

FILED

JAN 12 2009

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DIVISION III
STATE OF WASHINGTON
By _____

27194-3-III

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OF THE STATE OF WASHINGTON

IN RE DETENTION OF

RONALD D. LOVE

APPEAL FROM THE SUPERIOR COURT

OF FRANKLIN COUNTY

APPELLANT'S BRIEF

Julia A. Dooris
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Seattle, WA 98122
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A. ASSIGNMENTS OF ERROR

1. The Trial court erred by denying Mr. Love's CR 60(b) motion.
2. The Trial court erred by applying the 2005 amendments to RCW 71.09.090.
3. The trial court erred in by denying appellant's CR 60(b) motion that would have provided him an evidentiary hearing on whether he currently met the sexually violent predator criteria.
4. The 2005 amendment to RCW 71.09.090 renders the statute unconstitutional because the amendment violates due process.⁵
4. The 2005 amendment to RCW 71.09.090 renders the statute unconstitutional because the amendment violates the separation of powers doctrine.

B. ISSUES

1. Did the trial court err by denying Mr. Love's CR 60(b) motion when Mr. Love presented evidence within a reasonable amount of time, that was newly discovered

advances in the science of psychiatry related to diagnosing methods of paraphelia and the analysis of recidivism rates?

2. Did the trial court err by finding that the triggering date for the 2005 amendments was Mr. Love's most recent evaluation by the State, instead of his initial probable cause determination in 2001?
3. If the 2005 amendment applies to Mr. Love, does the amendment violate Mr. Love's right to due process by impermissibly restricting the type of evidence that may be considered to obtain a new trial?

C. STATEMENT OF THE CASE

On January 17, 2001, the State filed a petition to commit Mr. Love to a secure facility as a sexually violent predator under chapter 71.09 RCW. After an order affirming probable cause was entered on February 6, and Mr. Love was transferred to the special commitment center at McNeil Island where he has been held since 2001. (CP 1183); *see also In re Detention of Love*, 2007 Wash. App. LEXIS 680 (2007).

The State filed a petition under RCW 71.09 to determine if Ronald Love was a sexually violent predator, and thus should be civilly committed. (CP 824) A seven-day trial was held on May 4, 5, 18-20,

2005. (CP 824) The court found that in the late 1970s, Mr. Love was convicted of two counts of forcible rape. (CP 824) He was convicted of attempted rape in 1991. (CP 825)

In its findings, the trial court acknowledged that the experts disagreed if Mr. Love suffered from a mental abnormality that caused him to have serious difficulty controlling his sexually violent behavior, and whether he was more likely than not to commit a sexually violent offense in the future if not confined. (CP 825)

At his commitment trial, Dr. Amy Phenix diagnosed Mr. Love with “Paraphelia Not Otherwise Specified (NOS)” (nonconsent). (CP 825) Mr. Love’s expert Dr. Robert Halon testified that this mental disorder cannot be found in the DSM, and that Mr. Love’s crimes were opportunistic and he committed them by choice. (CP 826)

The court found that “the diagnosis of Paraphilia NOS is a valid diagnosis that is commonly recognized and applied by mental health professionals....” (CP 826)

The court also noted that Mr. Love suffered from Antisocial Personality Disorder, he met the criteria for classification as a psychopath, and he suffered from an alcohol dependence and other substance abuse. (CP 826-27)

The trial court acknowledged that Mr. Love's risk of reoffending was disputed. The court accepted the evidence presented through Dr. Phenix using Static-99 and the Minnesota Sex Offender Screening Tool. Specifically, the court found "the Static 99 and the MnSOST-R are commonly accepted and used by the community of experts who perform risk assessments of sexual offenders, and that the Static 99 is the mostly widely used." (CP 827)

The court accepted Dr. Phenix's opinion based upon these instruments that Mr. Love was in the high risk category:

On both instruments, Mr. Love's score placed him into the high risk category. On the Static 99, Mr. Love's score indicated that he is statistically similar to a group of offenders who sexually recidivated at a rate of 52% over 15 years. On the MnSOST-R, which Dr. Phenix used to corroborate the Static 99 results, Mr. Love's score indicated that he was statistically similar to a group of offenders who sexually recidivated at a rate of 72% over six years. Both of these instruments tend to underestimate risk because they do not take into account undetected crimes.

