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STATE OF WASHINGTON
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NO. 31769-9

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

STATE OF WASHINGTON,

Appellant/Cross-Respondent,

v.

KEITH W. ELMORE,

Respondent/Cross-Appellant.

REPLY BRIEF OF APPELLANT/CROSS-RESPONDENT

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I. FACTS AND PROCEDURAL HISTORY

Mr. Elmore has been civilly committed as a sexually violent predator (SVP) pursuant to RCW 71.09 *et seq.* Approximately two years after he was committed, and pursuant to the annual review provisions found at RCW 71.09.090, the trial court ordered a recommitment trial. The trial court concluded that Mr. Elmore's condition had changed since his commitment. The parties' sought review of various aspects of the trial court's order and this Court subsequently granted review.

The State filed its opening brief in this matter in January 2005. Mr. Elmore filed his opening brief in March 2005.

Shortly after Mr. Elmore filed his opening brief, the State learned that a bill had been introduced in the legislature to amend RCW 71.09.090. Because this bill could have an impact on this appeal, the State moved this Court for an extension of time in which to file its reply brief. This motion was granted on May 16, 2005.

The legislature did, in fact, amend RCW 71.09.090 and, as a result, the State subsequently filed a motion to remand this matter to the trial court. The State indicated that in light of the amendments, Mr. Elmore should have the opportunity to supplement the record.

This motion was denied by this Court's commissioner on June 24, 2005. The State's subsequent motion to modify the commissioner's decision was denied on October 11, 2005.

This brief constitutes the State's reply in this matter. However, in light of the newly enacted and applicable legislative changes to the annual review provisions of RCW 71.09.090 and the *de novo* standard of review, this reply brief is better characterized as the State's substantive briefing in this matter.

II. ARGUMENT

This Court reviews *de novo* the trial court's order granting Mr. Elmore a recommitment trial. *Detention of Petersen v. State*, 145 Wn.2d 789, 799, 42 P.3d 952 (2002). The evidence presented at the annual review hearing, when assessed by this Court in light of the recently amended annual review provisions of RCW 71.09.090, demonstrates there is no basis upon which to order a recommitment trial in this matter.

The amended annual review procedure found at RCW 71.09.090 expressly provides that a recommitment trial is warranted only where any changes in the committed person's condition: 1) Have occurred since the most recent commitment trial; 2) Are the result of progress made in treatment or a permanent physiological change such as a stroke; and 3) Are not based on a single demographic factor such as age. The alleged

changes in Mr. Elmore's condition identified by his expert fail to satisfy these statutory requirements. As a result, this Court should reverse the trial court's order of a recommitment trial.

A. The Post-Commitment Annual Review Process in Sexually Violent Predator Cases.

Commitment as an SVP is indefinite and, as a result of the chronic nature of the mental disorders from which SVPs typically suffer, is likely to be lengthy. The annual review procedures of RCW 71.09 reflect both of these characteristics and provide that a recommitment trial may be held only where there is evidence to believe the person's condition has changed since commitment such that he or she no longer meets the definition of an SVP.

1. Commitment as an SVP is indefinite and typically lasts for a lengthy period of time.

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. *In re Young*, 122 Wn.2d 1, 27, 33, 857 P.2d 989 (1993), citing, *Addington v. Texas*, 441 U.S. 418, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979). The term of commitment is indefinite because the amount of time needed to treat the committed person's mental illness and thereby reduce the risk he or she poses to the community is variable and is unclear at the time the person is committed.

Indeed, the unremitting mental disorders from which SVPs typically suffer suggests that commitment as an SVP will be lengthy. The legislative findings underlying RCW 71.09 and relevant appellate precedent support this conclusion.

In enacting RCW 71.09, the legislature noted that the standard civil commitment statute, RCW 71.05, is “designed to provide short-term treatment” and, therefore, is inadequate for SVPs. RCW 71.09.010. The legislature found that SVPs have “personality disorders and/or mental abnormalities which are unamenable to existing mental illness treatment modalities” and, as a result, “the treatment needs of this population are *very long term*.” *Id.* (emphasis added).

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

Our sexually violent predator statute unequivocally contemplates an indefinite term of commitment, not a series of fixed one-year terms with continued commitment having to be justified beyond a reasonable doubt annually

at evidentiary hearings where the State bears the burden of proof.

In re the Detention of Petersen, 138 Wn.2d 70, 81, 980 P.2d 1204 (1999) (*Petersen I*).

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

2. The annual review procedures of RCW 71.09 provide for a recommitment trial only where the committed person’s condition has changed and he or she no longer meets the definition of an SVP.

