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OF THE STATE

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STATE OF WASHINGTON

No. BY _____
DEPUTY

SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

KEITH W. ELMORE,

Petitioner.

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STATE OF WASHINGTON
ap

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Keith Elmore, petitioner, asks this Court to accept review of the Court of Appeals' decision terminating review which is designated in Part B.

B. COURT OF APPEALS DECISION

Petitioner requests review of the decision of the Court of Appeals, Division II, in Docket No. 31769-9-II, which held that because Elmore has not presented sufficient evidence that his condition has so changed, and because the State has met its burden, Elmore is not entitled to an evidentiary hearing. The published opinion of the Court of Appeals, filed August 8, 2006, is in the Appendix, p. A-1 through A-16.

C. ISSUES PRESENTED FOR REVIEW

1. When a detainee is prepared to present expert testimony from a qualified witness, which describes several bases for concluding that he no longer meets the definition of a sexually violent predator, does the trial court abuse its discretion by summarily preventing a full evidentiary hearing on the issue?

2. Was the failure to allow a full hearing on the detainee's continued status as a sexually violent predator a violation of the detainee's right to due process of law?

D. STATEMENT OF THE CASE

On February 7, 1995, Elmore was convicted in Clark County Superior

Court of kidnapping and assault in the second degree, with sexual motivation. Elmore's conviction, which followed the entry of a plea of guilty, was based upon conduct alleged to have occurred on July 13, 1994. By agreement, the parties stipulated to an exceptional sentence of 60 months total confinement with the Department of Corrections. CP 167-68.

On July 8, 1999, shortly before Elmore's scheduled release from total confinement, the State of Washington filed a petition which asserted that Elmore was a sexually violent predator, as defined by RCW 71.09.020. CP 238, 276. Based upon the petition, the respondent was taken into custody and transported to the Clark County Jail. Following a hearing on October 12, 1999, a Clark County Superior Court Judge found probable cause to believe that Elmore was a sexually violent predator, and directed his detention at the Special Commitment Center, for an evaluation prior to his commitment trial.

Elmore contested the court's determination of probable cause, and its subsequent determination that he was a sexually violent predator. Elmore retained Dr. Richard Wollert to perform an independent evaluation, and to potentially provide expert testimony concerning the issues raised by the State in its commitment petition. Dr. Wollert's testimony was not presented to the court during Elmore's subsequent commitment trial. CP 131-133.

On October 8, 2001, a commitment trial was scheduled before the Clark County Superior Court, the Honorable Judge Roger Bennett presiding.

Prior to beginning the trial, Elmore and the State entered into an agreement to present only certain facts to the court, in lieu of live testimony and presentation of other evidence. The parties stipulated to the admissibility of five documents, including the July 26, 2000, evaluation of the respondent by Dr. James Manley, Ph.D. CP 3, 133-34. Elmore did not stipulate that he was a sexually violent predator. He agreed, however, that based upon Exhibits A-E, “the court may find, beyond a reasonable doubt, that he is a sexually violent predator.” CP 6, 199-200.

The detainee recognized that the court was free to review the evidence, and draw its own conclusions, and not to accept the agreement of the parties. If the court accepted the agreement of the parties concerning the admissibility and sufficiency of certain evidence, Elmore agreed to certain findings of fact being entered “for the purposes of this stipulation only.” CP 6. Elmore specifically refused to stipulate, and the court did not find, that he suffered from the mental abnormality of sexual sadism. References to this diagnoses were stricken from the Findings of Fact, Conclusions of Law and Order of Commitment presented to the court. CP 6-7.

The trial court reviewed the evidence stipulated to by the parties, and the proposed Findings of Fact, Conclusions of Law and Order of Commitment. Based upon this review, the trial court found that Elmore was a sexually violent predator as defined by RCW 71.09.020, and ordered him

committed to the custody of the Department of Social and Health Services, for placement at the Special Commitment Center. The trial court entered the Stipulation to Findings; Findings of Fact; Conclusions of Law; and Order of Commitment as a Sexually Violent Predator on October 8, 2001. CP 3-9.

A detainee committed as a sexually violent predator has the right to an annual review of his mental condition, to determine whether he continues to meet the definition of a sexually violent predator, and additionally to consider whether release to a less restrictive alternative placement is appropriate.

Elmore's first and second annual review hearings were combined, and a show cause hearing before the trial court was conducted on March 17, 2004. At the hearing, the State presented two written reports by Dr. Jason Dunham, an employee of the Special Commitment Center, to satisfy its burden of establishing prima facie that Elmore continued to meet the criteria for commitment as required by RCW 71.09.090(2). In response to the State's motion for summary judgment, Elmore presented the written evaluation of Dr. Wollert, completed in November 2003, to establish probable cause to believe that he no longer met the statutory definition. Appendix p. 17-28; CP 260-75, 277-78.

Prior to preparing his report, Dr. Wollert interviewed Elmore, and reviewed an extensive case history, including materials considered during his initial evaluation and interview of Elmore in 1999. Dr. Wollert also

considered materials describing Elmore's placement at the Special Commitment Center, including his progress in treatment while in that facility. CP 260-75.

Based upon this review, Dr. Wollert formed the opinion that Elmore no longer meets the definition of a sexually violent predator, and does not require continued commitment. Wollert noted a number of changes in Elmore's status and condition since being detained at the Special Commitment Center:

Among these are the following: progress on the completion of specific treatment milestones and overall treatment progress, diagnostic status, her status as to whether she currently suffers from a mental abnormality that affects her emotional or volitional capacity to the point that she is so predisposed to the commission of criminal sexual acts that she constitutes a menace to the health and safety of others, and her status as to whether she is more likely than not, if she were unconditionally released, to commit or attempt to commit a sexually violent offense against a stranger or casual acquaintance. In view of the fact that she is now 47 years old, and sexual recidivism decreases steadily with age, an analysis of the expected effects of age on an estimated recidivism risk should also be undertaken.

Appendix, p. 22. Wollert concluded that each of these factors, including Elmore's change in age, and substantial progress in treatment, supported his opinion that Elmore was no longer a sexually violent predator. Appendix, p. 28.

On April 15, 2004, the trial court issued its written Ruling on Probable Cause. Judge Bennett found that Elmore had established probable cause to

believe that he no longer met the statutory definition of a sexually violent predator, “because he is older now than when he was committed.” CP 276-81. But, the trial court expressly refused to allow Dr. Wollert to base his opinion on any of the other changes in Elmore’s condition that are identified in his report. Judge Bennett specifically prohibited Dr. Wollert from testifying that Elmore had sufficiently progressed in treatment, so that he no longer met the definition of a sexually violent predator. The court found that this opinion could not be described to the trier of fact, because it was inconsistent with the opinion of the Special Commitment Center’s staff. CP 278-79.

The judge also ruled that Dr. Wollert’s opinions on the changes in Elmore’s diagnostic status, and his use of statistical analysis and testing to determine the current likelihood that Elmore would reoffend, could not be presented to the trier of fact. The trial court noted Dr. Wollert’s original opinion that Elmore did not meet the definition of a sexually violent predator. Although the stipulation to consideration of certain evidence at the original trial specifically deleted references to sexual sadism, Judge Bennett found that Elmore had “conclusively stipulated” to this diagnosis. CP 280. The trial court read the original stipulation of facts to prohibit Elmore from ever challenging the diagnosis of his mental condition, or from arguing that it was currently incorrect, based upon observations, testing and analysis done after his commitment. CP 280-81.

In May 2005, after the trial court ruled in this case, the Washington Legislature amended RCW 71.09.090. Later, the Court of Appeals, Division II, held Elmore was not entitled to an evidentiary hearing. Elmore now petitions this court for discretionary review.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. When the detainee is prepared to present expert testimony from a qualified witness, which describes several bases for concluding that he no longer meets the definition of a sexually violent predator, the trial court abuses its discretion by summarily preventing a full evidentiary hearing on the issue.

The status of a detainee at the Special Commitment Center must be reviewed annually by the trial court. RCW 71.09.090. The Legislature contemplated that an evidentiary hearing would be conducted on the question of the detainee's present condition if

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 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)(c). The State "must bear the burden of proof in show

cause hearings held pursuant to RCW 71.09.090(2).” *In re Detention of Turay*, 139 Wn.2d 379, 424, 986 P.2d 790 (1999), *In re Detention of Petersen*, 145 Wn.2d 789, 797, 42 P.3d 952 (2002).

