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DIVISION II

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**COURT OF APPEALS FOR DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON,

Petitioner,

v.

KEITH W. ELMORE,

Respondent.

CORRECTED OPENING BRIEF OF PETITIONER

CHRISTINE O. GREGOIRE
Attorney General

TODD R. BOWERS
Assistant Attorney General
WSBA #25274
900 Fourth Avenue, Suite 2000
Seattle, WA 98164
(206) 389-2028

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I. ASSIGNMENT OF ERROR

- A. **The Clark County Superior Court erred in ordering a recommitment trial to determine whether Mr. Elmore continues to meet the definition of a sexually violent predator.**

II. ISSUES

- A. **Whether the term “condition” used in the annual review provision of RCW 71.09 means the mental condition from which the committed person suffers and which forms the basis of the underlying commitment.**
- B. **Whether a mere increase in age of two years since commitment is a change in the committed person’s mental condition which requires that a recommitment trial be held.**
- C. **Whether this Court should reject Division One’s recent decision in *In re Detention of Young* since that decision eviscerates the indefinite nature of commitment under RCW 71.09, runs contrary to the legislative intent underlying the statute, and erroneously permits newly discovered evidence claims to be presented at the annual review hearing.**
- D. **Whether a recommitment trial should be ordered on the basis of an expert’s opinion that is grounded solely upon two recent reports by unnamed persons.**

III. STATEMENT OF THE CASE

The State of Washington filed a petition in July 1999 in Clark County Superior Court seeking the involuntary civil commitment of the Respondent, Keith Elmore, as a sexually violent predator (SVP) pursuant to RCW 71.09 *et seq.* CP at 276. At the time the petition was filed, Mr. Elmore had just completed a prison sentence for the abduction and assault of the wife of a former co-worker. CP at 8-52; 54-55; 238. By

Mr. Elmore's own admission, he had intended to kill, dismember, and eat his victim, thereby consummating his long-standing sexual fantasy of becoming a woman in this manner. *Id.*

In preparation for the commitment trial, Mr. Elmore retained Dr. Richard Wollert, a licensed psychologist, to evaluate him and provide expert testimony at trial. CP at 145; RCW 71.09.050(2). Dr. Wollert's November 21, 2000 pretrial evaluation of Mr. Elmore reflects his opinion that Mr. Elmore is not likely to engage in predatory acts of sexual violence if released into the community, and therefore does not meet the definition of an SVP. CP at 176.

Despite Dr. Wollert's opinion, on October 8, 2001, the day his commitment trial was to begin, Mr. Elmore entered into a written stipulation to commitment as an SVP. CP at 1-7; 276. The psychological evaluation of Mr. Elmore by Dr. James Manley, rather than that of Dr. Wollert, was used as the factual basis of the stipulation. CP at 3; 276-77.

Dr. Manley is a licensed psychologist at the Special Commitment Center (SCC), the facility where persons detained pursuant to RCW 71.09 are housed, evaluated and treated. CP at 192. Dr. Manley diagnosed Mr. Elmore as suffering from Sexual Sadism, Gender Identity Disorder, and Personality Disorder Not Otherwise Specified (NOS) with Antisocial

Features. CP at 189. Dr. Manley concluded that Mr. Elmore is an SVP. CP at 192.

Based upon Dr. Manley's evaluation and the written stipulation to commitment, the trial court entered an order on October 8, 2001, indefinitely committing Mr. Elmore as an SVP. CP at 7. Since his commitment, Mr. Elmore has resided at the SCC, where he has been involved in treatment. CP at 241-44; 250-52.

Persons committed as SVPs have the right to an annual review of their mental condition to determine whether they continue to meet the definition of an SVP and whether release to a less restrictive alternative placement (LRA) is appropriate. RCW 71.09.070. Unless the committed person affirmatively waives his right to this annual review, the trial court must set a show cause hearing. RCW 71.09.090(2)(a).

At the show cause hearing, the trial court may order a recommitment trial to determine whether the committed person continues to meet the definition of an SVP, a trial to determine whether an LRA is appropriate, or a trial on both issues. RCW 71.09.090(2)(c). The court may order a trial on these issues only where: a) The State fails to present prima facie evidence that the committed person continues to meet the definition of an SVP and an LRA is not appropriate. RCW 71.09.090(2)(c)(i); or b) The committed person presents evidence

establishing probable cause to believe that his condition has “so changed” that he no longer meets the definition of an SVP, or that an LRA is appropriate. RCW 71.09.090(2)(c)(ii). A trial granted on either issue is not a limited proceeding, but rather a trial with the full panoply of rights applicable at the initial commitment trial, including the right to a trial by jury. RCW 71.09.090(3)(a), (b).

