent predator petition. Such likelihood must be evidenced by a recent overt act if the person is not totally confined at the time the petition is filed under RCW 71.09.030.
- (8) "Mental abnormality" means a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to the commission of criminal sexual acts in a degree constituting such person a menace to the health and safety of others.
- (9) "Predatory" means acts directed towards: (a) Strangers; (b) individuals with whom a relationship has been established or promoted for the primary purpose of victimization; or (c) persons of casual acquaintance

with whom no substantial personal relationship exists.

(10) "Recent overt act" means any act or threat that has either caused harm of a sexually violent nature or creates a reasonable apprehension of such harm in the mind of an objective person who knows of the history and mental condition of the person engaging in the act.

(11) "Risk potential activity" or "risk potential facility" means an activity or facility that provides a higher incidence of risk to the public from persons conditionally released from the special commitment center. Risk potential activities and facilities include: Public and private schools, school bus stops, licensed day care and licensed preschool facilities, public parks, publicly dedicated trails, sports fields, playgrounds, recreational and community centers, churches, synagogues, temples, mosques, public libraries, public and private youth camps, and others identified by the department following the hearings on a potential site required in RCW **71.09.315**. For purposes of this chapter, "school bus stops" does not include bus stops established primarily for public transit.

(12) "Secretary" means the secretary of social and health services or the secretary's designee.

(13) "Secure facility" means a residential facility for persons civilly confined under the provisions of this chapter that includes security measures sufficient to protect the community. Such facilities include total confinement facilities, secure community transition facilities, and any residence used as a court-ordered placement under RCW **71.09.096**.

(14) "Secure community transition facility" means a residential facility for persons civilly committed and conditionally released to a less restrictive alternative under this chapter. A secure community transition facility has supervision and security, and either provides or ensures the provision of sex offender treatment services. Secure community transition facilities include but are not limited to the facility established pursuant to RCW **71.09.250**(1)(a)(i) and any community-based facilities established under this chapter and operated by the secretary or under contract with the secretary.

(15) "Sexually violent offense" means an act committed on, before, or after July 1, 1990, that is: (a) An act defined in Title **9A** RCW as rape in

the first degree, rape in the second degree by forcible compulsion, rape of a child in the first or second degree, statutory rape in the first or second degree, indecent liberties by forcible compulsion, indecent liberties against a child under age fourteen, incest against a child under age fourteen, or child molestation in the first or second degree; (b) a felony offense in effect at any time prior to July 1, 1990, that is comparable to a sexually violent offense as defined in (a) of this subsection, or any federal or out-of-state conviction for a felony offense that under the laws of this state would be a sexually violent offense as defined in this subsection; (c) an act of murder in the first or second degree, assault in the first or second degree, assault of a child in the first or second degree, kidnapping in the first or second degree, burglary in the first degree, residential burglary, or unlawful imprisonment, which act, either at the time of sentencing for the offense or subsequently during civil commitment proceedings pursuant to this chapter, has been determined beyond a reasonable doubt to have been sexually motivated, as that term is defined in RCW **9.94A.030**; or (d) an act as described in chapter **9A.28** RCW, that is an attempt, criminal solicitation, or criminal conspiracy to commit one of the felonies designated in (a), (b), or (c) of this subsection.

(16) "Sexually violent predator" means any person who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility.

(17) "Total confinement facility" means a secure facility that provides supervision and sex offender treatment services in a total confinement setting. Total confinement facilities include the special commitment center and any similar facility designated as a total confinement facility by the secretary.

2. RCW 71.09.090

(1) If the secretary determines that the person's condition has so changed that either: (a) The person no longer meets the definition of a sexually violent predator; or (b) conditional release to a less restrictive alternative is in the best interest of the person and conditions can be imposed that adequately protect the community, the secretary shall

authorize the person to petition the court for conditional release to a less restrictive alternative or unconditional discharge. The petition shall be filed with the court and served upon the prosecuting agency responsible for the initial commitment. The court, upon receipt of the petition for conditional release to a less restrictive alternative or unconditional discharge, shall within forty-five days order a hearing.

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

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

71.09.070.

The committed person may present responsive affidavits or declarations to

which the state may reply.

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

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

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

(b) If the issue at the hearing is whether the person should be unconditionally discharged, the burden of proof shall be upon the state to prove beyond a reasonable doubt that the committed person's condition remains such that the person continues to meet the definition of a sexually

violent predator. Evidence of the prior commitment trial and disposition is admissible.

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

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

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

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

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

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

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

FILED
BY
JAN 21 2010
CLERK OF COURT
CLARK COUNTY
WASHINGTON

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

IN RE THE DETENTION OF,)
) Court of Appeals No. 39490-1-II
) Clark County No. 99-2-02447-8
)
)
 KEITH ELMORE,)
) AFFIDAVIT OF MAILING
)
)
 Appellant.)
)
)
)
)
)

ANNE M. CRUSER, being sworn on oath, states that on the 20th day of January,
2010 affiant placed a properly stamped envelope in the mails of the United States
addressed to:
Kristie Barham
Office of the Attorney General
800 5th Ave., Suite 2000
Seattle, WA 98104-3188

AND
David C. Ponzoha, Clerk
Court of Appeals, Division II
950 Broadway, Suite 300
Tacoma, WA 98402-4454

AND

Anne M. Cruser
Attorney at Law
P.O. Box 1670
Kalama, WA 98625
Telephone (360) 673-4941
Facsimile (360) 673-4942
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Keith Elmore, A.K.A. Rebecca Elmore
Special Commitment Center
P.O. Box 88600
Steilacoom, WA 98388

and that said envelope contained the following:

- (1) BRIEF OF APPELLANT
- (2) RAP 10.10 (TO ELMORE)
- (3) AFFIDAVIT OF MAILING

Dated this 20th day of January, 2010.


 ANNE M. CRUSER, WSBA #27944
 Attorney for Appellant

I, ANNE M. CRUSER, certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Date and Place: Jan. 20, 2010, Kalama, WA

Signature: Anne M. Cruser