The trial court conducts a preliminary screening of the necessity for a full evidentiary hearing, by reviewing both the written submissions of the State and the respondent. The focus is on the present condition of the detainee, including a consideration of evidence from expert witnesses:

Even if the State carries its burden to prove a prima facie case for continued imprisonment, the prisoner may present his own evidence which, if believed, would show (1) the prisoner no longer suffers from a mental abnormality or personality disorder, i.e., the prisoner has “so changed”, or (2) if the prisoner still suffers from a mental abnormality or personality disorder, the mental abnormality or personality disorder would not likely cause the prisoner to engage in predatory acts of sexual violence if conditionally released to a less restrictive alternative **or unconditionally discharged. . . . If the prisoner makes either showing, there is probable cause that continued incarceration is not warranted. Former RCW 71.09.090(2) then mandates the court to set the matter for a full evidentiary hearing.**

In re Detention of Petersen, 145 Wn.2d at 798-99 (emphasis supplied). The court should simply determine whether evidence presented by the detainee meets the statutory standard. *In re Detention of Andre Young*, 120 Wn. App. 753, 758, 86 P.3d 810 (2004). When determining probable cause at an annual show cause hearing, a trial court should not weigh evidence. *In re Detention of Petersen*, 145 Wn.2d at 803.

Dual consideration of continued mental problems, and continued dangerousness, is similar to the review process following insanity acquittals. *State v. Reid*, 144 Wn.2d 621, 627, 30 P.3d 465 (2001). The show cause proceeding conducted by the court is not an opportunity for summary determination of the facts by the trial court. As in other civil proceedings, summary determination is only appropriate if the moving party establishes that there is no general issue of material fact, and that the moving party is entitled to judgment as a matter of law. *Ellis v. City of Seattle*, 142 Wn.2d 450, 13 P.3d 1065 (2000).

In reviewing whether the detainee has established probable cause, the trial court must consider all facts, “and all reasonable inferences that can be drawn from those facts, in the light most favorable to the non-moving party, . . .” *Barrett v. Freise*, 119 Wn. App. 823, 839, 82 P.3d 1179 (2003). “Because weighing of evidence, balancing of competing expert credibility, and resolution of conflicting material facts are not appropriate on summary judgment, a trial is necessary to resolve these matters.” *Larson v. Nelson*, 118 Wn. App. 797, 810 (footnote 17), 77 P.3d 671 (2003). At the show cause hearing held in advance of each SVP annual review “courts do not ‘weigh evidence’ to determine probable cause.” *In re Detention of Petersen, supra*, at 798.

In this case, Elmore presented the written report of Dr. Wollert, which

described his opinion that a number of conditions had changed since the detainee's commitment, and that Elmore's further incarceration at the Special Commitment Center was unnecessary. Appendix, p. 17-28. These changes were not limited to inevitable increases in Elmore's age, although Dr. Wollert found that this aging process was statistically significant in measuring the likelihood of recidivism. Dr. Wollert also believed that Elmore's substantial engagement in, and progress through, treatment, since commitment was important, as well as additional information, obtained after commitment, which related to his diagnoses, his mental condition, and his likelihood of reoffense. Based upon each of these factors, Dr. Wollert concluded that Elmore could be released from confinement, either unconditionally, or to a less restrictive alternative form of confinement.

By prohibiting the presentation of some of Dr. Wollert's opinions, to the trial of fact, Judge Bennett made exactly the same mistake as the trial judge in *In re Detention of Andre Young*. CP 276-81. In *Young*, the trial court conducted a preliminary hearing on an annual review of a detainee's status as a sexually violent predator. The trial court weighed the evidence presented by the parties, including the opinions of experts, on a motion for summary judgment. The judge decided to assign weight to some pieces of evidence, and to attach no weight to the opinions of one of the detainee's experts. Through this process, the court concluded that there were no material issues of

fact, and granted the State's motion for continued commitment, without an evidentiary hearing. *Young*, 120 Wn.App. at 755-56.

The Court of Appeals reversed the trial court's ruling, and remanded the case for a full evidentiary hearing, pursuant to RCW 71.09.090(2).

An annual show cause hearing is not the proper venue to challenge and weigh the evidence. The State will have an opportunity to challenge Dr. Barbaree's opinion, and the trier of fact will have the opportunity to weigh his opinion against the State's evidence in a proper venue—a new commitment hearing. By discounting Dr. Barbaree's opinion and weighing it against the State's evidence, the trial court substituted judgment for that of *Young's* expert. Under *Petersen* and *Thorell*, the court may only determine whether the evidence, if believed, is prima facie evidence requiring a new evidentiary hearing.

In re Detention of Young, supra, at 760.

Although Judge Bennett recognized that he was bound by the *Young* opinion, the court improperly focused on the specific expert testimony offered in that case. The Court of Appeals did not indicate that weighing of evidence and resolution of review hearings on summary judgment was inappropriate only when the opinion was grounded in a change in the detainee's age. The trial court is charged only with determining if probable cause exists, based upon an expert's opinion, and if that opinion could be believed by a rational trier of fact. *Young*, 120 Wn.App at 758-60. Once that determination is made, it is not the trial court's duty, or authority, to pick apart the expert's opinion, and to allow only those factual grounds that the judge feels are credible to be

weighed and presented at the evidentiary hearing. Instead, those issues are properly left to cross-examination, and presentation of competing witnesses by the State of Washington. *Young*, 120 Wn.App at 763 (footnote 19).

For example, the trial court in this case ruled that Dr. Wollert would not be allowed to express his opinion that Elmore has sufficiently progressed in treatment, so that he no longer meets the definition of a sexually violent predator. The sole basis for this ruling was the judge's conclusion that Wollert's opinion conflicted with the opinions of SCC staff. CP 276-81. By accepting the opinion of the State's experts concerning Elmore's progress in treatment, "the trial court substituted its judgment for that of [the detainee's] expert." *Young*, 120 Wn.App. at 759-60.

Similarly, Judge Bennett accepted the State's argument that Dr. Wollert could not present his opinion concerning changes in Elmore's diagnostic status, because he would have reached a similar conclusion at the time of Elmore's initial commitment. But this challenge goes to the weight of Dr. Wollert's testimony, not its admissibility. Division I of this Court has recognized that:

A new diagnosis would be another way of proving someone is not still a sexually violent person. . . . [A] new diagnosis focuses on the present. The present diagnosis would be evidence of whether an individual is still a sexually violent person.

In re Detention of Young, supra, at 763 (footnote 20), quoting, *In re Commitment of Pocan*, 2003 WI App. 233 §12, 671 NW 2d 860 (2003).

Adoption of the State's position would essentially make the statutory review process meaningless. The Court of Appeals, Division II, essentially held that the detainee can only obtain a full review hearing when the SCC staff believes that he or she has significantly progressed in treatment, or when the State's experts believe that his or her diagnostic status has changed. This deference to the petitioner's experts, and automatic rejection of any contrary opinion, is exactly the opposite of the procedure outlined by the Legislature, and upheld by Washington's courts. Further, the State is not entitled to indefinitely detain Elmore. It is allowed to detain him only for so long as he meets the definition of a sexually violent predator. Once he does not, he is entitled to be released. *In re Detention of Petersen, supra*.

The Superior Court Judge's legal conclusion of whether the evidence meets the probable cause standard is reviewed de novo. *In re Detention of Petersen, supra*. This Court should reverse the trial court's ruling, and remand for a full evidentiary hearing, to correct the trial court's error of failing to fully comply with the procedures outlined in *Young*, and RCW 71.09.090. The Court should remand the case to the trial court with instructions that Elmore is entitled to a full evidentiary hearing on the question of whether he continues to qualify for imprisonment at the Special Commitment Center.

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2. *Failure to allow a full hearing on the detainee's continued status as a sexually violent predator violates the detainee's right to due process of law.*

Although the State has an interest in preventing the premature release of a dangerous mentally ill individual, a detainee has a significant liberty interest "in avoiding unnecessary confinement." *Hickey v. Morris*, 722 F.2d 543, 548 (9th Cir., 1983); *Vitek v. Jones*, 445 U.S. 480, 100 S.Ct. 1254, 63 L.Ed.2d 552 (1980); *In re Personal Restraint of Young*, 122 Wn.2d 1, 26, 857 P.2d 989 (1993); *In re Detention of Albrecht*, 147 Wn.2d 1, 7, 51 P.3d 73 (2002). To be consistent with the requirements of due process, review procedures must assure that "the acquittee may be held so long as he is both mentally ill and dangerous, but no longer." *Foucha v. Louisiana*, 504 U.S. 71, 77, 112 S.Ct. 1780, 118 L.Ed.2d 437 (1992). The Constitution allows the government to detain an individual based on his mental condition only until he "is no longer a danger to himself or society." *Jones v. United States*, 463 U.S. 354, 370, 103 S.Ct. 3043, 77 L.Ed.2d 694 (1983).

If the pre-amendment Washington statutes were followed, they provided sufficient procedural safeguards for a detainee seeking review of his or her confinement following commitment as a sexually violent predator. The statutes provided for regular review, on an annual basis, of the current condition and dangerousness of the detainee. The detainee was to be provided with the opportunity for a full evidentiary hearing, the opportunity to depose

any of the State's expert witnesses and conduct such discovery as is permitted by civil rules, and the opportunity to present his or her own evidence and the right to challenge the State's evidence, upon only a minimal showing of probable cause. *In re Detention of Petersen, supra*. In order for the commitment process to pass constitutional muster, the procedures must be fully followed by the trial court.