The annual review procedures of RCW 71.09.090 reflect the relatively long period of time required to reduce the risk the committed person poses to the community through treatment of the underlying mental disorder. The SVP statute, therefore, provides that recommitment trials are not held every year, but only when there is sufficient evidence to believe that the committed person’s mental condition has “so changed” that he or she no longer meets the definition of an SVP. RCW 71.09.090.

The Department of Social and Health Services (DSHS) must conduct an annual review of the mental condition of each person who is

civily committed as an SVP. RCW 71.09.070. The annual review addresses two issues: 1) Whether the person continues to meet the definition of an SVP; and 2) Whether conditional release to a less restrictive alternative placement (LRA) is appropriate.¹ *Id.*

As part of the annual review, DSHS must provide the committed person with written notice of his right to petition the trial court for unconditional release. RCW 71.09.090(2)(a). Unless the committed person affirmatively waives his right to petition for release, the trial court must set a hearing. *Id.* At the hearing, the trial court must determine whether “probable cause exists to warrant a hearing on whether: (i) The person’s condition has *so changed* that he or she no longer meets the definition of a sexually violent predator.” *Id.* (emphasis added).

Probable cause to order a trial to determine whether the person continues to meet the definition of an SVP – a recommitment trial - may be found in one of two ways: Either failure in the State’s proof, or through proof presented by the committed person. The evidence presented by the State (typically the annual review evaluation conducted by DSHS staff) may fail to provide *prima facie* evidence that the committed person continues to meet the definition of an SVP. RCW 71.09.090(2)(c)(i).

¹ The LRA provision is not relevant in this proceeding since Mr. Elmore seeks a recommitment trial. As a result, the State will not discuss the LRA provisions of the statute.

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

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

3. Court of Appeals' decision in *Young AR*: An increase in age alone is a change in condition requiring a recommitment trial.

In 2004, the Court of Appeals issued its decision in *In re Young*, 120 Wn.App. 753, 86 P.3d 810 (2004), *rev. denied*, 152 Wn.2d 1035, 103 P.3d 201 (2004) (hereafter, *Young AR*²). The *Young AR* court held that an increase in age, standing alone, is a sufficient change in condition within the context of RCW 71.09.090 to warrant a recommitment trial.

² This decision is referred to as *Young AR* (annual review) to distinguish it from an earlier decision, also cited in this brief, involving the same person, Andre Young: *In re Young*, 122 Wn.2d 1, 857 P.2d 989 (1993).

The appellant in *Young AR* was Andre Young, who had been committed as an SVP in 1991. Young's annual review expert, Dr. Barbaree, conducted an evaluation of Mr. Young and concluded Mr. Young's condition had changed since his commitment in 1991 such that he no longer meets the definition of an SVP. *Young AR*, 120 Wn.App. at 756, 760-61.

The change identified by Dr. Barbaree was not the result of any treatment gains made by Mr. Young or any debilitating health problems. Rather, the change identified by Dr. Barbaree was simply that Mr. Young had aged since his commitment and was over 60 years old.

Dr. Barbaree concluded that new scientific research conducted since Mr. Young's 1991 commitment supports the conclusion that rapists released after age 60 rarely ever sexually reoffend. *Id.* at 760-61. The trial court examined Dr. Barbaree's opinion and rejected it, denying Mr. Young's request for a recommitment trial. *Id.* at 756, 759.

The *Young AR* court reversed the trial court, holding that the trial court erred by weighing Dr. Barbaree's opinion that an increase in Mr. Young's age, standing alone, reduced his risk to below the statutory threshold supporting continued commitment. *Id.* at 758-60. The court found that Dr. Barbaree's report constitutes *prima facie* evidence establishing probable cause to believe that Mr. Young no longer meets the

definition of an SVP, triggering the right to a recommitment trial under RCW 71.09.090(2). *Id.*

4. The Legislative Response to *Young AR*

In response to *Young AR*, the legislature passed S.B. 5582, 56th Leg., Reg. Sess. (Wash. 2005). This bill became effective on May 9, 2005, while this action was pending before this Court. App. A at 1, 7. As a result, the amendments contained in S.B. 5582 apply in this Court's *de novo* review of the trial court's decision at issue in this matter. S.B. 5582 makes changes to RCW 71.09.090 which clarify the legislature's intent regarding the nature of the changes in the committed person's condition that will trigger a recommitment trial.