Mr. Elmore’s first and second annual review hearings were combined and held before the trial court on March 17, 2004. CP at 277. At the hearing, the State relied upon the SCC’s two annual reviews of Mr. Elmore’s condition to satisfy its burden of establishing prima facie evidence to believe Mr. Elmore continues to meet the criteria for commitment as required by RCW 71.09.090(2)(c)(i). *Id.*

These evaluations were done by Dr. Jason Dunham, an SCC psychologist, in November 2002 and November 2003. CP at 202-59. Dr. Dunham diagnosed Mr. Elmore as suffering from Sexual Sadism, Gender Identity Disorder, and Personality Disorder NOS with Antisocial and Dependent Traits. CP at 220, 250. Both of Dr. Dunham’s evaluations reflect his opinion, and that of the SCC, that Mr. Elmore continues to meet the definition of an SVP and is not appropriate for release to an LRA. CP at 222-23; 252-53.

Mr. Elmore again retained Dr. Wollert to be his expert in this matter. CP at 260; RCW 71.09.070. He presented Dr. Wollert's November 2003 evaluation at the annual review hearing in March 2004 to establish probable cause to believe he no longer meets the criteria for commitment.¹ CP at 260-75; 277-78; RCW 71.09.090(2)(c)(ii).

Dr. Wollert's evaluation reflects his belief that there have been four changes in Mr. Elmore's condition since his commitment, which Dr. Wollert believes demonstrate Mr. Elmore no longer meets the definition of an SVP. CP at 265-70. First, he concluded that Mr. Elmore has completed the residential portion of his treatment program. CP at 265-66. In addition, Dr. Wollert stated that Mr. Elmore does not suffer from Sexual Sadism and Personality Disorder NOS, two of the diagnoses assigned by Drs. Manley and Dunham.² CP at 266. The third change in Mr. Elmore's condition identified by Dr. Wollert is the risk Mr. Elmore poses to the community. CP at 268-69.

The last of the four alleged changes in Mr. Elmore's condition identified by Dr. Wollert is the two-year increase in Mr. Elmore's age since his commitment. CP at 269-70. According to Dr. Wollert, this

¹ Dr. Wollert had been retained by Mr. Elmore as part of the first annual review proceeding, but did not complete his evaluation until the time of the second annual review hearing.

² This is consistent with Dr. Wollert's pre-commitment conclusion on this issue, as reflected in his pre-commitment evaluation. CP 173.

increase in age results in a decrease in Mr. Elmore's risk to reoffend from 16% to 9%, as measured using the Static-99, one of the actuarial risk assessment tools. *Id.*

Dr. Wollert based this calculation on the 2001 and 2003 conclusions of "different investigators." *Id.* However, Dr. Wollert provided no information about these investigators that would allow the court to determine whether their apparent conclusions are scientifically grounded and generally accepted in the relevant scientific community.

The trial court rejected the first three changes in Mr. Elmore's condition claimed by Dr. Wollert. CP at 278-79. However, the trial court did find that the last change cited by Dr. Wollert – the alleged reduction in risk flowing from Mr. Elmore's two-year increase in age since commitment – was sufficient to establish probable cause to believe Mr. Elmore is no longer an SVP and to order a recommitment trial. CP at 5-6.

The trial court believed that a recent decision of Division One of the Court of Appeals required it to find that the new evidence relied upon by Dr. Wollert establishes probable cause. *Id.*, citing *In re Young*, 120 Wn. App. 753, 86 P.3d 810 (2004) (*Young AR*).³ The trial court noted

³ This decision will be referenced *Young AR* (for annual review) to distinguish it from *In re Young*, 122 Wn.2d 1, 897 P.2d 989 (1993), the seminal Washington case discussing RCW 71.09.

that the *Young AR* Court ordered a recommitment trial based upon the declaration of Young's expert that Young's increased age reduced his risk to reoffend. The trial court concluded its discussion of the impact of *Young AR* by noting:

The ramifications of this ruling [*Young AR*] are significant. The case can be read to require an evidentiary hearing on a yearly basis, no matter what, simply because a respondent will always be a year older than he or she was the proceeding (sic) year.

CP at 281.

The State moved for discretionary review of the trial court's order granting Mr. Elmore a recommitment trial. Mr. Elmore filed a cross-motion for discretionary review, alleging the trial court erred in denying him a recommitment trial based upon the three changes in his condition identified by Dr. Wollert that were rejected by the trial court. This Court has granted both the State's motion for discretionary review, as well as Mr. Elmore's cross-motion for discretionary review.⁴

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⁴ This brief constitutes the State's opening brief on the trial court's order granting a new trial based upon Dr. Wollert's opinion that Mr. Elmore's risk has been reduced because of his increase in age of two years. The State's opening brief on the trial court's ruling rejecting the other three changes identified by Dr. Wollert will be submitted after the State receives Mr. Elmore's brief on those issues, issues raised by him in his cross-motion for discretionary review.

