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**SUPREME COURT OF THE STATE OF WASHINGTON**

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In re the Detention of:

KEITH W. ELMORE,

Petitioner,

v.

STATE OF WASHINGTON,

Respondent.

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**STATE'S SUPPLEMENTAL BRIEF**

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## I. INTRODUCTION

Since adolescence, Keith Elmore has fantasized about becoming a woman by raping, killing, and cannibalizing women. CP 70-71, 101-03. In 1994, his attempt to realize his fantasy by abducting the wife of a former co-worker was thwarted only when she managed to escape. CP 4, 71-73, 103-05. Mr. Elmore was convicted and imprisoned for offenses relating to this crime. *Id.*

He subsequently stipulated to civil commitment as a sexually violent predator (SVP) in 2001. CP 1-7. This case is before this Court on review of the decision of the court of appeals holding that, in the context of an annual review of Mr. Elmore's indefinite commitment, he failed to show that his condition has changed since commitment such that he is no longer an SVP, and therefore, he is not entitled to an unconditional release trial. *In re Detention of Elmore*, 134 Wn. App. 402, 416-20, 139 P.3d 1140 (2006). The court also held that the annual review procedures of RCW 71.09.090 are consistent with due process. *Id.* at 418.

## II. ISSUES

This appeal presents the Court with three issues:

1. May an SVP establish probable cause to believe that his or her condition has so changed since commitment that he or she no longer meets the definition of an SVP through expert testimony that collaterally attacks the original commitment determination,

rather than addressing relevant changes in the committed person's condition since commitment?

2. May an SVP establish probable cause to believe that his or her condition has so changed since commitment that he or she no longer meets the definition of an SVP through expert testimony of changes in condition that do not address the statutory requirements or are not supported by the evidence?
3. Are the annual review procedures of RCW 71.09.090 consistent with due process since they require an unconditional release trial where there is evidence of a relevant change in the SVP's condition since his or her commitment?

### **III. FACTS AND PROCEDURAL HISTORY**

The facts of this case are set forth at length in the State's original briefs before the court of appeals, as well as in its published opinion. Opening Brief of Petitioner at 1-7; Reply Brief at 13-17; *In re Detention of Elmore*, 134 Wn. App. at 406-12. For purposes of this supplemental brief, then, only a brief outline is necessary.

At an annual review hearing held after Mr. Elmore's commitment, the State presented two evaluations stating that Mr. Elmore continues to meet the statutory definition of an SVP. CP 66-94, 98-125. However, Mr. Elmore's expert, Dr. Wollert, opined that Mr. Elmore's condition has changed since commitment and he is no longer an SVP. CP 270.

The trial court rejected three of the four bases of Dr. Wollert's opinion, finding that Dr. Wollert's actuarial risk assessment and diagnostic conclusions were not based on any changes in condition, but were merely

reiterations of Dr. Wollert's pre-commitment opinion. CP 278-80. The court also found insufficient Dr. Wollert's opinion of a change in condition based on Mr. Elmore's alleged treatment completion because this conclusion is unsupported by the evidence. *Id.* However, the court did order an unconditional release trial based upon Dr. Wollert's conclusion that Mr. Elmore's two year increase in age since commitment is a relevant change in condition. *Id.* at 280-81

The court of appeals reversed the trial court's finding that Mr. Elmore's two-year age increase is a change in condition requiring that an unconditional release trial be held. *In re Detention of Elmore*, 134 Wn. App. at 417. The court of appeals affirmed the trial court's conclusion that the other three bases of Dr. Wollert's opinion are an insufficient basis upon which to require an unconditional release trial. *Id.* at 418-20.

In reaching its decision, the court applied the amended annual review procedures of RCW 71.09.090 that had become effective while Mr. Elmore's case was pending on appeal. *Id.* at 416-17. These were enacted in response to two court of appeals' decisions and served to clarify the nature of the change in condition necessary to trigger the right to an unconditional release trial. Laws of 2005, ch. 344, § 1. The court also

rejected Mr. Elmore's due process challenge to the annual review procedures. *In re Detention of Elmore*, 134 Wn. App. at 418.