In its findings prefacing the operative sections of S.B. 5582, the legislature echoed its finding made in 1990 when it enacted the SVP statute. The mental disorders from which SVPs suffer are "severe and chronic" and, as a result, commitment as an SVP is designed to "address the 'very long-term' needs of the sexually violent predator population for treatment and the equally long-term needs of the community for protection from these offenders." App. A, at 2. The statute serves these goals by mandating treatment of SVPs in a secure facility. *Id.* at 3. For those committed persons who make sufficient progress in treatment, the statute

provides for transition to an intensively monitored community placement.

Id.

The legislature found that *Young AR* runs contrary to the spirit of the SVP commitment scheme. The legislature recognized that “severe medical conditions like stroke, paralysis, and some types of dementia” can render a committed person unable to sexually reoffend. *Id.* at 2-3. However, “a mere advance in age or a change in gender or some other demographic factor after the time of commitment does not merit a new trial proceeding under RCW 71.09.090.” *Id.*

Indeed, the legislature found that ordering a recommitment trial solely on the basis of an increase in age seriously undermines the goals of the SVP statute. In light of *Young AR*’s holding, committed persons have no incentive to engage in treatment. *Young AR* “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.” *Id.* at 3.

The legislature then amended the operative annual review provisions of RCW 71.09.090 to clarify its intent in light of *Young AR*. These additions, found in a new RCW 71.09.090(4), expressly define the nature of the change in a committed person’s condition that is required

before a recommitment trial, “may be ordered, *or held.*”
RCW 71.09.090(4)(b) (emphasis added). Pursuant to S.B. 5582, the
change in a committed person’s condition that will trigger a recommitment
trial is either:

(b)(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

(b)(ii) A change in the person’s mental condition
brought about through positive response to continuing
participation in treatment which indicates that the person . .
. would be safe to be at large if unconditionally released
from commitment.

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

RCW 71.09.090(4).

In addition, S.B. 5582 specifies the relevant time frame in which
the changes in condition must occur. Only changes in the committed
person’s condition that have occurred “since the person’s last commitment
trial proceeding” are relevant and may require a recommitment trial.

RCW 71.09.090(4)(a).

It is important to note that the revisions to the annual review
procedures found in S.B. 5582 do not foreclose committed persons from

obtaining relief based upon generally accepted advances in relevant scientific areas such as risk assessment. Claims such as those made by Dr. Barbaree in *Young AR* may still be considered by the commitment trial court through the traditional avenue reserved for the presentation of such claims: CR 60(b). CR 60(b) governs motions to vacate judgments based upon, for example, newly discovered evidence that could not have been discovered at the time of the commitment trial.

The purpose of the legislature in enacting S.B. 5582 was not to terminate a committed person from presenting claims such as those found in *Young AR*. Rather, the legislature amended RCW 71.09.090 to encourage persons committed as SVPs to progress towards release by engaging in treatment.

B. There is Not Probable Cause to Believe Mr. Elmore's Condition has Changed Since His Commitment Such That He No Longer Meets the Definition of a Sexually Violent Predator.

As noted, this Court reviews *de novo* the trial court's decision whether to grant a recommitment trial. The evidence presented in the trial court, when assessed in light of the newly revised annual review provisions of RCW 71.09.090(4), demonstrates there is not probable cause to believe Mr. Elmore's condition has changed since his commitment. He continues to meet the definition of an SVP and is not entitled to a recommitment trial.

1. **The evidence presented by the State at the annual review hearing demonstrates that there has been no relevant change in Mr. Elmore's condition since his commitment and that he continues to meet the criteria of an SVP.**

As noted, probable cause to believe that Mr. Elmore's condition has "so changed" within the meaning of RCW 71.09.090 may be established either by failure in the State's proof, or based on evidence presented by Mr. Elmore. The evidence presented by the State in the two annual reviews done by DSHS staff psychologist, Dr. Jason Dunham, indicate that Mr. Elmore has not "so changed" since his commitment.³

Dr. Dunham completed his first annual review evaluation of Mr. Elmore in November 2002. CP 202-23. After noting the relevant aspects of Mr. Elmore's family, social, medical, criminal, sexual, and treatment history, Dr. Dunham's evaluation discusses information provided by Mr. Elmore's treating psychologists, Dr. Paul Spizman, and Dr. Holly Coryell. CP 203-11, 211-12.