IV. ARGUMENT

- A. **The indefinite nature of SVP commitment is reflected in the annual review procedures of RCW 71.09.090, which provide for a recommitment trial only when there is evidence that the committed person's mental condition has changed since his commitment.**

Commitment as an SVP is indefinite. The annual review procedures of RCW 71.09.090 reflect this. As a result, recommitment trials are not held every year, but only when there is sufficient evidence to believe that the committed person's mental condition has changed such that his risk to reoffend has been substantially reduced.

Both the statute and court decisions reinforce the open-ended nature of SVP commitment. For example, the statute provides that a person found to be an SVP is committed for "control, care and treatment *until such time as . . . [t]he person's condition has so changed* that the person no longer meets the definition of a sexually violent predator." RCW 71.09.060(1) (emphasis added).

The Washington Supreme Court has repeatedly recognized the indeterminate nature of commitment under RCW 71.09. In its first examination of the statute, the court noted that civil commitment as an SVP is "not subject to any rigid time limit. Rather, the commitment is tailored to the nature and duration of the mental illness." *In re Young*, 122 Wn.2d 1, 39, 857 P.2d 989 (1993).

The Supreme Court later expressly confirmed that commitment as an SVP is indefinite. *In re the Detention of Petersen*, 138 Wn.2d 70, 980 P.2d 1204 (1999) (*Petersen I*). There, the court held:

Our sexually violent predator statute unequivocally contemplates an indefinite term of commitment, not a series of fixed one-year terms with continued commitment having to be justified beyond a reasonable doubt annually at evidentiary hearings where the State bears the burden of proof.

Id. at 81.

The court explained that commitment as an SVP “is potentially indefinite because it depends upon the cure or elimination of the person’s sexually violent predilections.” *Id.* at 81, n. 7. Indeed, “the statute contemplates a prolonged period of treatment,” because the treatment needs of the SVP population are long-term and their mental disorders are chronic. *Id.* at 78.

The annual review structure found in RCW 71.09.090 flows naturally from the indeterminate nature of commitment as an SVP. As a result, it does not require a recommitment or conditional release trial every year, but only when there is sufficient evidence presented, by either party, to warrant such a trial.

The SCC must conduct an annual review of the “mental condition” of each person who is civilly committed as an SVP. RCW 71.09.070. The

annual review addresses two issues: 1) Whether the person continues to meet the definition of an SVP; and 2) Whether conditional release to an LRA is appropriate. *Id.*

As part of the annual review, the SCC must provide the committed person with written notice of his right to petition the trial court for conditional or unconditional release. RCW 71.09.090(2)(a). Unless the committed person affirmatively waives his right to petition for release, the trial court must set a show cause hearing. *Id.*

At the hearing, the trial court must determine whether “probable cause exists to warrant a hearing on whether: (i) The person’s condition has so changed that he or she no longer meets the definition of a sexually violent predator.”⁵ *Id.*

Probable cause to order a trial to determine whether the person is an SVP – a recommitment trial - may be found in one of two ways. First, the evidence presented by the State (typically the annual review evaluation conducted by SCC staff) may not constitute prima facie evidence that the committed person continues to meet the definition of an SVP. RCW 71.09.090(2)(c)(i). However, even if the State carries its burden, the committed person may still obtain a recommitment trial if he presents

⁵ This hearing also involves an inquiry into whether sufficient evidence has been presented to warrant a trial on the issue of conditional release. However, since that is not at issue in this case, the State will focus on those portions of the statutory procedure discussing the unconditional release issue.

evidence establishing probable cause to believe that his condition has so changed that he is no longer an SVP. RCW 71.09.090(2)(c)(ii)(A). This procedure has been endorsed by the Washington Supreme Court. *In re Detention of Petersen*, 145 Wn.2d 789, 798-99, 42 P.3d 952 (2002) (*Petersen II*).

In determining whether there is probable cause to order a recommitment trial, the trial court is not permitted to weigh the evidence presented by the parties. *Petersen II*, 145 Wn.2d at 798. Rather, the court must determine if the facts presented, if believed, warrant a full trial. *Id.*

The statute and cases, therefore, provide that once a person is found to be an SVP and committed as such, that commitment is indeterminate. Recommitment trials are not required each year, or at regular intervals after commitment. Rather, a hearing is held annually at which time the State is required to produce proof, typically through the SCC annual mental evaluation, that the committed person continues to meet the definition of an SVP. In addition, the committed person has the opportunity to obtain a recommitment trial by presenting evidence on his own behalf. The trial court must order a recommitment trial only where, through either avenue, there is probable cause to believe the “person’s condition has so changed” since his commitment that he is no longer an SVP. RCW 71.09.090(2)(c).

B. The change in “condition” that triggers the right to a recommitment trial refers to a change in the underlying mental condition from which the SVP suffers and which gives rise to his sexual offending.

In this case, the trial court concluded that the evidence presented by Mr. Elmore established probable cause to believe that Mr. Elmore’s condition has changed since his commitment such that he is no longer an SVP. This Court reviews this trial court determination *de novo*. *Petersen II*, 145 Wn.2d at 799.