(CP 827)

The trial court explained that it applied less weight to Mr. Love's expert, Dr. Wollert's testimony, related to recidivism projections:

Dr. Wollert testified about his method of applying Bayes' Theorem to reduce the Static 99 percentages commensurate with Mr. Love's age. Dr. Wollert concluded that Mr. Love's recidivism risk was well below 50%. However, neither Dr. Phenix nor Dr. Wollert, at least in his pre-trial

deposition, were aware of any other expert who used Bayes' Theorem to reduce the results of the Static 99 to account for age. Therefore, on the issues of the effect of Mr. Love's age on his recidivism risk, the Court assigns lower weight to Dr. Wollert's testimony than it does to Dr. Phenix's testimony.

(CP 828)

The court concluded that the findings were established beyond a reasonable doubt that Mr. Love suffered from Paraphilia NOS, a mental abnormality, and that he was likely to engage in predatory acts of sexual violence if not confined. (CP 828-29)

Mr. Love appealed to Division III. In an unpublished opinion, the court affirmed. *See In re Detention of Love, supra*.

On March 11, 2008, Mr. Love filed a petition under CR 60(b). (CP 452-547) He argued under CR 60(b) he was entitled to a new trial because "substantial changes in science" had occurred since his commitment trial. (RP¹ 3)

Specifically, Mr. Love presented new evidence from Dr. Michael First relating to the diagnosis of paraphilias and from Dr. Richard Wollert relating to advances in the science of predicting recidivism rates.

¹ "RP" refers to the transcript of proceedings from April 14, 2008.

Mr. Love presented Dr. First's deposition testimony from another sexually violent predator case.² The deposition was taken on September 14, 2007. (CP 208) In the deposition, Dr. First explained that he was the editor for the DSM IV-TR. He stated that prior to making a diagnosis that an individual is a sexually violent predator, the context of the crimes must be considered carefully. He explained that in a mistake exists in the DSM IV-TR because the current definition of paraphilia requires sexual fantasies, urges *or* behaviors as the criterion. (CP 215)

Dr. Love expressed that the error had "completely escaped our attention" and it was not until 2006 that he discovered that the diagnosis was being made incorrectly based upon this mistaken wording. (CP 215) Dr. Love is at the forefront of announcing and pointing out this serious mistake. (CP 216) He added that rape, by itself, is not typically paraphilic, and this behavior, by itself, "is not a behavior that is sort of suggestive of a paraphilia on its own the way pedophilia and other behaviors are more closely tied to a paraphilic focus." (CP 216)

Additionally, Mr. Love presented Dr. Richard Wollert's extensive new research findings related to recidivism rates. (CP 554-97) Based upon his findings, Dr. Wollert opined that Mr. Love no longer meets the

² *In re Detention of Davenport*, No. 99-2-50349-2. In that case, Judge Yule in Benton County granted Mr. Davenport's motion for an evidentiary hearing to determine if he continues to fall within the definition of a sexually violent predator. See Appeal No. 270491; The State filed a notice of appeal on September 22, 2008.

definition of a sexually violent predator. Dr. Wollert's studies were conducted in 2007, and he also referenced a study conducted in 2006 containing Dr. Hanson's similar findings. (CP 573) Using this new science, Dr. Wollert found that the "average best estimate of recidivism for Mr. Love ... is 21%." (CP 573)

Ultimately, the court denied Mr. Love's CR 60(b) the motion. (RP 91-93; CP 7) The court's written Order Denying Respondent's Motion to Set Aside Judgment was brief. The Court's finding in pertinent part was simply: "The Court ... finds that the motion was not brought within a reasonable time and that most of the information presented was available at the time of trial and would not have changed the outcome." (CP 7)

In its oral ruling, the court also held that the amendment to RCW 71.09.090 applied to Mr. Love's motion, and thus held that his motion did not meet the criteria required by the 2005 amendments:

I believe that the amendment to 71.09.090 does apply in this case. I believe that the – the – well, speaking specifically of the *Elmore* case, I believe that from a reading of that case, that the – initial probable-cause determination refers to the – each subsequent probable cause determination rather than back to the initial one made in 2005 [sic] in this case.