While both commended Mr. Elmore for his hard work in treatment, Dr. Spizman commented that Mr. Elmore does not understand what drives his fantasy of killing and consuming a woman as well as his transgender

³ The State will not discuss Dr. Dunham's qualifications in detail since they were not challenged by Mr. Elmore. However, if the Court wishes to examine these, Dr. Dunham's curriculum vitae is part of the clerk's papers in this matter. CP 254-58.

issues. CP 211. Dr. Coryell noted that Mr. Elmore continues to have fleeting thoughts of killing and consuming a woman when he masturbates. CP 212. In addition, he refuses to acknowledge that his criminal offense was sexually motivated or that he is sexually aroused by his cannibalistic fantasies. *Id.*

Dr. Dunham also conducted a clinical interview with Mr. Elmore as part of his annual review. CP 212-16. During the interview, Mr. Elmore admitted that he has “fleeting” thoughts of killing and eating a woman approximately 25% of the time that he masturbates. CP 214. Despite this, Mr. Elmore denied that his crime and his deviant fantasies are sexually arousing or contain a sexual component. *Id.*

Mr. Elmore’s treatment records clearly demonstrate that he “has been resistant to exploring aspects of his sexual deviance, as indicated by his desire to discuss transgender issues over sexual re-offense risks.” CP 216. According to Dr. Dunham, “it appears that [Mr. Elmore’s] current assertion that his crime and deviant fantasies are not sexually related is hindering his overall treatment progress, as he still has yet (according to records, collateral sources, and clinical observation) to adequately explain how they are not sexually related.” *Id.*

Dr. Dunham diagnosed Mr. Elmore as suffering from Sexual Sadism, Gender Identity Disorder, and Personality Disorder Not

Otherwise Specified (NOS) with Antisocial and Dependent Traits. CP 218-19. Based upon these disorders, Mr. Elmore is more likely than not to reoffend if conditionally or unconditionally released. CP 220.

Finally, although Mr. Elmore is actively participating in treatment, he does not agree with the DSHS treatment staff that his crime and fantasies have a sexual component. Dr. Dunham stated that until Mr. Elmore realizes that his crime and fantasies do have a sexual element, "his hard work [in treatment] will be moot." CP 222.

Dr. Dunham also conducted Mr. Elmore's 2003 annual review evaluation. CP 232-53. At the time Dr. Dunham conducted this evaluation, Mr. Elmore was in Phase 3 of the 6-phase treatment program at the Special Commitment Center (SCC), the DSHS facility where he is being held. CP 243.

Dr. Dunham consulted with Dr. Henry Richards, another psychologist at the SCC who was then in the process of evaluating Mr. Elmore. *Id.* According to Dr. Richards, Mr. Elmore has developed a desire to have his (Mr. Elmore's) own limbs removed. *Id.* This is consistent with Mr. Elmore's "need to appropriate the will of someone else," with Mr. Elmore's co-dependency issues, and Mr. Elmore's desire to "merge with another person and be dependent on them." *Id.*

Dr. Dunham also consulted Mr. Elmore's most recent treatment plan. CP 243-44. This document indicates that Mr. Elmore is continuing to engage in treatment at the SCC. He has acknowledged that his offense was partly motivated by his rage towards his mother and other women in his life. CP 243. In addition, Mr. Elmore denies having any continued cannibalistic fantasies. CP 244. However, Mr. Elmore continues to spend most of his time in treatment focusing on his transgender issues, "most recently including his desire and fantasy to have his limbs removed." *Id.*

Dr. Dunham also conducted a clinical interview with Mr. Elmore. CP 245-46. Mr. Elmore indicated during the interview that he no longer thinks, even briefly, about cannibalism when he masturbates. CP 246. However, his most common masturbatory fantasy:

[I]s that of having his legs and arms amputated so that he only has a body. He acknowledges that it is sexually arousing to him to think of watching the procedure of having his limbs removed, feeling his hairless legs afterward, and rubbing the area where his legs once were. . . . [H]e estimated the chances he could have it [the operation of having his limbs removed] performed in the community at "60 to 70 percent." . . . When asked what he would do if he was unable to have the surgery performed at all, Mr. Elmore replied, "There would be frustration there. I'd still masturbate to it."

CP 246.

As before, Mr. Elmore continues to deny that his offense and his past cannibalistic fantasies were sexually motivated. CP 247. “I’m still saying it wasn’t sexually motivated.” *Id.*

Dr. Dunham diagnosed Mr. Elmore as suffering from Sexual Sadism, Paraphilia Not Otherwise Specified (NOS) (Apotemnophilia)⁴, Gender Identity Disorder, and Personality Disorder NOS with Antisocial and Dependent Traits. CP 248-50. Mr. Elmore’s various mental disorders make him more likely than not to commit predatory acts of sexual violence unless he is confined in a secure facility. CP 253. It is Dr. Dunham’s opinion that Mr. Elmore continues to meet the definition of an SVP. *Id.*

The evidence presented by the State at the annual review hearing demonstrates that there is not probable cause to believe Mr. Elmore’s condition has “so changed” since his commitment such that a recommitment trial is required. He has neither a debilitating physical condition nor has he made sufficient progress in treatment to believe he is no longer an SVP. RCW 71.09.040(4)(b).