#### IV. ARGUMENT

**A. The Annual Review Procedures of RCW 71.09.090 Reflect the Indefinite Nature of SVP Commitment and Require an Unconditional Release Trial Only Where There is Evidence of a Relevant Change in the Condition of the Committed Person Since Commitment.**

This appeal does not arise from the proceeding that led to Mr. Elmore's commitment as an SVP, but rather from an annual review of his commitment. As a result, the inquiry here focuses not on whether Mr. Elmore is an SVP, since that finding was made beyond a reasonable doubt at the initial commitment proceeding. The inquiry in this matter focuses on whether Mr. Elmore has presented sufficient evidence showing that since his commitment, his condition has changed and, as a result of that change, he no longer meets the definition of an SVP.

The indefinite duration of civil commitment flows from the chronic nature of the mental disorders from which SVPs suffer that drive their high risk of sexually violent recidivism. RCW 71.09.010; *In re Detention of Petersen*, 138 Wn.2d 70, 78, 980 P.2d 1204 (1999) (*Petersen I*). It is simply unclear at the time of commitment how long the SVP will require inpatient treatment in a secure facility before he or she is safe to be released back into the community.

The indefinite duration of SVP commitment is reflected in the annual review procedures found at RCW 71.09.090. These procedures do not require that an unconditional release trial be held every year, but only when there is sufficient evidence to believe that the SVP's relevant mental or physical condition has changed sufficiently since commitment that he or she no longer meets the definition of an SVP. Consistent with due process, the statute provides numerous procedural protections to SVPs that ensure a regular and meaningful review of the commitment decision. RCW 71.09.070, .090 (annual review hearing required unless affirmatively waived by SVP; right to counsel and expert of SVP's own choosing at hearing; court must order unconditional release trial if State fails to present evidence that SVP continues to meet commitment criteria, or if SVP presents evidence establishing probable cause to believe he or she no longer meets commitment criteria.).<sup>1</sup>

**B. Recent Amendments to the Annual Review Procedures Clarify the Nature of the Change in Condition Necessary to Trigger the Right to an Unconditional Release Trial.**

During the pendency of Mr. Elmore's appeal, and in response to two court of appeals' decisions, the legislature amended RCW 71.09.090

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<sup>1</sup> The statute also provides for consideration of conditional release at the annual review hearing. Mr. Elmore sought conditional release at the annual review hearing, as well as unconditional release, but because he did not identify a placement meeting the criteria of RCW 71.09.092, the issue was not considered further and is not before this Court.

in order to clarify the nature of the change in condition necessary to trigger the requirement of an unconditional release trial. Laws of 2005, ch. 344. These amendments were necessary to preserve the indeterminate nature of SVP commitment, further the State's compelling interest in treating SVPs and protecting the public from them while treatment occurs, and strengthen the treatment focus of the commitment scheme.

The two recent court of appeals' decisions that spurred the 2005 amendments held that an increase in age since commitment and new diagnostic practices are changes in condition within the meaning of RCW 71.09.090 that are sufficient to require an unconditional release trial. *In re Detention of Young*, 120 Wn. App. 753, 761-63, 86 P.3d 810 (2004) (*Young AR*)<sup>2</sup>; *In re Detention of Ward*, 125 Wn. App. 381, 386, 104 P.3d 747 (2005). In crafting the amendments to RCW 71.09.090 in response to these decisions, which were ultimately enacted by unanimous vote, the legislature heard extensive testimony and considered documentary evidence that cast doubt on the expert opinion testimony being used by SVPs to obtain unconditional release trials through the annual review process.<sup>3</sup>

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<sup>2</sup> The State will refer to this decision as *Young AR* (for "annual review") to distinguish it from an earlier decision of this Court involving the same litigant, *In re Young*, 122 Wn.2d 1, 857 P.2d 989 (1993), and cited elsewhere in this brief.

<sup>3</sup> The affidavits considered were from national and international experts. One stated that the age-based opinion referenced in *Young AR* "is clearly not generally

Such evidence is “relatively weak” and “not generally accepted or empirically validated.” S.B. 5582, 56th Leg., Reg. Sess. (Wash. 2005), House Bill Report at 5.<sup>4</sup> The legislature subsequently made factual findings reiterating that the mental disorders from which SVPs suffer “are severe and chronic and do not remit due solely to advancing age or changes in other demographic factors,” and that SVPs “will generally require prolonged treatment in a secure facility.” Laws of 2005, ch. 344 §1.