The evidence presented by Mr. Elmore, and relied upon by the trial court, was Dr. Wollert’s opinion that Mr. Elmore’s risk to reoffend has fallen from 16% to 9%, as measured using one of the commonly used actuarial risk assessment tools. The change in Mr. Elmore’s condition upon which this reduction in risk was based is the two year increase in Mr. Elmore’s age since his commitment.

The trial court erred in concluding that a two year increase in age is a change in “condition,” as that term is used in RCW 71.09.090. When read within the context of the entire statute and consistent with the plain meaning of “condition,” that term refers to the committed person’s mental condition. This conclusion is consistent with the fundamental purpose of RCW 71.09, which is to reduce the risk posed by sexual predators by treating the mental disorders that cause their offending.

1. **Read within the context of RCW 71.09 as a whole, the term “condition” as it is used in RCW 71.09.090 refers to the committed person’s mental condition.**

The term “condition” used in the annual review portion of the SVP statute, RCW 71.09.090, is not defined. When engaging, therefore, in statutory interpretation, this Court should do so in such a manner, “so as to give effect to the legislative intent as determined within the context of the entire statute.” *State v. Elgin*, 118 Wn.2d 551, 556, 825 P.2d 314 (1992). The SVP statute, when read as a whole, clearly demonstrates that “condition,” as used in RCW 71.09.090, refers to the committed person’s mental condition.

The SVP statute is a mental health statute that permits the civil commitment of persons who, *inter alia*, suffer from a mental abnormality or personality disorder that makes the person likely to engage in predatory acts of sexual violence. RCW 71.09.020(16). Both of these are mental conditions.

A “mental abnormality” is defined as, “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.” RCW 71.09.020(8) (emphasis added).

The term “personality disorder” is not defined in RCW 71.09, but is defined in the American Psychiatric Association’s standard textbook on mental disorders, the *Diagnostic and Statistical Manual of Mental Disorders* (Fourth Edition, Text Revision, 2000) (DSM-IV-TR). DSM-IV-TR, at 685. As its inclusion in the DSM-IV-TR demonstrates, a personality disorder is a mental condition.

Other provisions of the statute provide additional evidence that the term “condition” means the committed person’s mental condition. For example, the SCC’s annual evaluation of persons committed as SVPs is an examination of those persons’ “mental condition.” RCW 71.09.070.

2. Washington courts’ interpretation of RCW 71.09 provides authority for reading “condition” to mean the mental condition from which the committed person suffers.

Washington courts have recognized that the focus of the statute’s post-commitment procedures is on the committed person’s mental condition. The Supreme Court has noted that, “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.” *In re Young*, 122 Wn.2d at 39 (emphasis added).

Perhaps the most compelling statement by the Supreme Court that it is the SVP’s mental condition that is at issue in the post-commitment

proceedings is found in *Petersen II*. In that case, the court held that in order to obtain a recommitment trial, there must be evidence showing that the SVP, “no longer suffers from a mental abnormality or personality disorder, i.e., the prisoner has ‘so changed.’” *Petersen II*, 145 Wn.2d at 798.

This holding from *Petersen II*, demonstrating the focus on the SVP’s mental condition, is illuminated by its application in that case to Petersen’s co-appellant, Bernard Thorell. In determining that Thorell had presented evidence of a change in his condition sufficient to warrant a new trial, the *Petersen II* Court focused on the manner in which the opinion of Thorell’s expert showed a change in Thorell’s underlying mental condition.

Thorell’s expert did not take issue with the determination made at the time Thorell was committed that he was an SVP. Rather, the expert alleged that “certain medication would suppress Thorell’s pedophilic urges.” *Id.* at 802. Tests showed the medication, “significantly reduced Thorell’s ‘mental abnormality.’” *Id.* Thorell obtained a recommitment trial because he presented evidence demonstrating a change in his mental condition.

3. Interpreting the term “condition” to mean the mental condition of the committed person is consistent with the plain and ordinary meaning of “condition” as that term as used in the SVP statute.

Where the Legislature does not define a term in a statute, the courts, “will give the term its plain and ordinary meaning ascertained from a standard dictionary.” *State v. Watson*, 146 Wn.2d 947, 954-55, 51 P.3d 66 (2002). The conclusion that the term “condition” found in RCW 71.09.090 refers to the SVP’s mental condition is consistent with the common meaning of the term, as it is used in RCW 71.09.

The SVP statute is a mental health statute and persons detained under RCW 71.09 are held in a secure mental health facility. Consistent with the mental health nature of RCW 71.09, the dictionary defines “condition” as a “state of health [what’s the patient’s condition?]” or “an illness; ailment [a lung condition].” Webster’s New World Dictionary at 290 (3rd Ed. 1997).