- 2. The evidence presented by Mr. Elmore at the annual review hearing does not establish probable cause to believe his condition has “so changed” since his commitment such that he is no longer an SVP and a recommitment trial is required.**

⁴ Sexual attraction to having one’s own limbs removed is called Apotemnophilia.

At the annual review hearing, Mr. Elmore presented the November 2003 evaluation conducted by Dr. Richard Wollert, a licensed psychologist. CP 260-75. Dr. Wollert's annual review evaluation, when analyzed pursuant to the newly amended provisions of RCW 71.09.090(4), fails to establish probable cause to believe Mr. Elmore's condition has "so changed" since his commitment that he is no longer an SVP. Specifically, the alleged changes identified by Dr. Wollert are either factually unsupported, are not changes at all but merely reiterations of Dr. Wollert's pre-commitment opinions regarding Mr. Elmore, or are, by Dr. Wollert's own admission, insufficient, standing alone, to justify ordering a recommitment trial.

Dr. Wollert is familiar with Mr. Elmore, having evaluated him at his request prior to Mr. Elmore's commitment as an SVP. CP 145-176. Dr. Wollert's pre-commitment evaluation of Mr. Elmore reflects his opinion that Mr. Elmore does not suffer from Sexual Sadism, a diagnosis provided by many other evaluators. CP 173. In addition, Dr. Wollert concluded that Mr. Elmore is not likely to engage in predatory acts of sexual violence if released into the community. CP 174-76. As a result, Dr. Wollert opined that Mr. Elmore did not meet the definition of an SVP. CP 176. Despite Dr. Wollert's opinion, Mr. Elmore stipulated to commitment as an SVP.

Mr. Elmore again retained Dr. Wollert after his commitment to conduct an annual review evaluation. CP 260. He presented this November 2003 evaluation at the annual review hearing.⁵ CP 260-75; 277-78.

Dr. Wollert identifies in his annual review evaluation what he claims have been four changes in Mr. Elmore's condition since commitment that establish that Mr. Elmore is no longer an SVP and, therefore is entitled to a recommitment trial. CP 265-70. First, Dr. Wollert states that Mr. Elmore does not suffer from Sexual Sadism and Personality Disorder NOS, two of the diagnoses assigned by Dr. Dunham. CP 266. The second change in Mr. Elmore's condition identified by Dr. Wollert is the alleged low level of risk Mr. Elmore poses to the community. CP 268-69. In addition, Dr. Wollert believes that Mr. Elmore's low risk to reoffend has been reduced further because Mr. Elmore has gotten two years older since his commitment. CP 269-70. Finally, Dr. Wollert believes that Mr. Elmore has completed the residential portion of his treatment program. CP 265-66. None of these changes identified by Dr. Wollert are a sufficient basis upon which to order a recommitment trial.

⁵ Dr. Wollert had been retained by Mr. Elmore as part of the first annual review proceeding, but did not complete his evaluation until the time of the second annual review hearing.

- a. **Dr. Wollert's conclusions regarding Mr. Elmore's diagnosis are either conclusory and factually unsupported, or are not based on any postcommitment changes in Mr. Elmore's condition but are simply reiterations of Dr. Wollert's pre-commitment opinion on this issue.**

Dr. Wollert contends that Mr. Elmore does not suffer from Personality Disorder NOS or Sexual Sadism, two diagnoses assigned by other evaluators, including the SCC psychologist, Dr. Dunham. However, Dr. Wollert's conclusion that Mr. Elmore does not suffer from these disorders is not based on any change in Mr. Elmore since his commitment. Rather, Dr. Wollert believes that Mr. Elmore has never suffered from these conditions.

Dr. Wollert stated in his annual review evaluation that Mr. Elmore does not suffer from Personality Disorder NOS. CP 266. After citing the various elements that must be met to sustain a diagnosis of Personality Disorder NOS, Dr. Wollert simply states they are "not applicable." *Id.* This conclusory statement is not supported by citation to any evidence in the record. More importantly, Dr. Wollert does not identify this as a change in Mr. Elmore's condition since commitment, a requirement mandated by RCW 71.09.090(4)(a).