At trial in this case, the judge did not follow the procedures outlined by RCW 71.09.090, as interpreted by the *Petersen, Thorell, and Young* decisions. Instead, the trial court conducted a review of the opinions of the experts of the parties, based solely upon written reports. The trial court then decided which of the experts' opinions would be deemed to be "valid," and could be presented at the evidentiary hearing, based upon the judge's determination of credibility. By its ruling on probable cause, the trial court denied Elmore the opportunity to present evidence or argument in support of his position, to call witnesses on his behalf, and to fully examine the State's witnesses. The hearing, as effectuated by the trial judge in this case, does not satisfy the due process clause of the federal and state constitutions.

As interpreted by the Court of Appeals, Division II, evidence of a present diagnosis, whether offered at the original commitment hearing or not, is insufficient as a matter of law to establish probable cause if it is the same as the expert's original diagnosis. This interpretation prevents a detainee from

presenting evidence of a diagnosis differing from the State. As it applies to this case, Dr. Wollert cannot present his opinion concerning changes in Elmore's diagnostic status, and Elmore's present diagnosis, because he would have reached a similar conclusion at the time of Elmore's initial commitment.

However, the Court of Appeals, Division I, recognized that:

A new diagnosis would be another way of proving someone is not still a sexually violent person. . . . [A] new diagnosis focuses on the present. The present diagnosis would be evidence of whether an individual is still a sexually violent person.

In re Detention of Young, supra, at 763 (footnote 20), quoting, *In re Commitment of Pocan*, 2003 WI App. 233 §12, 671 NW 2d 860 (2003). The holding of the Court of Appeals, Division II, does not satisfy the due process clause of the federal and state constitutions.

The amendments to RCW 71.09.090 prevent actuarial evidence accepted in the scientific community from being offered as evidence to show that a detainee presently is not a danger to society. The Legislature noted that *Young* was contrary to its intent, and subverted the statutory focus on treatment. The Legislature determined that:

Mental abnormalities and personality disorders that make a person subject to commitment under chapter 71.09 RCW are sever and chronic and do not remit due solely to advancing age or changes in demographic factors... Laws 2005 c 344 § 1.

The effect of the statute enacted is to prevent a detainee from presenting

scientifically accepted actuarial evidence relating to age, which would be otherwise admissible, to establish that they are no longer presently dangerous.

Age is only one of the factors Elmore wishes to present at the review hearing, and was not the only factor considered by Dr. Wollert. Regardless, Elmore's increase in age results in a decrease of risk to re-offend as measured by the Static-99, an actuary risk assessment tool commonly used to evaluate sexually violent predators. CP 269-70. According to this tool, Elmore's likelihood to re-offend decreased from a previous risk of 16% to a current risk of 9%. The statutory amendment and its effect violates the due process clause of the federal and state constitutions.

When determining whether a particular procedure used by the trial court satisfies due process, appellate courts balance the private interest affected, the risk of erroneous deprivation of that interest, and whether additional procedural requirements would decrease that risk; and the government's interests, and whether additional procedural requirements would be an unnecessary burden on the State. *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). "Due process is flexible and calls for such procedural protection as a particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972). When the Washington Legislature has established the need for an annual evidentiary review, based upon a minimal showing, the State must present some

compelling reason for the trial court to disregard the statutory scheme, and to impose more restrictive procedures on the detainee.

The Washington Supreme Court has held the sexually violent predator statute contemplates an indefinite term of commitment, rather than a series of fixed one year terms of continued commitment. *In re the Detention of Petersen*, 138 Wn.2d 70, 81, 980 P.2d 1204 (1999). As addressed in *In re Personal Restraint of Young*, commitment under the sexually violent predator statute should be tailored to the nature and duration of the individual's mental illness. *Young*, 122 Wn.2d at 39. However, the status of a detainee at the Special Commitment Center must be reviewed annually by the trial court. The Legislature contemplated that an evidentiary hearing would be conducted on the question of the detainee's present condition. RCW 71.09.090(2)(c). Further, the State bears the burden of proof at the show cause hearings held pursuant to RCW 71.09.090(2). *In re Detention of Turay*, 139 Wn.2d 379, 424, 986 P.2d 790 (1999); *In re Detention of Petersen*, 145 Wn.2d at 799.

The trial court must determine whether "probable cause exists to believe the person's mental abnormality or personality disorder has so changed that the person is not likely to engage in predatory acts of sexual violence if conditionally released to a less restrictive alternative or unconditionally discharge." RCW 71.09.090(2). The show cause inquiry determines whether facts, if believed, exist that warrant a hearing on the

merits. *In re Detention of Petersen*, 145 Wn.2d at 796-97. The two statutory ways for a court to determine probable cause exist are (1) by finding a deficiency in the proof submitted by the State, or (2) by sufficiency of proof by the detainee. *In re Detention of Petersen*, 145 Wn.2d at 798. This dual consideration of continued mental problems, and continued dangerousness, is similar to the review process following insanity acquittals. *State v. Reid*, 144 Wn.2d 621, 627, 30 P.3d 465 (2001).

No legitimate government interest is protected by the denial of a full annual review of Elmore's commitment. The statute clearly contemplates that such a review will occur, and that a detainee's condition may change sufficiently to allow unconditional discharge within a one-year period of time.

Dr. Wollert's opinion properly focuses upon changes in Elmore's condition since commitment, his present diagnosis, and his current status as a sexually violent predator. Appendix 17-28. The procedure used by the trial court in this case to restrict presentation of expert opinion was fundamentally unfair, and denied the detainee due process of law. This Court should reverse the trial court's ruling, and remand for a full evidentiary hearing. On remand, the trial court should be instructed to conduct a full evidentiary hearing on each issue presented by the detainee by a qualified expert.

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F. CONCLUSION

For the reasons stated above, the Supreme Court should accept review of Elmore's petition for discretionary review. The trial court's ruling addressed above, and the Court of Appeals Opinion should be reversed. The case should be remanded for a full evidentiary hearing.

DATED this 6th day of September, 2006.

Respectfully submitted,



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Attorneys for Petitioner.

FILED
COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY

DEPUTY

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

In re the Detention of:

KEITH W. ELMORE,

Respondent / Cross- Appellant,

v.

STATE OF WASHINGTON,

Appellant / Cross-Respondent.

No. 31769-9-II

PUBLISHED OPINION

PENoyer, J. — Keith W. Elmore has been civilly committed as a sexually violent predator (SVP). The State now appeals from a superior court order granting Elmore a new trial on the issue of whether he continues to meet the definition of an SVP. Elmore cross-appeals the trial court's exclusion of most of his expert's evidence. We hold that Elmore has not shown that he is entitled to a new trial and that portions of his expert's report were properly excluded.

Therefore, we reverse.

FACTS

I. BACKGROUND

On October 25, 1994, Elmore pleaded guilty to second degree kidnapping and second degree assault, both with a sexual motivation. According to the police reports, he lured a former coworker to his apartment by telling her that he had a gift for her husband. When she arrived, he put a rope around her neck and told her to take off her clothes. The coworker grabbed the rope

to prevent Elmore from pulling too tightly and eventually convinced him to stop choking her. When Elmore went to get the gifts, she fled the apartment.

While in jail at the Twin Rivers Correctional Facility, Elmore participated in sex offender treatment. He was eventually dismissed from the program for lack of progress. As he neared the end of his five-year sentence, the State petitioned to commit Elmore for treatment as an SVP under chapter 71.09 RCW.¹

II. INITIAL SCC EVALUATION

Elmore was transferred to the Special Commitment Center (SCC) for evaluation. Dr. James Manley prepared the State's report, relying on the evaluations of other professionals. Elmore claimed that he desired to become female and had erotic fantasies about killing and eating a woman in order to absorb her feminine attributes or about skinning a woman to wear her

¹ According to the definitions in RCW 71.09.020:

(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.

(15) "Sexually violent offense" means . . . (c) an act of . . . assault in the first or second degree, [or] . . . kidnapping in the first or second degree, . . . which act, . . . has been determined beyond a reasonable doubt to have been sexually motivated.

(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.

(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.

hide. Dr. Manley diagnosed Elmore as suffering from delusional disorder, sexual sadism, gender identity disorder, and a personality disorder not otherwise specified with antisocial features.

Staff at the SCC administered a series of diagnostic tests to determine Elmore's risk for reoffending. The Minnesota Sex Offender Screening Tool-Revised (MnSOST-R) placed him within the low-risk range of recidivism over a six-year period. The Static-99 test score suggested a low to medium risk of recidivism over a fifteen-year period. The Violence Risk Appraisal Guide (VRAG), designed to predict recidivism among violent offenders, suggested that Elmore had an eight percent chance of violently recidivating within ten years. Finally, the Sexual Violence Risk-20 (SVR-20) tool, which examines 20 dynamic risk factors that have been identified with sexually violent recidivism, determined that Elmore had a very high risk of reoffending.

Based on these assessments, Dr. Manley concluded that Elmore met the criteria as an SVP and recommended that Elmore be placed in a secure setting.