* * *

I believe that the State has made and has presented prima facie evidence that the – Mr. Love continues to meet the definition of a sexually violent predator, and that – that Mr. Love's response then fails to meet the statutory – well, the amended statute's requirements to warrant a new hearing.

(RP 92)

Mr. Love appeals.

D. ARGUMENT

1. MR. LOVE SATISFIED THE REQUIREMENTS UNDER CR 60(b) AND THUS WAS ENTITLED TO RELIEF.

The appellate court reviews a trial court's decision on a CR 60(b) motion for abuse of discretion. *Luckett v. Boeing Co.*, 98 Wn. App. 307, 309, 989 P.2d 1144 (1999). Discretion is abused when it is exercised on untenable grounds or for untenable reasons. *Luckett*, 98 Wn. App. at 309-10.

CR 60(b) provides that “On motion and upon such terms as are just, the court may relieve a party from a final judgment, order or proceeding” for several enumerated reasons. These include:

(3) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under rule 59(b);

(11) Any other reason justifying relief from the operation of the judgment.

CR 60(b). Time limits apply to CR 60(b) motions: “The motion shall be made within a reasonable time and for reasons (1), (2) or (3) not more than 1 year after the judgment, order, or proceeding was entered or taken.”

CR 60(b).

a. Mr. Love Was Entitled To Relief Under CR 60(b)(3).

CR 60(b)(3) authorizes a court to vacate a judgment on the basis of “[n]ewly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under rule 59(b).... Evidence is newly discovered only if it (1) will probably change the result of the trial; (2) was discovered since the trial; (3) could not have been discovered before trial by the exercise of due diligence; (4) is material; and (5) is not merely cumulative or impeaching.” *Go2Net, Inc. v. C I Host, Inc.*, 115 Wn. App. 73, 88, 60 P.3d 1245 (2003). A motion based on newly discovered evidence must satisfy all five factors. *Holaday v. Merceri*, 49 Wn. App. 321, 330, 742 P.2d 127 (1987).

The trial court denied Mr. Love’s motion for a new trial on two bases: (1) the motion was “not brought within a reasonable time” and (2) “most of the information presented was available at the time of trial and would not have changed the outcome.” (CP 7) This ruling seems to blend the general “reasonable time limit” applicable to CR 60(b)(4)-(11) with the requirement under CR 60(b)(3) that newly discovered evidence will probably change the result of the trial. As such, both prongs will be addressed.

i. Mr. Love's CR 60(b) Motion Was
Filed Within One Year Of His Annual
Review.

The one-year requirement that a motion based upon CR 60(b)(3) was met in this case. The State must annually examine each person committed under Chapter 71.09 to determine "whether the committed person currently meets the definition of a sexually violent predator and whether conditional release to a less restrictive alternative is in the best interest of the person and conditions can be imposed that would adequately protect the community." RCW 71.09.070 (*see also* RCW 71.09.090(2)(a) (person subject to civil commitment is entitled to an annual review)).

As a result, the State may not continue to detain an individual under this chapter without an annual determination that the person currently meets the definition of a sexually violent predator. Each annual order starts the clock anew for purposes of motions brought under CR 60(b).

The annual determination that a person committed under chapter 71.09 has not presented probable cause establishing that the person's condition has changed pursuant to RCW 71.09.090(2) is not appealable as a matter of right. *In re Detention of Peterson*, 138 Wn.2d 70,

980 P.2d 1204 (1999). In that case, the court found “no principled distinction” between its analysis involving the appeal of a twice-annual dependency determination and the annual determination related to a sexually violent predator. *Peterson*, 138 Wn.2d at 87. In the dependency determination, the court found that the dependency review orders entered pursuant to RCW 13.34.130(3) do not require a finding of dependency be made at each review hearing. *Id.*, citing *In re Dependency of Chubb*, 112 Wn.2d 719, 773 P.2d 851 (1989). As a result, *Peterson’s* holding is limited to the analysis that the annual review order is not a “final” order, as required for an appeal as a matter of right under RAP 2.2(a)(1) (a party may appeal from “the final judgment entered in any action or proceeding.”)