Likewise, Dr. Wollert's opinion that Mr. Elmore does not suffer from Sexual Sadism also fails to provide a basis upon which to order a

recommitment trial. It is not based on any changes in Mr. Elmore's condition since commitment. Indeed, this portion of Dr. Wollert's annual review evaluation is, quite literally, copied word for word from Dr. Wollert's pre-commitment evaluation. *Compare*, CP 173-74 and 266-67.⁶ Since Dr. Wollert's annual review opinion regarding Mr. Elmore's diagnosis is both conclusory and not based on any change in condition that has occurred since Mr. Elmore's commitment, this is not a valid basis upon which to order a recommitment trial. RCW 71.09.090(4).

- b. Dr. Wollert's contention that Mr. Elmore is not likely to sexually reoffend if released is not based on any post-commitment changes in Mr. Elmore's condition, but rather is Dr. Wollert's pre-commitment opinion on this issue.**

Dr. Wollert's also claims that Mr. Elmore is not likely to engage in predatory acts of sexual violence if released. However, Dr. Wollert's opinion on Mr. Elmore's risk to reoffend is not based on any post-commitment changes in Mr. Elmore's condition. Instead, Dr. Wollert's conclusion on this issue is a restatement of his pre-commitment opinion regarding Mr. Elmore.

In his annual review evaluation, Dr. Wollert uses the same risk assessment tools that he did in the pre-commitment evaluation and assigns

⁶ The only change Dr. Wollert appears to have made is to change the pronoun "he" to "she."

the same scores on those instruments. CP 174-75, 268-69. As with his discussion of the Sexual Sadism diagnosis, Dr. Wollert appears to have copied verbatim this section of his annual review evaluation from his pre-commitment evaluation. *Compare*, CP 174-75 and CP 268-69. Because Dr. Wollert's conclusions regarding Mr. Elmore's risk are not based on any post-commitment changes in his condition, this portion of Dr. Wollert's annual review evaluation cannot provide a basis for ordering a recommitment trial. RCW 71.09.090(4)(a).

- c. **Dr. Wollert's opinion that Mr. Elmore's risk has been reduced because he has aged two years since commitment is not a statutorily permissible basis upon which to order a recommitment trial.**

The third change in Mr. Elmore's condition identified by Dr. Wollert in his annual review evaluation is very similar to that cited by Dr. Barbaree in *Young AR*. Specifically, Dr. Wollert claims that Mr. Elmore's risk to reoffend has been reduced even further since his commitment because he has gotten two years older. CP 269. However, this change fails to satisfy the requirements of RCW 71.09.090(4)(c), which provides that an increase in age, standing alone, is not a sufficient basis upon which to order a recommitment trial.

At the time of Dr. Wollert's annual review, Mr. Elmore had, in fact, aged two years since his commitment. According to Dr. Wollert, this

increase in age results in a decrease in Mr. Elmore's risk to reoffend from 16% to 9%, as measured using the Static-99, one of the actuarial risk assessment tools. CP 269-70.

Dr. Wollert based this calculation on the 2001 and 2003 conclusions of "different investigators." *Id.* However, Dr. Wollert provided no information in his annual review evaluation about the qualifications and provenance of these "investigators" and their conclusions. Without such information, this Court has no information upon which to confirm that the investigators' findings are scientifically grounded and generally accepted in the relevant scientific community.

However, even if these difficulties are laid aside, Dr. Wollert's conclusion on this point still fails to satisfy the statutory prerequisites of a recommitment trial. An alleged reduction in risk stemming from age alone is not a relevant change in condition within the meaning of RCW 71.09.090(4), which provides:

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

RCW 71.09.090(4)(c) (emphasis added).⁷

⁷ It is important to note that had Mr. Elmore's increase in age led to a permanent "physiological change . . . such as paralysis, stroke, or dementia" that made Mr. Elmore

d. Dr. Wollert admits that any progress made by Mr. Elmore in treatment, standing alone, does not sufficiently reduce his risk such that a recommitment trial is warranted.

Finally, Dr. Wollert concludes that Mr. Elmore's participation in treatment at the SCC has reduced his risk. CP 265-66. This, "taken together" with the other changes identified by Dr. Wollert, demonstrates that Mr. Elmore is no longer likely to sexually reoffend if released and, therefore, no longer meets the definition of an SVP. CP 270. He is mistaken.

Dr. Wollert concludes that it is "appropriate to regard [Mr. Elmore] as having finished residential treatment" at the SCC. CP 265-66. Dr. Wollert reaches this conclusion despite the fact that after two years in treatment, Mr. Elmore remains at the same treatment level as when he entered the program (level 3 of 6). CP 243. In addition, the SCC, in whose treatment program Mr. Elmore is enrolled, does not believe Mr. Elmore has concluded residential treatment. CP 252. Nonetheless, based on his conclusion that Mr. Elmore has completed residential sex offender treatment, Dr. Wollert notes that this contributes to a reduction in his risk to reoffend. CP 266.

unable to commit a sexually violent act, a recommitment trial would be appropriate. RCW 71.09.090(4)(b)(i). However, a mere increase in age alone is not sufficient to justify a recommitment trial.