Courts owe great deference to legislative findings of fact and “ordinarily will not controvert or even question” such findings. *City of Tacoma v. O’Brien*, 85 Wn.2d 266, 270, 534 P.2d 114 (1975). The deference owed to legislative findings of fact extends to findings relating to scientific matters, and “where scientific opinions conflict on a particular point, the legislature is free to adopt the opinion it chooses, and the court

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accepted in the field of sexual offender treatment, or in the field of study relative to risk assessment for sexual offenders.” Affidavit of Dr. Dennis Doren submitted to House Criminal Justice & Corrections Committee, March 23, 2005. Another stated. “there is not sufficient research to make general statements about the impact of age on risk of sex offenders. . . . There have been far too many examples of individuals who have committed acts of sexual aggressions at ages of 50 (and 60) and over, for us to simply infer that such acts are ‘highly unlikely’ since, obviously, they do happen.” Affidavit of Dr. Richard Packard submitted to House Criminal Justice & Corrections Committee, March 23, 2005.

<sup>4</sup> This conclusion is supported in the scientific literature. For example, with regard to the effect of age-at-release on the sexual recidivism risk of high risk offenders, the scientific community is, at best, split. See e.g., Dennis M. Doren, *What Do We Know About the Effect of Aging on Recidivism Risk for Sexual Offenders?*, 18 *Sexual Abuse: A Journal of Research and Treatment* 137, 153-54 (2006) (“We do not yet know if there is a meaningful age-at-release threshold after which high risk necessarily dissipates for all sexual offenders.”).

will not substitute its judgment for that of the legislature.”

*State v. Brayman*, 110 Wn.2d 183, 193, 751 P.2d 294 (1988).

The *Young AR* and *Ward* decisions undermine the compelling State interests served by the SVP statute:

The legislature finds that a new trial ordered under the circumstances set forth in *Young [AR]* and *Ward* 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 of 2005, ch. 344 §1.

An additional problem stemming from these decisions is that they permit committed SVPs to collaterally attack the commitment decision through the annual review procedures on grounds completely distinct from any change in the committed person’s mental disorder. Laws of 2005, ch. 344 §1. Collateral attacks such as those made in *Young AR* and *Ward* must be pursued through “other existing statutes and court rules.” *Id.* These other procedural avenues include motions to vacate, personal restraint petitions, and the federal writ of habeas corpus. CR 60(b)(3) and (11); RAP 16.4(c); and 28 U.S.C. §2241-55.

The amended version of RCW 71.09.090 is the relevant statutory framework under which to analyze Mr. Elmore’s claim. Application of the amended statute is appropriate since it became effective while

Mr. Elmore's appeal in this matter was pending and before any release trial has been held. In addition, application of the amended statute is also appropriate because, as the Court of Appeals recognized, the amended statute "expresses the legislature's intent more clearly and completely." *In re Detention of Elmore*, 134 Wn. App. at 413. Finally, there is no issue of retroactivity because the "triggering event" for purposes of applying the amended statute is the release trial, which has not yet occurred. *State v. Pillatos*, No. 75984-7, Slip op. at 10 (Wash. January 25, 2007). As such, application of amended RCW 71.09.090 is prospective in this case. *Id.*<sup>5</sup>

As clarified by the 2005 amendments, the nature of the change in condition sufficient to trigger an unconditional release trial must have occurred since the most recent commitment trial and be either: 1) A permanent physiological change such as a stroke, paralysis or dementia that renders the person unable to commit a sexually violent act, or 2) A change in the committed person's mental condition arrived at through

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<sup>5</sup> Even if the statute's application were retroactive, a statutory amendment will be applied retroactively when the legislature so intends, or when it is curative in that it clarifies or technically corrects ambiguous statutory language. *McGee Guest Home, Inc. v. Dep't of Soc. Health Servs.*, 142 Wn.2d 316, 324, 12 P.3d 144 (2000). Retroactive application is particularly appropriate "where an amendment is enacted during a controversy regarding the meaning of the law." *Id.* at 325. Such an act is "curative in nature" and therefore applied retroactively, "if it clarifies or technically corrects an ambiguous statute." *Id.* Curative amendments adopted in response to lower court decisions, such as the court of appeals' decisions in *Young AR* and *Ward*, are properly applied retroactively. *Id.*

treatment which indicates that the person would be safe to be at large if unconditionally released. RCW 71.09.090(4)(b)(i), (ii). A change in a single demographic factor, including age, is not a relevant change in condition. RCW 71.09.040(4)(c).