The language in CR 60 is significantly different from that in RAP 2.2. CR 60 provides an avenue to pursue relief from “a “final judgment, order or proceeding.” Additionally, at least one justice on the Washington Supreme Court recognized that a person committed under RCW 71.09 may utilize CR 60 in seeking relief: “A detainee may challenge his committing diagnosis in a number of ways. Civil Rule (CR) 60(b) allows for a detainee to seek relief from judgment based on newly discovered evidence or “[a]ny other reason justifying relief.” CR 60(b)(3),

(11).” *In re Det. of Elmore*, 162 Wn.2d 27, 41, 168 P.3d 1285 (2007) (dissenting op, Bridge.)

Moreover, proceedings under CR 60 are equitable in nature and the court should exercise its authority liberally “to preserve substantial rights and do justice between the parties.” *Haller v. Wallis*, 89 Wn.2d 539, 543, 573 P.2d 1302 (1978); *In re Marriage of Hardt*, 39 Wn. App. 493, 495-496, 693 P.2d 1386 (1985). When presented with a motion related to indefinite detention under RCW 71.09, the equities balance in the detainee’s favor: “Although a civil statute, the sexually violent predator act authorizes the commitment of individuals. The interest in finality of judgments is easily outweighed by the interest in ensuring that an individual is not arbitrarily deprived of his liberty.” *State v. Ward*, 125 Wn. App. 374, 381, 104 P.3d 751 (2005); see *Suburban Janitorial Servs. v. Clarke Am.*, 72 Wn. App. 302, 313, 863 P.2d 1377 (1993) (“[C]ircumstances arise where finality must give way to the even more important value that justice be done. . . . CR 60 is the mechanism to guide the balancing between finality and fairness.”).

Additionally, the court may vacate judgments involving irregularities even where an order is unappealable for error of law. Trautman, *Vacation and Correction of Judgments in Washington*, 35 Wash. L. Rev. 505, 515 (1960); *Morsbach v. Thurston Cy.*, 148 Wash.

87, 91, 268 P. 135 (1928); *In re Estate of Johnston*, 107 Wash. 25, 33-34, 181 P. 209 (1919); *State v. Keller*, 32 Wn. App. 135, 140, 647 P.2d 35 (1982) (CR 60 allows relief in extraordinary circumstances).

Because CR 60 proceedings are equitable and the balance should lie in Mr. Love's favor, this court should use its authority liberally to preserve Mr. Love's substantial right to have an appellate court review whether the trial court erred by refusing to grant an evidentiary hearing to determine if Mr. Love continues to meet the definition of a sexually violent predator, and thus remain confined by the State, indefinitely.

The court should find that his motion under CR 60(b)(3) was timely, because it was within one year of the annual commitment evaluation and order.

ii. Mr. Love's Evidence Satisfied The Newly Discovered Evidence Requirements.

As stated above, evidence qualifies as "newly discovered" only if it (1) will probably change the result of the trial; (2) was discovered since the trial; (3) could not have been discovered before trial by the exercise of due diligence; (4) is material; and (5) is not merely cumulative or impeaching. *Go2Net, Inc.* 115 Wn. App. at 88.

Under the statute, a sexually violent predator is "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.” RCW 71.09.020(16). Thus, relevant information would relate to (1) the continued existence of a mental abnormality and (2) likelihood of committing future sexually violent acts.

In this case, Mr. Love presented evidence through Dr. Wollert and Dr. First that science has changed since his commitment trial. Dr. First unequivocally stated that he learned in 2006 that people were being diagnosed with paraphilia incorrectly – because the definition in the DSM-IV-TR, a tome for which he was Editor, was incorrect. The definition allows mental health practitioners to diagnose paraphilia based upon behavior alone, which is untenable.

Moreover, Mr. Love also presented evidence from Dr. Wollert that new studies have improved the accuracy of the analysis related to recidivism rates. These studies were produced in 2006 and 2007, and thus were not available at the time of Mr. Love’s original commitment trial.