Ignoring the fundamental factual problems surrounding Dr. Wollert's conclusions regarding Mr. Elmore's treatment progress, such progress, if true, is not a sufficient basis upon which to conclude that Mr. Elmore's condition has changed such that a recommitment trial is appropriate. Dr. Wollert expressly states in his annual review evaluation that it is the combination of all of the changes in Mr. Elmore's condition that he identifies that lead him to believe Mr. Elmore is no longer an SVP:

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. . . . I am therefore of the opinion that Ms. Elmore has so changed that she no longer meets the definition of a sexually violent predator.

CP 270 (emphasis added).

As demonstrated previously, the first three changes in Mr. Elmore's condition identified by Dr. Wollert may not be considered in determining whether Mr. Elmore's condition has changed since his commitment. These alleged changes fail to satisfy the statutory requirements which require that a recommitment trial will only be held upon a showing that the committed person's condition has: 1) Changed since his or her most recent commitment trial; 2) The change results from a permanent diminution in the person's ability to commit sexual offenses or progress in treatment; and 3) Is

not the result of a single demographic factor such as age. RCW 71.09.040(4).

Since a recommitment trial may not be ordered based on the first three changes identified by Dr. Wollert, it naturally follows – by Dr. Wollert’s tacit admission - that Mr. Elmore’s alleged completion of the SCC residential treatment program, standing alone, is insufficient. As a result, Dr. Wollert’s annual review evaluation does not provide a basis upon which to hold a recommitment trial.

III. CONCLUSION

Civil commitment as an SVP is indefinite and may continue until such time as the committed person’s risk to sexually reoffend has been sufficiently reduced through treatment. Consequently, the inquiry into whether a recommitment trial is required focuses on relevant changes in the committed person’s condition that have occurred since the most recent commitment proceeding. The only changes that will trigger a recommitment trial are those flowing from participation in treatment or a permanent deterioration in the committed person’s physiological condition such as a stroke.

The evidence presented by the State in Mr. Elmore’s annual review proceeding demonstrates that Mr. Elmore’s condition has not sufficiently changed since his commitment to require a recommitment trial. In addition,

Dr. Wollert's evaluation also provides an insufficient basis upon which to order a recommitment trial.

Two of the changes in Mr. Elmore's condition identified by Dr. Wollert are not changes at all, but rather a recycling of Dr. Wollert's pre-commitment opinions regarding Mr. Elmore. Dr. Wollert's contention that a two year increase Mr. Elmore's age since his commitment has sufficiently reduced his risk is statutorily prohibited from providing the basis for a recommitment trial through the annual review procedures. Finally, Dr. Wollert's factually suspect allegation that Mr. Elmore has completed residential treatment at the SCC also fails since, by Dr. Wollert's tacit admission, this or any of the other factors, standing alone, are an insufficient basis upon which to conclude that Mr. Elmore no longer meets the definition of an SVP.

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This Court, applying the current annual review provisions of RCW 71.09.090(4), must conclude that there is not probable cause to believe Mr. Elmore's condition has so changed since his commitment that he no longer meets the definition of an SVP. This Court should, therefore, reverse the trial court's order granting Mr. Elmore a recommitment trial and remand this matter to the trial court.

RESPECTFULLY SUBMITTED this 7th day of November, 2005.



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Appendix A

CERTIFICATION OF ENROLLMENT

SENATE BILL 5582

Chapter 344, Laws of 2005

59th Legislature
2005 Regular Session

SEXUALLY VIOLENT PREDATORS--CHANGE IN DEMOGRAPHIC FACTORS

EFFECTIVE DATE: 5/09/05

Passed by the Senate March 9, 2005
YEAS 47 NAYS 0

BRAD OWEN

President of the Senate

Passed by the House April 11, 2005
YEAS 96 NAYS 0

FRANK CHOPP

Speaker of the House of Representatives

Approved May 9, 2005.

CHRISTINE GREGOIRE

Governor of the State of Washington

CERTIFICATE

I, Thomas Hoemann, Secretary of the Senate of the State of Washington, do hereby certify that the attached is **SENATE BILL 5582** as passed by the Senate and the House of Representatives on the dates hereon set forth.

THOMAS HOEMANN

Secretary

FILED

May 9, 2005 - 3:46 p.m.