Using this definition, Mr. Elmore’s “condition,” as referenced in the mental health evaluations of him, includes Sexual Sadism, Gender Identity Disorder, and Personality Disorder Not Otherwise Specified (NOS) with Antisocial and Dependent Traits. CP at 189, 220, 250. His conditions are the mental disorders from which he has been diagnosed as suffering.

Using the dictionary definition of that term relevant in the context of the SVP statute, one would never say that Mr. Elmore's "condition" is that he is two years older now than when committed. "Age" can be used as a noun: "The time that a person has, or a thing that has existed since birth or beginning." Webster's New World Dictionary at 24 (3rd Ed. 1997). Age is also a verb: "To grow old or show signs of growing old." *Id.*

Under neither of these definitions would it be proper to say that Mr. Elmore has a "condition" because he is two years older. Age is not a "condition." It is simply a descriptive term or a natural process.

4. The legislative goals of the SVP commitment scheme are best served by construing the term "condition" as referencing the committed person's mental condition.

In determining the meaning of "condition," as that term is used in RCW 71.09.090, this Court should, "ma[k]e that interpretation which best advances the perceived legislative purpose," of the SVP statute. *Wichert v. Cardwell*, 117 Wn.2d 148, 151, 812 P.2d 858 (1991). When applied here, this rule of statutory construction leads to the conclusion that "condition" means the SVP's mental condition.

Interpreting the annual review provisions of RCW 71.09 in a manner which focuses on the mental condition of committed person is consistent with, and furthers, the underlying purpose of the SVP statute.

The Washington Supreme Court has recognized that the SVP statute serves two compelling interests. *In re Young*, 122 Wn.2d at 26. First, the statute permits the State to reduce the risk posed by dangerous sexual predators by treating the mental disorders that contribute to the sexual offending. *Id.* In addition, the statute protects the public during this treatment process by mandating that the person is detained in a secure facility, without easy access to victims, during the treatment process. *Id.*

Construing the term “condition” to mean mental condition ensures that recommitment trials are limited to those committed persons whose risk has been ameliorated through treatment of their underlying mental conditions. Conversely, expanding the definition of “condition” to include self-effectuating changes in a person such as an increase in age would not serve the purpose of the SVP statute. Such an expansion would effectively take away all incentive for committed persons to engage in treatment and, thereby, gut the statute by robbing the State of the method which serves to reduce the risk these offenders pose to the community.

C. A mere increase in age since commitment is not a sufficient basis upon which to order a recommitment trial because an increase in age is not a change in Mr. Elmore’s mental condition.

Dr. Wollert’s conclusion that Mr. Elmore’s risk has been reduced from 16% to 9% on one of the actuarial risk assessment tools because he

has aged two years since his commitment is not a sufficient basis upon which to order a recommitment trial. Dr. Wollert's opinion fails because an increase in age is not a change in Mr. Elmore's mental condition, as required by RCW 71.09.090.

There is nothing in Dr. Wollert's analysis pointing to a specific aging process in Mr. Elmore that has altered his underlying mental disorders - Sexual Sadism, Gender Identity Disorder, or Personality Disorder NOS. There is no evidence of stroke or dementia, aged-related illnesses that could bring about a change in Mr. Elmore's underlying mental conditions. In the absence of any opinion from Dr. Wollert that Mr. Elmore's mental condition has changed since his commitment, this Court should reverse the trial court's order of a recommitment trial.

D. This Court should not follow *Young AR* as that decision is fatally flawed.

In ordering a recommitment trial for Mr. Elmore in this matter, the trial court relied exclusively, and reluctantly, on the recent *Young AR* decision issued by Division One of this Court. The appellant in *Young AR* was Andre Young, who had been committed as an SVP in 1991. Young retained an expert, Dr. Barbaree, to conduct an annual review evaluation on his behalf. *Young AR*, 120 Wn. App. at 755-56. Dr. Barbaree's

evaluation was submitted to the trial court at the annual review show cause hearing. *Id.* at 756.

The evaluation reflected Dr. Barbaree's opinion that Young's condition had changed since his commitment in 1991 so that he no longer meets the definition of an SVP. *Id.* at 756, 760-61. The change identified by Dr. Barbaree was the increase in Young's age since commitment. Dr. Barbaree concluded that new scientific research done since Young's 1991 commitment supports the conclusion that rapists released after age 60 rarely ever sexually reoffend. *Id.* at 760-61. The trial court rejected Dr. Barbaree's opinion and denied Young's request for a recommitment trial. *Id.* at 756.

The *Young AR* Court reversed the trial court. According to the *Young AR* Court, the trial court erred by weighing the newly discovered scientific evidence in Dr. Barbaree's report. *Id.* at 758-60. The court found that Dr. Barbaree's report, which relies on the new research, constitutes *prima facie* evidence establishing probable cause to believe that Young no longer meets the definition of an SVP, triggering the right to a recommitment trial under RCW 71.09.090(2). *Id.*, citing, *Petersen II*, 145 Wn.2d at 803.