This evidence dramatically affects both prongs related to the definition of sexually violent predators. Because Mr. Love presented evidence that likely would change the outcome of the trial, was discovered after the trial and could not have been discovered prior to trial, is not cumulative and is material, he satisfied all the criteria for granting a CR

60(b)(3) motion. The trial court abused its discretion by refusing to grant Mr. Love an evidentiary hearing.

b. In The Alternative, Mr. Love Was Entitled To Relief Under CR 60(b)(11).

CR 60(b)(11) grants the court discretion to vacate an order or final judgment for “[a]ny other reason justifying relief from the operation of the judgment.” Washington courts have consistently held that the use of CR 60(b)(11) should be limited to situations involving extraordinary circumstances not covered by any other section of CR 60(b). *In re Marriage of Furrow*, 115 Wn. App. 661, 673, 63 P.3d 821 (2003) (citing *In re Marriage of Yearout*, 41 Wn. App. 897, 902, 707 P.2d 1367 (1985)).

CR 60(b)(11) is a “catchall provision,” intended to serve the ends of justice in extreme, unexpected situations. To vacate a judgment under CR 60(b)(11), the case must involve “extraordinary circumstances,” which constitute irregularities extraneous to the proceeding. *In re Marriage of Knies*, 96 Wn. App. 243, 248, 979 P.2d 482 (1999). A defendant can move to vacate judgment under CR 60(b)(11) when his circumstances do not permit moving under another subsection of CR 60(b). *In re Marriage of Thurston*, 92 Wn. App. 494, 499, 963 P.2d 947 (1998); *Shum v. Dep't of Labor & Indus.*, 63 Wn. App. 405,

408, 819 P.2d 399 (1991). Motions under this subsection must be made within a “reasonable time.” CR 60(b).

Mr. Love’s motion under CR 60 was based upon the changes in science of psychiatry, and statistical prediction. These are extraordinary circumstances, as these two disciplines are the underpinnings of the RCW 71.09 statutory scheme, and the developments in these areas are extraneous to the proceedings related to Mr. Love. RCW 71.09 is based upon science, and its relationship with human behavior. Fortunately, science is evolving and dynamic, and thus new developments, ideas and theories are posited, established, and proven. Justice Breyer in his dissent in *Kansas v. Hendricks*, called the “science of psychiatry “an ever-advancing science.” *Hendricks*, 521 U.S. at 359 (BREYER, J., dissenting).

Because the science has changed since Mr. Love’s initial commitment trial, he is now entitled to have an evidentiary hearing, utilizing these new concepts to determine if in fact he fits within the definition of a sexually violent predator.

2. BECAUSE MR. LOVE'S INITIAL PROBABLE CAUSE HEARING WAS HELD IN 2001, THE 2005 AMENDMENTS TO RCW 71.09.090 DO NOT APPLY TO HIM.

Persons committed to the SCC have the right to an annual review of their continued confinement. RCW 71.09.070; RCW 71.09.090. SCC clinical staff evaluates the detained person. *Id.* The SCC evaluator is required to render an opinion as to whether the person continues to meet the criteria of a sexually violent predator. *Id.* A sexually violent predator is defined as "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." RCW 71.09.020(16).

If the SCC determines a person's condition has "so changed" that he no longer meets the definition of a sexually violent predator, it must authorize the person to petition the court for unconditional discharge. RCW 71.09.090(1). The court must order an evidentiary hearing under that circumstance. *Id.*

The committed person may also challenge the findings of the evaluator by exercising his right to an annual review hearing. RCW 71.09.090(2). "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.” RCW 71.09.090(2)(a).

At an order to show cause hearing, the State must make out a prima facie case that the individual still meets the criteria of an SVP. The person also has the opportunity to present evidence that they have “so changed” since the time of their commitment to warrant a new full evidentiary hearing, or, a new commitment trial. *See* former RCW 71.09.090(2) (amended by Laws of 2005, ch. 344, § 1); *see also In re Detention of Petersen*, 145 Wn.2d 789, 798, 42 P.3d 952 (2002).

The trial court may not weigh the evidence, but rather must simply determine whether sufficient evidence has been presented to establish prima facie probable cause that the person’s continued civil commitment is unlawful. *Peterson*, 145 Wn.2d 789.