III. DR. WOLLERT'S INITIAL EVALUATION

Elmore retained Dr. Richard Wollert to evaluate him. Dr. Wollert's November 21, 2000 evaluation concluded that Elmore suffered from schizoaffective disorder, a type of schizophrenia. Dr. Wollert disagreed with the diagnosis of sexual sadism, claiming that Elmore did not meet the diagnostic criteria set forth by the American Psychiatric Association.

Dr. Wollert emphasized Elmore's relatively low risk of reoffending based on his Static-99 and VRAG assessments. He also noted that other diagnostic tools such as the Rapid Risk Assessment for Sexual Offender Recidivism (RRASOR), the Psychopathy Checklist-Revised (PCL-R), and the Level of Services Inventory - Revised (LSI-R), all indicated that Elmore was at a low risk for reoffending. Dr. Wollert said:

The great preponderance of weight in making a decision in this case should be based on the actuarial evidence, as 8 studies have thus[]far compared the accuracy of actuarial versus clinical judgment for predicting recidivism or parole failure and actuarial judgment was found to be more accurate in all of them.

2 CP at 176.

Dr. Wollert concluded that Elmore was unlikely to reoffend. He recommended that Elmore be placed in a halfway house and continue outpatient treatment.

Elmore did not present Dr. Wollert's report at a commitment hearing but instead stipulated on October 8, 2001, to an order declaring him to be an SVP and committing him for treatment. The order incorporated Dr. Manley's evaluation, but it contained no specific references to Elmore suffering from sexual sadism.

By law, patients at the SCC are entitled to annual reviews of their mental conditions to determine whether they still meet the definition of an SVP. RCW 71.09.070. Elmore's 2002 review was continued so Elmore could get another evaluation from Dr. Wollert. The second report Dr. Wollert submitted, dated November 17, 2003, coincided with Elmore's 2003 annual review. Elmore submitted Dr. Wollert's 2003 report to demonstrate that he no longer met the definition of an SVP.

IV. DR. WOLLERT'S 2003 EVALUATION

After reviewing Elmore's history, Dr. Wollert noted the following as areas where Elmore "may have changed" since commitment: (1) his progress on completing specific treatment milestones and overall treatment progress; (2) his status as to whether he currently suffers from a mental abnormality; and (3) his status as to whether he is more likely than not to commit a

sexually violent offense.² Dr. Wollert also noted that “an analysis of the expected effects of age on estimated recidivism risk should also be undertaken.” 2 CP at 265. He concluded that conditional release to a less restrictive alternative would be in Elmore’s best interests and could be done while adequately protecting the community.

As part of his report, Dr. Wollert interviewed Elmore and reviewed Elmore’s clinical file. Dr. Wollert noted that Elmore was close to completing phase three and being advanced to phase four of his treatment program. Dr. Wollert also said:

In my experience, outpatient sex offender treatment based on weekly sessions is usually completed within 2 to 4 years. In light of the wide range of projects [Mr.] Elmore has completed, the extent to which [he] as met the specific release criteria . . . , [his] previous 15-month participation in the [sex offender treatment program] at Twin Rivers, and the length and intensity of [his] treatment experience at the SCC, I believe it would be appropriate to regard [him] as having finished residential treatment.

2 CP at 265-66.

Dr. Wollert went on to dispute the personality disorder diagnosis and to reiterate his conclusion that Elmore does not suffer from sexual sadism. He noted that Elmore does suffer from gender identity disorder and “may be positive” for delusional disorder or the schizoaffective disorder previously diagnosed. 2 CP at 267. However, he noted that none of these three diagnoses has been correlated with sexual recidivism.

Dr. Wollert also said that Elmore’s scores on the various actuarial tests had not changed since the date they were administered. He said that the recidivism risk for those with similar convictions decreased by about four percent per year. From this, Dr. Wollert estimated Elmore’s

² In 2002, Elmore obtained a court order legally changing his first name to Rebecca. Apparently he prefers the female pronoun as well. Because the caption still uses the male name, we continue to use that name and the male pronoun for the sake of consistency.

current recidivism risk to be about nine percent because Elmore is now two years older than when initially evaluated.

Dr. Wollert concluded by saying that Elmore's "status on various dimensions should be considered to have changed a great deal since [he] was detained and civilly committed. Taken together, these changes converge on the conclusion that [his] risk of sexual recidivism no longer falls above the commitment standard." 2 CP at 270.

V. TRIAL COURT REJECTS DR. WOLLERT'S REPORT

At a March 17, 2004 show cause hearing, the trial court was required to determine whether probable cause existed to warrant a full hearing on whether Elmore's condition had changed. RCW 71.09.090(2)(a). The State relied on the reports Dr. Jason Dunham at the SCC had prepared for Elmore's 2002 and 2003 annual reviews. Both reports concluded that Elmore was cooperating with treatment but that he continued to meet the definition of an SVP. Specifically, Elmore was not addressing the sexual component of his offense but, rather, was continuing to say that the attack was not sexually motivated.

The trial court noted:

Dr. Wollert's November 2003 report opines that Respondent, at this time, does not meet that statutory definition, for four reasons, specifically that Respondent has completed the residential portion of his treatment program, does not, and never did qualify for the diagnoses of sexual sadism and personality disorder not otherwise specified, that his risk to re-offend is less than 50% based on statistical analysis, and the Respondent's increased age reduces his risk to re-offend.

As to the first three reasons, Dr. Wollert's report is insufficient to establish probable cause to believe that Respondent's condition has *changed* since the order of commitment, so as to remove him from the definition of sexually violent predator.

Dr. Wollert concludes that Respondent has completed residential treatment. He does so, however, by imposing his own "experience" that outpatient sex offender treatment based on weekly sessions is usually completed within two to four years. . . . Notably missing in his opinion is any application of

the criteria of the Sexually Violent Treatment Program itself. It is insufficient for Dr. Wollert to opine that Respondent has completed residential treatment at the Special Commitment Center, where the staff at the [SCC] are of the opposite opinion. This is not a case of two differing opinions creating a genuine issue of material fact. The court is not weighing conflicting evidence. Dr. Wollert's opinion that Respondent has completed the program is unsupported by relevant evidence.

2 CP at 278-79 (emphasis in original).

As to the diagnoses of sexual sadism and personality disorder, the trial court found that Dr. Wollert only said that the diagnoses were wrong and remain wrong. “[I]t appears that [Dr. Wollert’s] proffered evidence would be that Respondent’s correct diagnoses today are the same as they were prior to commitment.” 2 CP at 280. The trial court ruled that Elmore had stipulated to the diagnoses underlying his commitment and so, absent evidence of a change, the stipulation was still binding. “The same can be said of Dr. Wollert’s opinion as to likelihood of recidivism based on statistical analysis and testing.” 2 CP at 280.

The trial court then referred to the Division One case *In re the Detention of Young*, 120 Wn. App. 753, 86 P.3d 810 (2004), *superseded by statute*, RCW 71.09.090, Laws 2005 c 344 § 1. In *Young*, where the detainee’s advancing age affected his risk of reoffending so that he was entitled to a new commitment hearing to determine whether he continued to meet the definition of an SVP. *Young*, 120 Wn. App. at 762. The trial court here read *Young* to mean that Elmore was entitled to a trial on the issue of whether he still meets the statutory definition of an SVP now that he is older than when he was committed. The trial court ruled that Elmore was entitled to a trial on this issue to the exclusion of the other issues Dr. Wollert raised.

The State appeals, claiming that the trial court erred in granting a recommitment trial based solely on Elmore’s increase in age. Elmore cross-appeals, claiming that the trial court

erred in rejecting Dr. Wollert's non-age based evidence that he no longer meets the statutory definition of an SVP.

ANALYSIS

I. LEGAL RULE

Every person committed at the SCC has the right to petition the court for conditional release to a less restrictive alternative (LRA) or for unconditional discharge. RCW

71.09.090(2)(a). Statute says:

If the [committed] 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 [LRA] 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) (emphasis added).

In May 2005, after the trial court ruled in this case, the legislature amended RCW 71.09.090. Laws 2005 c 344 § 4. In its notes, the legislature said it intended to "clarify the 'so changed' standard." Laws 2005 c 344 § 1. We therefore read these recent statutory amendments as a clarification of the legislature's intent and not as a substantive change in the law. We use the statute's current version to resolve this case because it expresses the legislature's intent more clearly and completely. *See State v. Cooper*, 156 Wn.2d 475, 479, 128 P.3d 1234 (2006) (statutory interpretation requires courts to give effect to the legislature's intent and purpose in passing a law).

Probable cause exists to believe that a person's condition has "so changed" 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 no longer meets the definition of a sexually violent predator. RCW 71.09.090(4)(a).

A new trial proceeding . . . 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

RCW 71.09.090(4)(b).

A change in a single demographic factor, without more, does not establish probable cause for a new trial proceeding. RCW 71.09.090(4)(c). A single demographic factor includes, but is not limited to, a change in the chronological age, marital status, or gender of the committed person. RCW 71.09.090(4)(c).