This Court should reject *Young AR* because the court there failed to recognize that "condition" is ambiguous and thus failed to apply the rules

of statutory construction to determine its meaning. This failure led to a holding which eviscerates the indefinite nature of the SVP commitment scheme and undermines the Legislature's intent that the risk posed by sexual predators should be reduced through treatment of their underlying mental disorders.

This Court should also decline to follow *Young AR* because that case improperly expands the scope of the annual review proceedings of RCW 71.09.090. It does so by allowing claims based on newly discovered scientific evidence to be presented at the annual review hearing. Under *Petersen II*, the trial court is not permitted to weigh such claims when made at the annual review hearing, but must, assuming *prima facie* evidence is presented, automatically order a recommitment trial. Such claims are appropriately made pursuant to CR 60(b) or a personal restraint petition (PRP), both of which permit the reviewing court to examine the preliminary merits of the claims before ordering a recommitment trial. However, they are not appropriate within the context of an RCW 71.09.090 show cause hearing where the party challenging the newly discovered scientific evidence is not permitted to challenge such evidence.

1. **The *Young AR* Court failed to recognize that the term “condition” in RCW 71.09.090 is ambiguous and to employ the tools of statutory construction to determine its meaning.**

The *Young AR* Court assumed that an increase in age can be a change in the committed person’s “condition,” as that term is used in RCW 71.09.090. However, as noted, the term “condition” is not expressly defined in RCW 71.09. It is, therefore, ambiguous, as it is capable of more than one meaning. *Harmon v. DSHS*, 134 Wn.2d 523, 530, 951 P.2d 770 (1998). As a result, *Young AR* should have used the tools of statutory construction to determine the meaning of “condition.” *Id.* Application of those rules would have led to the conclusion, as previously demonstrated, that “condition” refers to the committed person’s underlying mental disorders that give rise to his sexual offending.

2. ***Young AR* effectively abolishes the indefinite nature of the SVP commitment scheme, turning it into a series of one-year commitments.**

By failing to engage in any statutory construction analysis, the *Young AR* Court reached a holding that eviscerates the indefinite nature of the SVP commitment scheme designed by the Legislature and approved by the Washington Supreme Court. *Young AR* turns this system into one involving a series of fixed, one-year commitments punctuated by annual recommitment trials.

An example, using the facts of Mr. Elmore's case, demonstrates this effect of *Young AR*. Relying on *Young AR*, the trial court in this case ordered a recommitment trial for Mr. Elmore based upon Dr. Wollert's opinion that Mr. Elmore's condition has changed since his commitment because he is two years older than at the time of commitment and, based on new scientific research, this age increase means he is not likely to reoffend if released.

At a recommitment trial, the jury could reject Dr. Wollert's opinion and find that Mr. Elmore continues to meet the definition of an SVP. In the annual review hearing held the year after the recommitment trial, Mr. Elmore could again retain Dr. Wollert. Relying on the same scientific research rejected by the jury at the recommitment trial, Dr. Wollert may opine that Mr. Elmore, because of the one year increase in his age since the recommitment trial, is not likely to reoffend if released and is, therefore, not an SVP.⁶

If *Young AR* controls, the trial court cannot weigh the evidence and examine Dr. Wollert's opinion or methodology. The court must accept his opinion at face value and order another expensive and time-consuming recommitment trial based on substantially the same evidence the jury rejected just a year previously.

⁶ Indeed, Dr. Wollert's conclusion could not be otherwise if the scientific research upon which he relies shows a steady decrease in recidivism rates with an increase in the age of the offender, research the State disputes.

By turning the SVP commitment scheme into a series of one-year commitments, with recommitment trials every year, the *Young AR* decision has effectively nullified the Legislature's intent that SVP commitments are indeterminate in length. In the preamble to RCW 71.09, the Legislature wrote:

The legislature finds that a small but extremely dangerous group of sexually violent predators exist who do not have a mental disease or defect that renders them appropriate for the existing involuntary treatment act, chapter 71.05 RCW The legislature further finds that *the prognosis for curing sexually violent offenders is poor, the treatment needs of this population are very long term, and the treatment modalities for this population are very different than the traditional treatment modalities for people appropriate for commitment under the involuntary treatment act.*

RCW 71.09.010 (emphasis added).

In addition, as noted previously, the indefinite nature of commitment under RCW 71.09 has been recognized by the Washington Supreme Court, which has held:

Our sexually violent predator statute unequivocally contemplates an indefinite term of commitment, not a series of fixed one-year terms with continued commitment having to be justified beyond a reasonable doubt annually at evidentiary hearings where the State bears the burden of proof.

Petersen I, 138 Wn.2d at 1204.

3. *Young AR* undermines a fundamental goal of the SVP statute, which is to reduce the risk posed by sexual predators through treatment of the mental conditions that trigger their sexual offending.

The *Young AR* holding is also directly contrary to the Legislature's goal of reducing the risk posed by SVPs through treatment. It does this by reducing any incentive SVPs have to engage in treatment.