Prior to 2005, the nature of evidence that a person could rely on to establish probable cause that he or she has “so changed” was not defined. *See* former RCW 71.09.090. In 2004, the court decided *Young* in which a

detainee offered expert opinion at his order to show cause hearing that his advanced age meant he was no longer likely to commit acts of predatory sexual violence and thus did not continue to meet the definition of an SVP. *Young*, 120 Wn. App. 753. The expert opinion was based on actuarial risk assessment. The *Young* court held the evidence presented sufficient to show probable cause warranting a new commitment trial.

In 2005, the legislature amended RCW 71.09.090 finding the decision in *Young* to be “contrary to the legislature's intent” and established that a mere change in a demographic factor alone, such as age, is insufficient to establish probable cause warranting a new commitment trial. Laws of 2005, ch. 344, § 1.

The amendments to RCW 71.09.090 limit the kind of evidence that may constitute "probable cause" to grant a full evidentiary hearing on the issue of release. RCW 71.09.090(4)(a) provides probable cause exists that a person's condition has "so changed" that he no longer meets the SVP definition "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."

Moreover, the change must be due to permanent physiological change 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 participation in treatment which indicates that the person meets the standard for conditional release to a less restrictive alternative or the person would be safe to be at large if unconditionally released from commitment." RCW 71.09.090(4)(b)(i) and (ii).

Mr. Love's initial probable cause determination was held in February, 2001. The 2005 amendment to the sexually violent predator act is not retroactive. *In re Det. of Elmore*, 162 Wn.2d at 36; *In re Det. of Smith*, 163 Wn.2d 699, 184 P.3d 1261 (2008). The triggering event is not the evidentiary hearing, but rather "the triggering event for the amendment is the initial probable cause determination..." *Elmore*, 162 Wn.2d at n.7.

Thus, for a detainee whose initial probable cause determination took place prior to May 9, 2005, an expert's opinion that a detainee's advancing age rendered him no longer likely to commit future acts of sexual violence may justify a hearing to determine eligibility for release. *Smith*, 163 Wn.2d at 699. Because Mr. Love's initial probable cause determination occurred prior to 2005, his evidence from Dr. Wollert's recent work (2006) that sexual recidivism decreases with age, is sufficient

to afford Mr. Love a new evidentiary hearing. (CP 569-73) This court should find that the trial court erred by applying the 2005 amendments to Mr. Love's CR 60(b) motion, and should remand with instructions to hold an evidentiary hearing.

3. THE AMENDMENT TO RCW 71.09.090 VIOLATES DUE PROCESS AND THE SEPARATION OF POWERS, AND THEREFORE IS UNCONSTITUTIONAL.

a. The 2005 Amendment Violates Due Process.

RCW 71.09.090 is unconstitutional because it contravene's the court's constitutional decisions in *In re Detention of Young*, and *In re Detention of Ward*, and thus violates Mr. Love's right of due process and the doctrine of separation of powers.

RCW 71.09.090 violates constitutional due process because it limits the type of evidence that may be relied upon to obtain a review of an individual's indefinite detention as a sexually violent predator (SVP). The trial court erroneously denied Mr. Love's request for a trial on the legality of his continued confinement due to its reliance on this unconstitutional statute.

The state and federal constitutions guarantee the right to due process of law. U.S. Const. amends. 5 and 14; Wash. Const. art. 1, § 3. A person's right to be free from physical restraint "has always been at the

core of the liberty protected by the Due Process Clause from arbitrary government action." *Foucha v. Louisiana*, 504 U.S. 71, 80, 112 S. Ct. 1780, 118 L. Ed.2d 437 (1992). The indefinite commitment of sexually violent predators is a restriction on the fundamental right of liberty, and consequently, the State may only commit persons who are both currently dangerous and have a mental abnormality. *Id.* at 77; *Kansas v. Hendricks*, 521 U.S. 346, 357-58, 117 S. Ct. 2072, 138 L. Ed. 2d 501 (1997); *In re Detention of Thorell*, 149 Wn.2d 724, 731-32, 72 P.3d 708 (2003). Current mental illness is a constitutional requirement of continued detention. *O'Connor v. Donaldson*, 422 U.S. 563, 574-75, 95 S. Ct. 2486, 45 L. Ed. 2d 396 (1975). Indefinite commitment is unconstitutional under Chapter 71.09 RCW unless it is necessary to further the compelling state interest of protecting society from an individual that is currently dangerous. *In re the Detention of Albrecht*, 147 Wn.2d 1, 7, 51 P.3d 73 (2002); *In re the Pers. Restraint of Young*, 122 Wn.2d 1, 26, 857 P.2d 989 (1993). "[A] narrowly tailored statute must require that an individual be both mentally ill and dangerous for civil commitment to satisfy due process." *Albrecht*, 147 Wn.2d at 7.