**C. Mr. Elmore Did Not Present Evidence Establishing Probable Cause to Believe His Condition Has Changed Since Commitment.**

The court of appeals, like the trial court, held that Dr. Wollert's opinion does not establish probable cause to believe that Mr. Elmore's condition has changed since commitment so as to satisfy RCW 71.09.090. The reasons for this are fully set forth in the State's briefing before the court of appeals.<sup>6</sup> State's Reply Brief at 12-28.

**D. The Annual Review Provisions of RCW 71.09.090 Do Not Violate Due Process.**

Civil commitment as an SVP satisfies due process because it occurs only upon a finding that a person is mentally ill and, as a result, dangerous to others. RCW 71.09.020(16). .060(1); *In re Young*, 122 Wn.2d 1, 26, 857 P.2d 989 (1993), *citing*, *Addington v. Texas*, 441 U.S. 418, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979); *see also*,

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<sup>6</sup> The only additional point to be made regarding this issue is that Dr. Wollert's opinion also fails because he opines to the wrong standard. He states that the alleged changes in Mr. Elmore's mental condition make him no longer an SVP. However, the statute requires that any changes in mental condition make the SVP "safe to be at large" if unconditionally released. RCW 71.09.090(4)(b)(ii). Although Dr. Wollert believes Mr. Elmore is no longer an SVP, he does not indicate Mr. Elmore is "safe to be at large."

*Larson v. Seattle Popular Monorail Authority*, 156 Wn.2d 752, 757, 131 P.3d 892 (2006) (statutes are presumed constitutional). The SVP commitment scheme serves two compelling State interests: It allows the State to exercise its *parens patriae* power and treat this mentally disordered population, and it protects the public from them during such treatment by ensuring it occurs in a secure facility. *In re Young*, 122 Wn.2d at 26.

The three-part test of *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) determines whether SVP commitment procedures comply with due process. *In re Detention of Stout*, No. 77369-6, Slip op. at 17 (Wash. January 4, 2007). Specifically, the reviewing court should consider: 1) The private interest affected by the procedure at issue; 2) The risk of an erroneous deprivation of the private interest through the procedures used, and the probable value, if any, of additional procedural safeguards; and 3) The State's interest, including the fiscal and administrative burdens that the additional procedures would impose. *Id.* at 12-13.

**1. The Negative Impact of the Annual Review Procedures on Mr. Elmore's Private Interests is Mixed.**

The private interest affected by SVP commitment is the liberty interest in freedom from unnecessary confinement, as well as from the

stigma sometimes associated with civil commitment. *Addington v. Texas*, 441 U.S. at 425-26. However, the negative impact of commitment on these interests is ameliorated by other countervailing private interests that are served by civil commitment.

The SVP is provided with individualized care and treatment for his or her mental disorders by qualified professional staff. CP 117-18; RCW 71.09.080(2); *United States v. Wattleton*, 296 F.3d 1184, 1198-99 (11<sup>th</sup> Cir. 2002). In addition, any stigma associated with continued commitment is minimal because the committed person has already been found to meet the statutory definition of an SVP. *United States v. Wattleton*, 296 F.3d at 1199. Finally, because release from detention occurs only upon a change in condition and concomitant reduction in risk, the SVP avoids being released prematurely and while still dangerous, thus reducing the risk of a subsequent criminal offense and potential lifetime criminal incarceration. RCW 9.94A.570 (sentencing of persistent offenders); 9.94A.712 (determinate plus sentencing for serious sex offenses).