**Secretary of State
State of Washington**

SENATE BILL 5582

Passed Legislature - 2005 Regular Session

State of Washington

59th Legislature

2005 Regular Session

By Senators Regala, Hargrove, Stevens, Carrell, Franklin, McAuliffe
and Kohl-Welles

Read first time 01/28/2005. Referred to Committee on Human Services
& Corrections.

1 AN ACT Relating to the use of demographic factors in proceedings
2 under chapter 71.09 RCW; amending RCW 71.09.090; creating a new
3 section; and declaring an emergency.

4 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

5 NEW SECTION. **Sec. 1.** The legislature finds that the decisions in
6 *In re Young*, 120 Wn. App. 753, review denied, ___ Wn.2d ___ (2004) and
7 *In re Ward*, ___ Wn. App. ___ (2005) illustrate an unintended
8 consequence of language in chapter 71.09 RCW.

9 The *Young* and *Ward* decisions are contrary to the legislature's
10 intent set forth in RCW 71.09.010 that civil commitment pursuant to
11 chapter 71.09 RCW address the "very long-term" needs of the sexually
12 violent predator population for treatment and the equally long-term
13 needs of the community for protection from these offenders. The
14 legislature finds that the mental abnormalities and personality
15 disorders that make a person subject to commitment under chapter 71.09
16 RCW are severe and chronic and do not remit due solely to advancing age
17 or changes in other demographic factors.

18 The legislature finds, although severe medical conditions like
19 stroke, paralysis, and some types of dementia can leave a person unable

1 to commit further sexually violent acts, that a mere advance in age or
2 a change in gender or some other demographic factor after the time of
3 commitment does not merit a new trial proceeding under RCW 71.09.090.
4 To the contrary, the legislature finds that a new trial ordered under
5 the circumstances set forth in *Young and Ward* subverts the statutory
6 focus on treatment and reduces community safety by removing all
7 incentive for successful treatment participation in favor of passive
8 aging and distracting committed persons from fully engaging in sex
9 offender treatment.

10 The *Young and Ward* decisions are contrary to the legislature's
11 intent that the risk posed by persons committed under chapter 71.09 RCW
12 will generally require prolonged treatment in a secure facility
13 followed by intensive community supervision in the cases where positive
14 treatment gains are sufficient for community safety. The legislature
15 has, under the guidance of the federal court, provided avenues through
16 which committed persons who successfully progress in treatment will be
17 supported by the state in a conditional release to a less restrictive
18 alternative that is in the best interest of the committed person and
19 provides adequate safeguards to the community and is the appropriate
20 next step in the person's treatment.

21 The legislature also finds that, in some cases, a committed person
22 may appropriately challenge whether he or she continues to meet the
23 criteria for commitment. Because of this, the legislature enacted RCW
24 71.09.070 and 71.09.090, requiring a regular review of a committed
25 person's status and permitting the person the opportunity to present
26 evidence of a relevant change in condition from the time of the last
27 commitment trial proceeding. These provisions are intended only to
28 provide a method of revisiting the indefinite commitment due to a
29 relevant change in the person's condition, not an alternate method of
30 collaterally attacking a person's indefinite commitment for reasons
31 unrelated to a change in condition. Where necessary, other existing
32 statutes and court rules provide ample opportunity to resolve any
33 concerns about prior commitment trials. Therefore, the legislature
34 intends to clarify the "so changed" standard.

35 **Sec. 2.** RCW 71.09.090 and 2001 c 286 s 9 are each amended to read
36 as follows:

37 (1) If the secretary determines that (~~either:—(a)~~) the person's

1 condition has so changed that either: (a) The person no longer meets
2 the definition of a sexually violent predator; or (b) conditional
3 release to a less restrictive alternative is in the best interest of
4 the person and conditions can be imposed that adequately protect the
5 community, the secretary shall authorize the person to petition the
6 court for conditional release to a less restrictive alternative or
7 unconditional discharge. The petition shall be filed with the court
8 and served upon the prosecuting agency responsible for the initial
9 commitment. The court, upon receipt of the petition for conditional
10 release to a less restrictive alternative or unconditional discharge,
11 shall within forty-five days order a hearing.

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

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

1 the annual report prepared pursuant to RCW 71.09.070. The committed
2 person may present responsive affidavits or declarations to which the
3 state may reply.

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

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

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

33 (b) If the issue at the hearing is whether the person should be
34 unconditionally discharged, the burden of proof shall be upon the state
35 to prove beyond a reasonable doubt that the committed person's
36 condition remains such that the person continues to meet the definition
37 of a sexually violent predator. Evidence of the prior commitment trial
38 and disposition is admissible.

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

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

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

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

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

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

37 (5) The jurisdiction of the court over a person civilly committed