Even when initial commitment is constitutional, the State may not continue confinement where the basis for commitment, whether mental illness or dangerousness, no longer exists. *Foucha*, 504 U.S. at 77-78; *see*

also *O'Connor*, 422 U.S. at 574-75 (continued confinement of person who is mentally ill but not dangerous to himself or others violates due process); *Hendricks*, 521 U.S. at 364 (upholding sexual offender civil commitment because "Kansas does not intend an individual committed pursuant to the Act to remain confined any longer than he suffers from a mental abnormality rendering him unable to control his dangerousness.").

The purpose of annual show cause hearings is to determine whether a detainee remains mentally ill and a danger to the public. *In re Det. of Ward*, 125 Wn. App. 381, 386, 104 P.3d 747 (2005). When a person committed as a SVP presents prima facie evidence establishing he is not a danger to society, due process requires he receive a full trial on whether he must remain committed. *Id.* at 389-90.

RCW 71.09.090(4) violates due process because it prevents a detainee from obtaining a new trial unless the detainee can show his SVP status changed in response to treatment since the person's last commitment trial. RCW 71.09.090(4)(a), (b), (b)(ii). Due process requires a new trial on the issue of release if there is prima facie evidence that the detainee currently does not meet the criteria for commitment, regardless of whether his condition changed in response to treatment.

In *Ward*, the detainee presented a report from an expert who opined he was not a sexually violent predator at the annual show cause

hearing. *Ward*, 125 Wn. App. at 383. The issue was whether the expert report, if believed, was sufficient to establish probable cause that Ward did not currently meet the SVP definition. *Id.* at 385. Ward's expert concluded Ward did not suffer from a mental abnormality that predisposed him to criminal sexual acts and suggested he never did. *Id.* at 388. The expert further concluded Ward did not meet the definition of a sexually violent predator and supported his conclusion by factual assertions. *Id.* at 389. This Court held new diagnostic practices relied on by an expert constituted evidence of "change" and demonstrated probable cause to warrant a full trial on the issue of whether a person still meets the SVP criteria. *Id.* at 383.

According to the appellate Court, "[i]f a detainee provides new evidence establishing probable cause that he is not currently a sexually violent predator, due process requires a trial on the merits, regardless of whether his evidence could have also challenged the basis of his original commitment." *Id.* at 386; *see also In re Detention of Young*, 120 Wn. App. 753, 763, 86 P.3d 810, *rev. denied*, 152 Wn.2d 1035 (2004) (actuarial risk assessment evidence not available at initial commitment trial presented prima facie evidence showing Young was not a SVP; "because current risk assessment techniques suggest Young is not

currently an SVP, denying him a hearing at this point raises due process concerns.").

This Court reviews a trial court's legal conclusion of whether evidence meets the probable cause standard *de novo*. *In re Det. of Petersen*, 145 Wn.2d at 799. The question on review is "whether the evidence, or lack thereof, suffices to establish probable cause for an evidentiary hearing." *Id.* at 801. Probable cause exists if a detainee presents facts that, if believed, would lead a reasonable person to conclude that, more probably than not, he no longer meets the definition of a sexually violent predator. *Id.* at 797-99; *Ward*, 125 Wn. App. at 387. A trial court may not weigh the evidence in determining whether probable cause exists. *In re Detention of Elmore*, 162 Wn.2d at 37. The trial court's job is simply to determine whether prima facie evidence exists, not whether the evidence should be believed. *Ward*, 125 Wn. App. at 387.