The indefinite nature of commitment as an SVP is indisputable. A person is committed until such time as the mental disorders giving rise to their sexual offending have changed in such a manner as to reduce the person's risk to the community. The Legislature's intent is to effectuate this change through treatment. RCW 71.09.060(1) (persons are committed for "control, care and treatment").

Young AR runs directly contrary to this intent. By expanding the definition of the term "condition" to include mere increases in age, *Young AR* severs the link created by the Legislature between a change in the person's mental conditions resulting in a lowering of their risk, and the right to a recommitment trial.

Put another way, *Young AR* provides an incentive for committed persons *not* to engage in treatment. Why should they engage in treatment when they can obtain a recommitment trial solely on the basis of adding another candle to their birthday cake?

4. ***Young AR* erroneously expands the scope of the annual review hearing to include claims based on newly discovered scientific evidence generated since commitment, claims which the trial court is required to accept without any examination.**

Young AR also improperly expands the scope of the annual review hearing. It accomplishes this by allowing committed persons to present claims they are no longer an SVP; claims that are based on scientific evidence developed since their commitment.

Dr. Barbaree's opinion in *Young AR* that Young is no longer an SVP was based upon scientific research conducted after Young's commitment as an SVP. *Young AR*, 120 Wn.App. at 763-64. The *Young AR* Court felt compelled to permit Young to present this evidence in the context of the annual review hearing.

However, in allowing the presentation of this newly discovered scientific evidence at the annual review hearing, *Young AR* robs trial courts in SVP cases of the ability to screen petitions for a recommitment trial based on newly discovered evidence. This is because the trial courts may not weigh evidence at the annual review show cause hearing. *Id.* at 758-60.

The result is a system in which any claim by an expert that is based on scientific evidence released since a person's commitment will be sufficient to trigger a recommitment trial. The trial court will be forced to

order the recommitment trial and will not be permitted, prior to doing so, to examine the scientific evidence to determine whether it is based on generally recognized scientific techniques and is relevant.

5. **Claims that a person is no longer an SVP because of new scientific evidence should be brought via CR 60 or a personal restraint petition since these avenues would allow the reviewing court the ability to examine the preliminary merits of the claim before ordering a new trial.**

It is apparent from the *Young AR* decision that the court there felt compelled to permit newly discovered scientific evidence to be presented at the annual review hearing. *Id.* at 763-64. However, avenues already exists for the presentation of such claims; avenues which provide the court the ability to examine the newly discovered scientific evidence to ensure a recommitment trial is warranted.

Both CR 60(b) and the personal restraint petition (PRP) procedures of RAP 16 are recognized vehicles which can be used by persons committed as SVPs to present claims that they are no longer meet the criteria of SVPs because of new scientific evidence developed since their commitment. More importantly, unlike at the annual review show cause hearing, if such newly discovered evidence claims are presented via CR 60(b) or a PRP, the court has the ability to examine the claim

presented to ensure that, before ordering a new trial, the scientific evidence presented is based on sound science and is relevant.

For example, when newly discovered evidence claims are presented in a PRP, the reviewing court will grant a new trial only if the petitioner establishes that the evidence upon which he is relying:

- (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.

In re PRP of Stenson, 150 Wn.2d 207, 246, 76 P.3d 241 (2003).

Both CR 60(b) and RAP 16 strike the appropriate balance between the need for finality and the need to correct a miscarriage of justice. Unlike the annual review procedures of RCW 71.09.090, neither CR 60(b) nor PRPs require the court to blindly accept the opinion of an expert before ordering a recommitment trial. Rather, both give the court the ability to scrutinize the evidence to ensure a trial is, in fact, supported by the evidence.

E. Dr. Wollert’s age-based opinion regarding Mr. Elmore’s risk is insufficient to require a recommitment trial because it fails to meet even the very low standards of reliability required of evidence presented at annual review hearings.

Even if this Court determines, consistent with *Young AR*, that “condition” includes a mere increase in age and that newly discovered evidence claims may be considered at the annual review hearing,

Dr. Wollert's age-based opinion regarding Mr. Elmore's risk remains an insufficient basis upon which to order a recommitment trial. His opinion, grounded only on the 2001 and 2003 reports of two unnamed persons, fails to meet even the minimal standards of competency and reliability required of newly discovered evidence presented at annual review hearings.

Courts may not weigh the evidence presented by SVPs at the annual review show cause hearing. *Young AR*, 120 Wn.App. at 758-60, relying on *Petersen II*, 145 Wn.2d at 798. Nonetheless, the evidence presented must have some minimal indicia of reliability and competency in order to provide the basis upon which to order a full-blown recommitment trial. Any other result would permit SVPs to obtain a recommitment trial whenever they wished based solely on the report of any half-baked expert they might find.