At the show cause hearing, the prosecuting attorney or attorney general must present prima facie evidence establishing that the committed person continues to meet the definition of a sexually violent predator, that an LRA is not in the person's best interest, and that conditions cannot be imposed to adequately protect the community. RCW 71.09.090(2)(b).

The inquiry at the show cause hearing is whether "facts exist" that warrant a full hearing on the merits. *In re the Detention of Petersen*, 145 Wn.2d 789, 796, 42 P.3d 952 (2002). The Statute says:

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 . . . ; 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.

RCW 71.09.090(2)(c).

The standard of proof at the show cause hearing is "probable cause." *Petersen*, 145 Wn.2d at 796. Probable cause exists if the proposition to be proven has been prima facie shown. *Petersen*, 145 Wn.2d at 797. The court determines whether the facts (or absence thereof)--if believed--warrant more proceedings. *Petersen*, 145 Wn.2d at 797. Courts do not "weigh evidence" to determine probable cause. *Petersen*, 145 Wn.2d at 798.

Essentially, a court may determine probable cause to proceed to an evidentiary hearing in one of two ways: (1) by deficiency in the State's proof, or (2) by sufficiency of proof by the committed person. *Petersen*, 145 Wn.2d at 798. The State must make out a prima facie case by setting forth evidence that, if believed, shows (1) the committed person still has a mental abnormality or personality disorder, i.e., the committed person has not "so changed;" and (2) this mental abnormality or personality disorder will likely cause the committed person to engage in predatory acts of sexual violence if conditionally released to a LRA or unconditionally discharged. *Petersen*, 145 Wn.2d at 798.

The second way to establish probable cause that the committed person's condition has changed is through the patient's own proof. *Petersen*, 145 Wn.2d at 798. Even if the State

carries its burden to prove a prima facie case for continued commitment, the committed person may present his own evidence which, if believed, would show that (1) the patient no longer suffers from a mental abnormality or personality disorder, i.e., the patient has "so changed;" or (2) if the patient still suffers from a mental abnormality or personality disorder, the mental abnormality or personality disorder would not likely cause the patient to engage in predatory acts of sexual violence. *Petersen*, 145 Wn.2d at 798. If the patient makes either showing, there is probable cause that continued commitment is not warranted. *Petersen*, 145 Wn.2d at 799.

We review de novo a trial court's legal conclusion of whether evidence meets the probable cause standard. *Petersen*, 145 Wn.2d at 799.

II. USE OF AGE TO DETERMINE PROBABLE CAUSE FOR A NEW TRIAL

A. Arguments on appeal

The State argues that commitment as an SVP is indefinite, so trials are not to be held every year. Rather, it claims that a trial should be ordered only when there is probable cause to believe that a person's condition has so changed since commitment that he is no longer an SVP. It claims that this change in "condition" means a change in the underlying mental condition and not simply a change in age.

The State urges us to reject *Young*. In addition to misinterpreting the meaning of "condition," the State claims that the *Young* court erroneously expanded the scope of the annual review hearing to include claims based on newly discovered scientific evidence.

Elmore responds that age is just one of the many factors that he wanted to present at the review hearing. He claims that the trial court properly found that the reduction in risk flowing from his increase in age was sufficient to establish probable cause that he is no longer an SVP. He argues that "condition" refers to a detainee's mental abnormality that creates a present

dangerousness to the community and that the trial court properly considered Dr. Wollert's opinion that age has significantly affected his risk to reoffend. Finally, Elmore argues that due process requires that commitment review procedures permit a detainee to be held only so long as he or she is both mentally ill and dangerous. He claims that the trial court did not err in ordering a new trial because the age evidence showed that he was not presently dangerous.

B. Analysis

The State submitted its brief before the legislature amended RCW 71.09.090. The amendments, which took effect on May 9, 2005, clarified that a change in a demographic factor such as age does not establish probable cause for a new trial. RCW 71.09.090(4)(c). In its notes, the legislature specifically found that *Young* was contrary to its intent that civil commitment address the "very long term" needs of the SVP population for treatment. Laws 2005 c 344 § 1.

The legislature further determined that:

[T]he mental abnormalities and personality disorders that make a person subject to commitment under chapter 71.09 RCW are severe and chronic and do not remit due solely to advancing age or changes in other demographic factors. . .

To the contrary, the legislature finds that a new trial ordered under the circumstances set forth in *Young* and *Ward*³ subverts the statutory focus on treatment and reduces community safety by removing all incentive for successful treatment participation in favor of passive aging and distracting committed persons from fully engaging in sex offender treatment.

Laws 2005 c 344 § 1.

Given the amendments to RCW 71.09.090, we hold that the trial court erred in using Elmore's age as a factor in granting him a new trial. The legislature clearly stated that only a

³ *In re the Matter of the Detention of Ward*, 125 Wn. App. 381, 104 P.3d 747 (2005), *superseded by statute*, RCW 71.09.090, Laws 2005 c 344 § 1.

change in the underlying mental condition, not a change in a demographic factor, could be a basis for a new trial under RCW 71.09.090(3). RCW 71.09.090(4).

III. REJECTING DR. WOLLERT'S OPINIONS AS A BASIS FOR A NEW COMMITMENT HEARING

A. The evaluations

Elmore claims that, through Dr. Wollert's report, he submitted sufficient evidence to establish probable cause that he no longer meets the definition of an SVP. He claims that the trial court improperly weighed the evidence that Dr. Wollert presented and improperly excluded some of Dr. Wollert's conclusions. Specifically, Elmore claims that the trial court weighed Dr. Wollert's opinion that Elmore had sufficiently progressed in treatment against the SCC staff's opinion that he had not. He asks us to reverse the trial court's decision to exclude most of Dr. Wollert's opinions and remand for a full evidentiary hearing.

Elmore claims that the trial court's exclusions violated his due process rights. He claims that the trial court improperly decided whether he continued to be an SVP based on the merits of each expert's report. He also claims that Dr. Wollert's opinion properly focuses on changes in his condition since commitment.

B. Analysis

1. Preliminary

We hold that the trial court properly found that Dr. Wollert's report did not create probable cause to believe that Elmore was no longer an SVP. Dr. Wollert himself only recommended supervised residential placement, an LRA, not unconditional release. Whether Elmore qualified for conditional release was already being litigated in other proceedings.

Furthermore, civil commitment as an SVP satisfies due process because a person may only be committed upon a finding that the person is both mentally ill and dangerous. RCW 71.09.020(16), .060(1).

2. Conclusion that Elmore has completed residential treatment

Dr. Wollert does not state sufficient facts to warrant a finding of probable cause to believe that Elmore has completed residential treatment. As *Petersen* said, facts must exist which, if believed, warrant more proceedings. *Petersen*, 145 Wn.2d at 797. The facts that Dr. Wollert states are: (1) Elmore is almost at stage four (out of six) in his treatment program; (2) typical sex offender treatment lasts between two to four years and Elmore has undergone that amount when the 15-month program at Twin Rivers is taken into account; and (3) Elmore has completed a wide range of projects and met some of the specific release criteria.

Elmore being near stage four implicitly acknowledges that he still has more work to do. Furthermore, the amount of time and effort that Elmore has put into treatment does not give probable cause to believe that the treatment was successful so that Elmore is no longer an SVP.

3. Reiterating the initial report

a. Evidence of a different diagnosis

The recent statutory amendments make clear that the relevant focus is on changes since the last commitment trial. RCW 71.09.090(4)(a), (b). The legislative notes for RCW 71.09.090's 2005 amendments stated:

The legislature also finds that, in some cases, a committed person may appropriately challenge whether he or she continues to meet the criteria for commitment. Because of this, the legislature enacted RCW 71.09.070 and 71.09.090, requiring a regular review of a committed person's status and permitting the person the opportunity to present evidence of a relevant change in condition from the time of the last commitment trial proceeding. These provisions are intended only to provide a method of revisiting the indefinite commitment due

to a relevant change in the person's condition, not an alternate method of collaterally attacking a person's indefinite commitment for reasons unrelated to a change in condition. Where necessary, other existing statutes and court rules provide ample opportunity to resolve any concerns about prior commitment trials. Therefore, the legislature intends to clarify the "so changed" standard.

Laws 2005 c 344 § 1.

We interpret these notes to mean that evidence questioning a past diagnosis is not in and of itself sufficient to establish probable cause that a detainee's condition has changed. Instead, the trial court should focus on changes since commitment. Therefore, we hold that Dr. Wollert's disagreement with the diagnoses of personality disorder and sexual sadism does not establish probable cause for a new hearing. This information was available for Elmore to present at his initial commitment hearing. Because he chose not to do so and stipulated to the State's expert's report instead, we hold that he cannot now collaterally attack that initial report on appeal.⁴ Instead, he must focus on how he has changed through treatment.

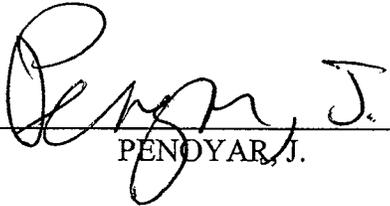
b. Actuarial evidence

The same is true for Dr. Wollert reiterating his initial conclusion that the actuarial evidence from the different tests does not support civil commitment. As Dr. Wollert notes, the results of Elmore's scoring have not changed. Because this was the same evidence that was available at the initial commitment hearing, we hold that the trial court properly discounted it as evidence of change warranting a new trial.