In *Fox*, a two-judge majority in Division Two held RCW 71.09.090, as amended in 2005, did not violate due process as applied to the detainees in that case. *In re Detention of Fox*, 138 Wn. App. 374, 381, 396-400, 158 P.3d 69 (2007), *review granted* 164 Wn.2d 1025, 196 P.3d 136 (2008). The detainees in *Fox* argued RCW 71.09.090 violated due process because it prevented them from presenting scientific evidence of their lower danger to the community

based on change to a single demographic factor. *Id.* at 380, 398-99. The majority reasoned "[n]othing 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.* at 399.

The *Fox* holding is incorrect, should not be followed, and has been accepted for review by the Washington Supreme Court. The reasoning behind Judge Armstrong's dissent in *Fox* retains greater persuasive force than the majority opinion. Judge Armstrong recognized "where a person committed as an SVP is no longer likely to engage in predatory acts of sexual violence, the justification for his confinement no longer exists and further detention is unconstitutional." *Fox*, 138 Wn. App. at 407 (J. Armstrong, dissenting).

Referring to the statute's directive that advanced age alone is insufficient to establish probable cause, Judge Armstrong argued RCW 71.09.090 prevents an SVP from using certain evidence to make a prima facie case that he is no longer dangerous. *Id.* at 407-08. "Under such circumstances, the State would no longer be holding the defendant

because of his dangerousness, but because it has blocked his access to a hearing on whether he is still dangerous. Where the State creates legal grounds to hold an SVP unrelated to his actual dangerousness, it violates due process." *Id.* at 408.

This court recently decided that the 2005 amendments to RCW 71.09.090 are not unconstitutional. *In re Detention of Savala*, 2008 Wash. App. LEXIS 2306 (motion to publish granted, December 23, 2008)³. This court relied upon *Fox* in determining that the amendment passes constitutional muster. Because *Fox* decision has been accepted for review, and *Savala* may well be accepted for review as well, the court's previous analysis on this issue remains in question.

b. The Legislature Violated The Constitutional Separation Of Powers By Attempting To Override Due Process Requirements.

RCW 71.09.090 violates separation of powers principles because it negates due process protections enunciated by the courts.

The Washington Constitution vests the judicial power of the State in the Supreme Court and other authorized courts. Wash. Const. art. IV, § 1; *State v. Fields*, 85 Wn.2d 126, 129, 530 P.2d 284 (1985). The separation of powers doctrine is derived from the constitution's distribution of governmental authority into three branches.

³ Mr. Savala's appellate counsel has indicated to counsel her intent to file a petition for review with the Washington State Supreme Court by January 22, 2008.

State v. Moreno, 147 Wn.2d 500, 505, 58 P.3d 265 (2002). Each branch of government may only exercise the powers it is given. *Id.* One branch is not permitted to encroach upon the fundamental function of another. *Id.*

The ultimate power to interpret, construe, and enforce the constitution belongs to the judiciary. *Seattle School District No. 1 of King County v. State*, 90 Wn.2d 476, 496, 585 P.2d 71 (1978). "[I]t is emphatically the province and duty of the judicial department to say what the law is . . . even when that interpretation serves as a check on the activities of another branch or is contrary to the view of the constitution taken by another branch." *Id.* at 496 (citations and internal quotation marks omitted).

Because the court is the ultimate interpreter of constitutional law, the Legislature cannot abridge constitutional rights by its enactments. *Id.* at 503 n.7 (citing *Marbury v. Madison*, 5 U.S. 137, 163, 2 L. Ed. 60, 69 (1803)). Legislation that violates the separation of powers doctrine is void. *State v. Thorne*, 129 Wn.2d 736, 762, 921 P.2d 514 (1996).

As set forth above, due process requires a new commitment trial if evidence shows the person does not meet the SVP criteria. RCW 71.09.090 attempts to prevent the judiciary from enforcing the constitutional right to liberty when one presents evidence that he does not

meet the criteria for continued commitment. The amended legislation is therefore void.

E. CONCLUSION

For the reasons stated above, the trial court should be reversed, and this court should remand with an order granting Mr. Love an evidentiary hearing.

Dated this 9th day of January, 2009.

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