Indeed, a close examination of *Young AR* demonstrates that the court there subjected the evidence presented by Young to some level of scrutiny and determined it warranted a new trial. In noting that Dr. Barbaree's report was sufficient to establish probable cause to order a recommitment trial, the *Young AR* Court cited the extensive discussion in Dr. Barbaree's report of the scientific basis for his conclusion that Young was less than 50% likely to reoffend if released. *Young AR*, 120 Wn. App.

at 760-62. Dr. Barbaree “stated that the documents and procedures he used are of a kind reasonably relied on by psychologists completing forensic evaluations.” *Id.* at 760. In support of his belief that offenders are less likely to reoffend as they age, Dr. Barbaree cited “several studies that he and other experts conducted.” *Id.* In addition, the report contained “a table with suggested age adjustments to the Static-99 actuarial table.” *Id.*

Dr. Wollert’s report contains none of the information cited by the *Young AR* Court in holding that Dr. Barbaree’s report was sufficient evidence to order a recommitment trial. Dr. Wollert’s report notes only that, based upon the 2001 and 2003 reports of two different, but unnamed, “investigators,” it is Dr. Wollert’s opinion that Mr. Elmore’s risk on the Static-99 risk assessment tool has fallen from 16% to 9%. CP at 269. Dr. Wollert’s report provides no additional information about the basis of his opinion, including the names of the investigators, their qualifications, the scientific basis of their age-based risk reduction formula, a statement that the formula has been published in a peer-reviewed scientific journal, or information demonstrating that the formula is generally accepted in the relevant community of those who conduct risk assessments of sex offenders. As a result, the trial court erred in concluding that

Dr. Wollert's report establishes probable cause sufficient to order a recommitment trial.

V. CONCLUSION

Commitment as an SVP is indefinite and is intended to last until such time as the SVP's mental conditions which give rise to his sexual offending have "so changed" that the SVP no longer meets the definition of an SVP. Although the annual review provisions of RCW 71.09.090 do not define the term "condition" used therein, standard rules of statutory construction lead to the inescapable conclusion that the term refers to the SVP's mental condition. Such a conclusion is consistent with the underlying purposes of the SVP statute, as well as the Legislature's intent.

As a result, the trial court erred when it ordered a recommitment trial in this matter based only on the opinion of Dr. Wollert that, because Mr. Elmore is two years older than at the time of his commitment, he is a lower risk as assessed on one of the actuarial risk assessment tools. A mere increase in age of two years is not a change in Mr. Elmore's underlying mental condition sufficient to trigger a recommitment trial.

This Court should reject Division One's decision in *Young AR*. That decision is erroneous because it turns RCW 71.09, an indefinite commitment scheme, into a series of fixed one-year commitments. It

therefore runs contrary to the language of the statute and the Legislative intent embodied therein.

Young AR is also erroneous because it permits newly discovered evidence claims to be presented at the annual review hearing. Because courts cannot weigh evidence at the annual review hearing, such claims may not be examined to ensure the scientific evidence relied upon is based upon sound methodology and is generally accepted in the relevant scientific community. Put more simply, *Young AR* permits persons committed as SVPs to obtain an expensive and time-consuming recommitment trial based on the opinion of anyone with a doctorate who submits a report to the court that is based on anything the expert claims is new scientific research.

Even assuming, though, that a mere increase in age of two years is a change in condition, the trial court still erred. Dr. Wollert's evaluation fails to meet even the very low *prima facie* evidence standard set in *Petersen II*. The trial court erred in granting a recommitment trial where

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the sole basis of Dr. Wollert's opinion relied upon by the trial court is the
"reporting" of two unnamed "investigators."

RESPECTFULLY SUBMITTED this ____ day of January, 2005.

A handwritten signature in black ink, appearing to read "TRB", with a horizontal line extending to the right from the end of the signature.

TODD R. BOWERS, WSBA #25274
Assistant Attorney General

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DIVISION II

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STATE OF WASHINGTON

BY _____
CITY

NO. 31769-9-II

**COURT OF APPEALS FOR DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON,

Petitioner,

v.

KEITH W. ELMORE,

Respondent.

DECLARATION OF
SERVICE

MACEY ANTHONY declares as follows:

On Thursday, January 19, 2005, I deposited in the United States

Mail, postage prepaid addressed as follows:

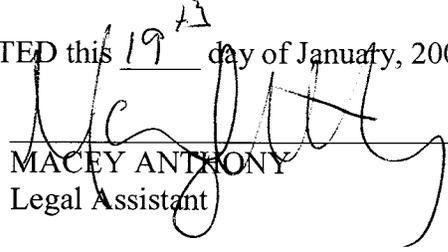
DAVID SCHULTZ
ATTORNEY AT LAW
430 NE EVERETT STREET
CAMAS, WA 98607

copies of the following documents:

CORRECTED OPENING BRIEF OF PETITIONER and
DECLARATION OF SERVICE.

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

RESPECTFULLY SUBMITTED this 19th day of January, 2005.



MACEY ANTHONY
Legal Assistant