⁴ Even if Elmore had not stipulated to the State's report, he would still be bound if the trial court had found for the State after an adversarial hearing.

CONCLUSION

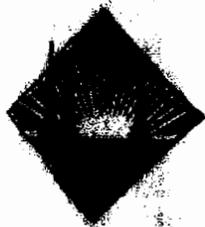
Because Elmore has not presented sufficient evidence that his condition has changed, and because the State met its burden of demonstrating that Elmore is still an SVP, we hold that Elmore is not entitled to a new trial at this time.


PENOYAR, J.

We concur:


HOUGHTON, P.J.


ARMSTRONG, J.



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November 17, 2003

Mr. Robert A. Lewis
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Dear Mr. Lewis:

Thank you for asking me to evaluate Ms. Rebecca Elmore, formerly known as Mr. Keith Elmore, who stipulated to being committed to the SCC in 1999 as a sexually violent predator, for the purpose of determining whether a) her condition has so changed that she no longer meets the definition of being a sexually violent predator or b) a conditional release to a less restrictive alternative would be in her best interests and such a release could be imposed under conditions that adequately protect the community. As you know, I evaluated Ms. Elmore's eligibility for commitment prior to her stipulation, and have recently interviewed her again. I have also read the file materials that have been sent to me since her placement at the SCC, and compiled them into a summary of Ms. Elmore's performance in that program. Although I believe the summary I have developed is reasonably comprehensive, it should be noted that a number of reports, progress notes, and polygraph exams were missing from the file and remained unavailable even after they were requested.

As the first step in responding to your questions, Ms. Elmore's case history will be summarized for the purpose of identifying important vectors of change. After this, the extent to which Ms. Elmore has changed on each of these vectors will be reviewed. The conclusions that are apparent from this review will then be presented. Since the subject has a long history of identifying with the female gender, and recently changed her name to reflect this identity, I have referred to her as a female throughout the report.

Case History

The life histories in Ms. Elmore's file indicate that she was born on 6/12/56 and grew up in a stable and religious family that included her mother, father, and younger sister.

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Although she characterized her mother as critical and domineering, and as having an explosive temper, she had a good relationship with her. She also felt very close to her father on some occasions, yet could be scornful of what she considered his passivity. Neither parent had substance abuse problems, and neither abused her sexually or physically. They allowed Ms. Elmore and her sister Diana to watch x-rated movies with them, however, and Ms. Elmore's step-grandfather apparently "goosed" Ms. Elmore on occasion and molested Diana when she was three years old.

When Ms. Elmore was a teenager she completed high school without getting into any trouble but dated only a few girls in high school and had limited social contacts. She also experienced frequent migraine headaches and occasional small seizures, and consulted with a psychologist when she was 17 years old after becoming depressed and feeling suicidal. During the course of treatment it was discovered that she had been cross-dressing for sometime and that occasionally she masturbated while cross-dressing. By this time she had also been shaving her body for a number of years.

As a young adult she began drinking moderately. Although she told an examiner in 1995 that she had been intoxicated twice and experimented with marijuana once, she maintained that she had never used other street drugs, blacked-out, or been in trouble as a result of drinking.

Completing two years of college coursework in machine tool technology, she consistently worked as a machinist. Leaving her parents home when she was 23 years old, she lived with her sister for five years between the ages of 23 to 32. During one period her parents and she started a small business but it failed. Towards the end of this time she underwent an intensive neurological assessment at Stanford Medical School which concluded that what were thought to have been seizures were actually "complex migraine headaches".

When she was 32 years old Ms. Elmore married her wife Judy after dating her for a year. Judy was 37 years old at the time and had 4 children from a previous marriage who ranged in age from 13 to 18 years old. Although Ms. Elmore has described their sexual relationship as adequate, she also indicated that she was passive and non-expressive towards Judy. On one occasion while she was asleep she choked Judy in their bed, after which she consulted with a psychologist who helped her understand that difficulties in expressing anger towards Judy over what she saw as her demanding and critical personality were associated with this behavior. At some point in her marriage she disclosed to Judy that she shaved her body and in 1994 she told her while she was engaging in cunnilingus with her that that she fantasized about eating Judy's limbs. In subsequent interviews Ms. Elmore acknowledged that she kept alcohol in her dresser because she knew her wife disapproved of drinking. She also acknowledged keeping a knife there in case Judy ever indicated that she was agreeable to voluntarily giving up her life so that she might be eaten. It is doubtful, however, that Ms. Elmore could have acted out her fantasies were Judy to agree, as she has admitted that she has "never cleaned anything more than a fish ... watched the butchering of an animal ... or considered how

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much the implementation of her fantasies" – given all of the pain and gore this would entail – "differed from just thinking about them". In 6/94 Judy separated from her.

Ms. Elmore apparently had a history of engaging in consensual relations with adult women prior to the offense which led to her current commitment. She had never hired a prostitute, had sex with a male partner, been to a topless bar, or called a telephone sex line. She also denied having any pedophilic or sadistic fantasies, or ever engaging in acts of bestiality, exhibitionism, frottage, pedophilia, or voyeurism. Her use of pornography was limited, as was her contact with arcades that sell sexually explicit materials.

Prior to her being arrested for the crime leading to her commitment, Ms. Elmore had no previous arrests or convictions for any type of sexual offense, and had never been a person of interest or suspect in any other sex offense case. She also did not have any previous arrests or convictions for any type of nonsexual offense. No other incidents of physically aggressive behavior involving Ms. Elmore have been reported other than her offense and the choking incident. She also does not have a history of suicide attempts or mood psychotic episodes, and has never been hospitalized as a result of having a psychiatric illness. After the choking incident she began taking Prozac, which blocked her fantasies of eating her wife, but did not continue with this regimen for very long. Although her wife obtained a restraining order against her in 7/94, she did not violate any of the conditions of this order. She also apparently did not violate any other community supervision conditions.

In the years immediately preceding her offense, Ms. Elmore suffered many stressful experiences. These included the death of her father in 6/92, the death of her mother in 2/94, the destruction of her house in a fire in 3/94, being laid off from work in 4/94, separating from her wife in 5/94, being faced with divorce proceedings in 6/94, and being advised by her pastor to seek a new church congregation in 7/94. She also started a new job and moved into a new apartment in 7/94. In 11/96 she told her therapist that she "formed the intent to offend" after Judy told her that "she wanted no further contact with her".

Ms. Elmore was convicted of second degree kidnapping with sexual motivation and second degree assault with sexual motivation after Lolene Clark, a former co-worker, reported that Ms. Elmore assaulted her on 7/13/94 in Ms. Elmore's apartment and told her to take her clothes off. According to the incident report and PSI, Ms. Elmore called Ms. Clark beforehand and told her that she had some gifts for her husband. When they met at a convenience store near the apartment, Ms. Elmore told Ms. Clark that she should park at the store and they should walk to the apartment because there weren't any parking spots there. Enroute to the apartment Ms. Elmore asked her if she told anyone about the visit and Ms. Clark indicated that she had talked with two co-workers about it. After they entered her apartment, Ms. Elmore seated Ms. Clark in her living room and told her she had a surprise for her, but that she had to close her eyes. Then she put a rope around her neck and pulled up on it so that there was a "momentary restriction of breathing". Before

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she did so, however, Ms. Clark grabbed the rope and was able to "pull ... to help keep the rope from strangling her too much". When Ms. Elmore told her to take her clothes off, she refused to do so and pled with her to stop. Ms. Elmore responded that she was going to get the rope tighter. Ms. Clark pointed out that others knew where she was, to which Ms. Elmore replied that it would take them awhile to figure out what had happened to her because she had parked at the store. After this Ms. Clark said she wouldn't tell anybody if she were released. Ms. Elmore commented that "I kind of have to (continue what I'm doing) now". Finally, Ms. Clark told her that there was no reason to "ruin everything", that she had babies, and that she had always thought of Ms. Elmore as a gentle person. After this Ms. Elmore began to release her grip on the rope and took it off Ms. Clark's neck. She also apparently did not strike her, threaten her verbally in a direct way, tell her she wanted to rape or kill her, touch her breasts or vagina, or assault her with a weapon other than the rope. When Ms. Elmore went into the kitchen to get the gifts she had promised Ms. Clark, Ms. Clark fled the apartment and returned to work. When officers later searched the apartment they found pieces of rope and the presents as well. They also found women's wigs, underwear, and clothing that apparently belonged to Ms. Elmore.

Subsequent to her arrest, Ms. Elmore was evaluated by a psychologist. Although she indicated at that time that she did not have any desire to become a woman, she reported experimenting with the application of make-up.

Ms. Elmore was incarcerated from 2/95 to 11/99. Positive references regarding her adjustment were frequently included in her classification referrals, including observations that indicated she received good to excellent work reports, needed little supervision, and got along well with staff and inmates. In a report dated 3/27/96, she was commended for her "willingness to program as fully as she is able" after it was noted that she had been participating in individual counseling, was involved in the Man to Man program, and had completed courses on anger management, stress control, and self-esteem. None of Ms. Elmore's classification referrals contained any negative references to her adjustment. She was also infraction free throughout her incarceration.

On 3/3/95 Ms. Elmore was evaluated for admission to the Sex Offender Treatment Program (SOTP) at the Twin Rivers Correctional Center (TRCC) and in 3/96 she began participating. In 8/96 a psychologist who evaluated her concluded that she was able to control her behavior in a clinical setting and diagnosed her as suffering from paraphilia (nos), adjustment disorder with anxiety or depression, and dependent personality disorder. At a staff meeting near this time it was also generally agreed that her behavior in this setting was goal-oriented rather than "compulsive". In connection with treatment Ms. Elmore completed a "full disclosure" of her offense and discussed her fantasies, interpersonal style, resentment towards her wife, and transsexual issues. Her responses to a plethysmographic exam also led the examiner to conclude that "it appears Ms. Elmore can intervene with her sexual arousal in the lab setting". Implementing a behavioral change program was challenging, however, because Ms. Elmore displayed a passive style that made it necessary "for people to pull information from her" and tended to "go in the

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direction of whatever theory is presented to her". Staff were also concerned that she had not disclosed her offence to her support system in the community. Nonetheless, notes from 1/97 indicated that "we anticipate that (she) will complete treatment near the beginning of the next quarter". On 7/10/97, the chair of the End of Sentence Review Committee expressed "significant concerns over Ms. Elmore's upcoming release from prison". On 7/31/97 Ms. Elmore was terminated from the TRCC sex offender treatment program because she was not making enough progress in the area of "behavioral changes". The therapists who wrote her treatment summary noted, however, that the program would re-admit her if there were "enough time". After completing their treatment summary, Ms. Elmore's treatment team sent a clarification of their stance on the issue of Ms. Elmore's custody level to the End of Sentence Review Committee. In this clarification they noted that "the best way of ensuring Ms. Elmore's safety in the community is to provide a structured release, including reduced security level". In December 1998 she completed a 36 hour "Victim Awareness Educational Program" that was offered by the TRCC.

Ms. Elmore was transferred to the Special Commitment Center in 10/99. On her initial treatment plan she was diagnosed as suffering from sexual sadism, gender identity disorder, delusional disorder, and personality disorder, nos (without further specification). Although her first several treatment plans did not delineate ultimate goals that needed to be achieved in the course of treatment, her treatment plan for the first trimester of 2000 indicated that "client is to eliminate inappropriate sexual behavior, practice relapse prevention, learn how to control emotions, and develop victim empathy in order to be considered for discharge planning".

In November of 2000 I completed an evaluation of Ms. Elmore to assess her eligibility for commitment as a sexually violent predator. During her interview she showed behavioral evidence of a) being able to empathize with the victim by offering a number of hypotheses as to the negative impact of her behavior on Ms. Clark and b) using relapse prevention techniques by observing that she had learned to use distraction and thought-stopping techniques so that she did not have any fantasies about eating someone else that lasted more than a couple of seconds. Regarding her future behavior, I found that her risk of recidivism, as measured by tests that are used to predict sexual or violent recidivism, was very low and that she suffered from schizoaffective disorder, a diagnosis that is specifically associated with a reduced risk of violence.

Although a trial was scheduled to determine Ms. Elmore's commitment status, she stipulated to being committed. Viewed within the context of Washington statutes, this was tantamount to agreeing with the state's attorneys that - at the time of her commitment - she a) suffered from a mental abnormality that affected her emotional or volitional capacity to the point that she was so predisposed to the commission of criminal sexual acts that constituted a menace to the health and safety of others and b) that she was more likely than not, if she were unconditionally released, to commit or attempt to commit a sexually violent offense against a stranger or casual acquaintance.

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Assessment of Change

The foregoing history points up many factors on which Ms. Elmore may have changed since she was detained at the SCC. Among these are the following: progress on the completion of specific treatment milestones and overall treatment progress, diagnostic status, her status as to whether she currently suffers from a mental abnormality that affects her emotional or volitional capacity to the point that she is so predisposed to the commission of criminal sexual acts that she constitutes a menace to the health and safety of others, and her status as to whether she is more likely than not, if she were unconditionally released, to commit or attempt to commit a sexually violent offense against a stranger or casual acquaintance. In view of the fact that she is now 47 years old, and sexual recidivism decreases steadily with age, an analysis of the expected effects of age on estimated recidivism risk should also be undertaken. Ms. Elmore's status with respect to each of these vectors of change is considered in the following sections.

Treatment Progress

Ms. Elmore's treatment progress was evaluated by compiling the attached 9-column chronological chart on the basis of information from her clinical file, her interview statements, and other sources. Although her involvement has sometimes been affected by differences with staff regarding the focus of treatment - she wants to examine both gender identity and relapse prevention issues, while staff want her to concentrate on relapse prevention issues - the entries in columns three through five indicate that she has consistently participated in good faith in group and 1:1 treatment, has completed a large number of projects and courses, and has a good understanding of sex offender treatment concepts). Regarding her institutional adjustment and personality functioning, the entries in columns six and seven indicate that she interacts with others co-operatively and respectfully, is compliant with rules and has received only one behavior management report (for smoking in her room), is trusted with the least restrictive privilege level attainable, and carries out her job competently. Regarding program advancement, she has completed all of the coursework to finish "Phase 3", and a polygraph on 8/02 confirmed the brief nature of her inappropriate fantasies. Although she did not pass a polygraph that asked about her level of arousal at the time of her offense, this test was not available among the materials I received and it was therefore impossible to analyze the content of the questions or find out whether she scored in the deceptive or uninterpretable range. At the present time she only needs to pass a polygraph and take a plethysmograph to be advanced to Phase 4.

In my experience, outpatient sex offender treatment based on weekly sessions is usually completed within 2 to 4 years. In light of the wide range of projects Ms. Elmore has completed, the extent to which she has met the specific release criteria listed in the second paragraph of page 5, her previous 15-month participation in the SOTP at Twin Rivers, and the length and intensity of her treatment experience at the SCC, I believe it

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would be appropriate to regard her as having finished residential treatment. This holds important implications in that Hanson and his colleagues found that the sexual recidivism rates for those who had completed a sex offender treatment program approximated 10% while the rates for those who did not were above 17%.

Diagnostic Status

As noted in the case history, treatment documents that were prepared shortly after Ms. Elmore was placed at the SCC indicated that she met the criteria associated with sexual sadism, gender identity disorder, delusional disorder, and personality disorder, nos (without further specification). Data that has subsequently been collected from the SCC clinical file and other sources, however, points to the conclusion that some of these diagnoses are either no longer applicable or need to be qualified.

Regarding the diagnosis of personality disorder, for example, all evaluators agree that Ms. Elmore does not meet the full criteria for any of the 10 specific personality disorders included in the fourth edition (TR version) of the Diagnostic and Statistical Manual of Mental Disorders of the American Psychiatric Association (2000). To be diagnosed as falling in the eleventh, and last, category of "personality disorder – not otherwise specified" he would have to exhibit a "pervasive" and "enduring" (p. 689) pattern of behavior, starting in adolescence, characterized by "features of several Personality Disorders" (p. 687). This pattern would also have to "deviate markedly" from what would be expected on the basis of his cultural circumstances (p. 689) and "involve clinically significant impairment" (p. 687). Since Ms. Elmore has not pervasively and repetitively displayed features of several personality disorders, the diagnosis of personality disorder (nos) is not applicable.

Regarding the diagnoses of sexual sadism, it would be inaccurate to diagnosis Ms. Elmore as suffering from sexual sadism for several reasons.

1. She does not meet the diagnostic criteria set forth by the American Psychiatric Association (1994) in that a) her fantasies – as she experiences them - do not revolve around inflicting pain and suffering on others; and b) she never becomes sexually excited at the prospect of carrying out any of her transformation fantasies.
2. Groth has discussed the phenomenon of sexual sadism using a case history approach (1985, pp. 44-57). There is no meaningful parallel between Ms. Elmore's case history profile and the histories presented by Groth. In particular, the following characteristics were observable in the histories of sexual sadists discussed by Groth: aggression was eroticized, torture and explicitly abusive acts were performed, sexual areas of the victims became a focus for inflicting injury, victims were typically strangers, assaults were associated with a "frenzied" escalation of sexual excitement, sadomasochistic pornography was of interest, and recurrent instances of cruelty were

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evident in everyday relationships with other people and animals. Ms. Elmore has never been shown to have any problems with any of these behaviors.

3. Gratzer and Branford (1995) empirically validated the concept of sadism by comparing the characteristics of the offenses of 58 men who were diagnosed as sexual sadists with 29 nonsadistic rapists. They found that significant differences between diagnostic groups were apparent on 14 items. Therefore, serious consideration should be given to classifying a person who is positive for a large number of these items as a sexual sadist. By the same token, a person who is positive for only a small number of items should not be classified as a sexual sadist. This approach to diagnosis, known as an "empirically-keyed" method, is widely accepted in psychology and has been relied upon for the development of instruments such as the MMPI. In the case at hand, Ms. Elmore is positive for two items that differentiate groups (i.e., took his victim to a preselected location, has a history of cross-dressing). She is negative, however, for 12 items (i.e., did not carefully plan out his entire assault, did not intentionally torture the victim, did not force the victim to perform fellatio, did not behave in an emotionally detached way, did not use an instrument of torture on the victim, did not bind or blindfold the victim, did not experience erectile dysfunction, never had any homosexual experiences, did not beat the victim with a blunt object, did not perform anal rape on the victim, never peeped or exposed himself or engaged in telephonic harrassment in the past, was not physically abused in childhood). This analysis indicates that it would be inappropriate to classify Ms. Elmore as a sadist.

Regarding the diagnoses of gender identity disorder and delusional disorder, Ms. Elmore is positive for the first disorder, and may be positive for the second as well. As noted in the case history, in my initial evaluation I concluded that she suffered from schizoaffective disorder. None of these disorders has been found to be positively correlated with sexual recidivism, however. Ms. Elmore's status with respect to these conditions is therefore irrelevant to answering the questions at hand.

Rereading my initial evaluation and recently conducting additional interviews with Ms. Elmore, it is clear to me that she only behaved aggressively during a period when she was in a state of distress that arose in connection with extreme losses in many sectors of her life. Within this context, her misconduct is most appropriately seen as a terribly confused and misguided attempt at forcing others to recognize her plight and communicating her desperation and helplessness. Since she did not touch the victim sexually or threaten her with rape, however, there is little evidence to suggest that her behavior was the product of compulsive sexual urges or a paraphilia.

Status With Respect to Not Being a Menace

Since none of the diagnoses for which Ms. Elmore is positive have been found to be associated with sexual recidivism, it would be untenable to assert that a mental

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abnormality affects her emotional or volitional capacity to the point that she is so predisposed to the commission of criminal sexual acts that she constitutes a menace to the health and safety of others.

Status With Respect to Being Unlikely to Sexually Reoffend if Unconditionally Released

Ms. Elmore's commitment eligibility was originally evaluated through the administration of three actuarial instruments called the RRASOR, Static-99, and VRAG. Since then, additional evidence has accumulated in support of the conclusions that a) actuarial prediction is more accurate than clinical judgment in forensic settings (Grove et al., 2000, pp. 24), and b) when adequate actuarial formulas are available, the use of clinical judgment is inadvisable because "research suggests that formal inclusion of the clinician's input does not enhance accuracy ... of the actuarial formula and that ... subjective attempts at adjustment can easily do more harm than good (Dawes, Faust, & Mechl, 1989; Grove & Mechl, 1996, p. 313; Quinsey, Harris, Rice, & Cormier, 1998, p. 171). In addition, the relevance of the VRAG for SVP commitment hearings has been questioned on the grounds that the test predicts violent recidivism, not sexual recidivism, and the developers of the test have taken the position that they "would not use the VRAG ... to make a numerical estimate of the lifetime likelihood of a person being arrested for a new sex offense" (Vern Quinsey, e-mail dated 2/7/03).

These developments indicate that risk predictions of sexual violence should be based on an approach that revolves around the administration of actuarial tests other than the VRAG to commitment candidates followed by a purely actuarial interpretation of the results. The VRAG still remains useful, however, for predicting violent recidivism, which includes both violent and sexual recidivism. Therefore, if a commitment candidate's risk of violent recidivism does not exceed 50% on the VRAG, it is impossible that his/her chances of sexual recidivism will be greater than 50%.

The results of scoring Ms. Elmore on the referenced actuarial tests have not changed since the date they were administered. They are as follows:

1. On the RRASOR, Ms. Elmore's risk of sexual recidivism was rated as a level 1. As a result she would be classified as a "likely success" in terms of not recidivating. From data collected on a group of 2,500 incesters, molesters, rapists, and sexual sadists from many different prisons, Hanson (1997) estimated that only 11% of those inmates with a score of 1 would be charged with a new sex offense over a 15-year period. He also reported that the 5-year sex offense rearrest rate for those with a score of 1 was 8%.
2. On the Static-99, Ms. Elmore's risk of sexual recidivism was rated as a level 2. As a result she would be classified as a "likely success" in terms of not recidivating. Sampling a group of 1,200 incesters, molesters, rapists, and sexual sadists from

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different prisons, Hanson and Thornton (1998) found that 16% of those inmates with a score of 2 were convicted of a new sex offense over a 15-year period.

3. On the VRAG, Ms. Elmore's risk of violent recidivism was rated as a level 2. Sampling a group of "mentally disordered offenders", Quinsey and his colleagues (Harris, Rice, & Quinsey, 1993) found that 10% of those inmates with a score of 2 were charged with a new violent offense over a 10-year period. This result was later duplicated by Rice and Harris (1997) with a sample of "mentally disordered sex offenders" - those who are "almost always (diagnosed with) pedophilia or sexual sadism" (Quinsey et al., 1998, p. 78). Since only about half of this group's violent crimes were of a sexual nature, the VRAG results also point up the low sexual recidivism risk that Ms. Elmore represents.

The PCL-R (Hare, 1991), which is a measure of what is often thought of as the "criminal personality", was also administered. On this test Ms. Elmore received a score of 5. For the sake of comparison it is useful to point out that about 98% of those who are incarcerated or are male forensic patients receive higher scores. Therefore, using the PCL-R actuarially, Ms. Elmore would be classified as a "likely success" in the sense that she would probably not commit another violent crime. Like the foregoing predictions, this prediction is also supported by empirical research. Among a group of offenders who were treated for 2 years at a maximum security psychiatric institution, Rice, Harris, and Cormier (1992) found that 77% who had scores of 25 or more committed a new violent crime within 10 years of their release, compared to 21% of those with scores of less than 25. In another study, Rice, Harris, & Quinsey (1990) found that the average PCL-R score for rapists who sexually recidivated within 46 months of being released - the group that probably included most sexual sadists - was about 22. Among those who didn't recidivate, however, the average score was 16. Ms. Elmore's score falls considerably below the average scores of both of these groups, again pointing up her low risk level.

These results point to the conclusion that Ms. Elmore is ineligible for continued commitment because it is a virtual certainty that her actuarially-determined recidivism risk does not exceed the relevant standard of 50%. Quite the contrary, it is not even close to this standard.

Corrections for the Effects of Age-related Recidivism Risk

In 2001 and 2003, different investigators reported that the recidivism risk for those whose convictions were similar to Ms. Elmore's decreased by about 4% per year. This means that a downward adjustment in Ms. Elmore's actuarial risk estimates should be made that accounts for the 13-year difference between Ms. Elmore's current age (47) and the average age (34) of subjects in the Static-99 developmental sample who received the same score for age (0) on this instrument as Ms. Elmore. When this is done, the best current estimate of Ms. Elmore's sexual recidivism risk approximates 9% (i.e., (1.00 -

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$.04)^{13} \times .16 = .09$). This estimate, which falls well below the commitment standard, will continue to decrease every year.

Conclusions

The foregoing sections indicate that Ms. Elmore's status on various dimensions should be considered to have changed a great deal since she was detained and civilly committed. Taken together, these changes converge on the conclusion that her risk of sexual recidivism no longer falls above the commitment standard. In contrast, the records I reviewed did not suggest the operation of factors that were reflective of an increased recidivism risk. I am therefore of the opinion that Ms. Elmore has so changed that she no longer meets the definition of a sexually violent predator.

Regarding your second question, the data I reviewed while compiling this report indicated that Ms. Elmore has received maximum benefit from inpatient treatment, that she is extremely respectful towards others and compliant with rules, that her offense is not attributable to a mental abnormality, that she has an appropriate support system, and that she is employable and a competent worker. During my initial evaluation, I also scored her on the Level of Services Inventory - Revised Version (LSI-R, Andrews & Bonta, 1995), which has been developed for the purpose of predicting how offenders might do on supervision and placement at a halfway-house. On this test Ms. Elmore received a score of 9. Bonta & Motiuk (1985) found that 93% of incarcerated offenders released to halfway houses who had scores of less than 11 were successful in completing their residencies. In contrast, this was the case for 63% of those who had scores of 12 or more. Using the LSI-R actuarially, Ms. Elmore would be classified as "highly likely to succeed" in a residential placement. Taken together, these conclusions indicate that a conditional release to a less restrictive alternative would be in Ms. Elmore's best interests and that conditions can be imposed that adequately protect the community.

Should it prove impossible to secure a viable community placement, it would be appropriate to consider her for the less restrictive placement that was recently been sited on McNeil Island.

I hope that you find this information helpful.

Sincerely,



Richard Wollert, Ph.D.
Licensed Oregon Clinical Psychologist
Certified Washington Sex Offender Treatment Provider

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