**2. The Risk of an Erroneous Decision Continuing the Commitment is Very Low Because of the Numerous Procedural Protections Afforded Mr. Elmore.**

The risk of the erroneous deprivation of an SVP's liberty interest through the annual review procedures is very low. First, all of the due

process protections built into the pre-commitment and trial provisions of RCW 71.09 provide a high degree of confidence in the initial commitment decision. These include the adversarial probable cause hearing required to be held within 72 hours of a person's detention pursuant to RCW 71.09, as well as the rights associated with the commitment trial: The right to counsel, to an expert, to a 12-person jury, to unanimity of the verdict, and to the beyond a reasonable doubt burden of proof upon the State. RCW 71.09.040 -.060(1). This Court recently acknowledged that these procedural protections play a vital role in greatly reducing the risk of an erroneous commitment determination in an SVP case. *In re Stout*, slip op. at 13.

Other courts have reached the same conclusion. In *Wattleton*, the court addressed a procedural due process challenge to the release procedures of the federal insanity acquittal statute, 18 U.S.C. §4243(d). In holding the law does not violate due process by placing the burden of proof on the insanity acquittee to show he or she is no longer dangerous in order to obtain release, the court stated:

The risk of an erroneous decision is significantly reduced because a §4243 hearing arises only after a jury finds a defendant not guilty by reason of insanity and only after all the procedural protections have been afforded the defendant in a criminal trial. The insanity verdict establishes both (1) that “the defendant committed an act that constitutes a criminal offense” and (2) that “he

committed the act because of a mental illness.” The Supreme Court concluded in *Jones* that “the fact that a person has been found, beyond a reasonable doubt, to have committed a criminal act certainly indicates dangerousness,” and “it comports with common sense to conclude that someone whose mental illness was sufficient to lead him to commit a criminal act is likely to remain ill and in need of treatment.” . . . Thus, the insanity verdict in and of itself supports the conclusion that the insanity acquittee continues to be mentally ill and dangerous.

*Wattleton*, 296 F.3d at 1199-1200 (quoting, *Jones v. United States*, 463 U.S. 354, 363-64, 103 S.Ct. 3043, 77 L.Ed.2d 694 (1983)).

Cases such as *Wattleton* involving insanity acquittal release procedures are particularly instructive in SVP cases because both types of cases involve the civil commitment of persons who have been found to be mentally ill and dangerous, and whose dangerousness has been demonstrated by the commission of a criminal offense. This Court has noted the similarities of these commitment schemes on several occasions. *State v. Platt*, 143 Wn.2d 242, 253 n.6, 19 P.3d 412 (2001), *In re Detention of Petersen*, 145 Wn.2d 789, 795, 42 P.3d 952 (2002) (*Petersen II*) (analyzing the annual review procedures of RCW 71.09 by reference to *Foucha v. Louisiana*, 504 U.S. 71 (1992), a case involving Louisiana’s insanity acquittal statute.); *In re Detention of Turay*, 139 Wn.2d 379, 411 n. 22, 986 P.2d 790 (1999).

Similarly, the due process protections already built into the annual review procedures minimize the risk of erroneously continuing the commitment. The State must provide an evaluation each year conducted by a qualified mental health professional stating that the SVP continues to meet the commitment criteria. RCW 71.09.090(2)(b). If the evaluation indicates the SVP no longer meets criteria, the State must inform the trial court of this and authorize the SVP to file a petition for release. RCW 71.09.090(1). Even if the annual review indicates the SVP continues to meet criteria, the State must notify the SVP in writing of the right to independently petition for release. RCW 71.09.090(2)(a).

The trial court must hold a hearing on the annual review unless the SVP affirmatively waives that right. *Id.* If the State fails to provide prima facie evidence at the hearing that the SVP continues to meet commitment criteria, the trial court must order an unconditional release trial. RCW 71.09.090(2)(c)(i). Even if the State satisfies its burden, the SVP can obtain a release trial through his or her own evidence establishing probable cause to believe he or she is no longer an SVP because of a permanent decline in the physical ability to reoffend, or a change in the mental condition arrived at through treatment. RCW 71.09.090(2)(c)(ii), .090(4). Similar procedures have been found to be an important factor in

finding civil commitment release procedures constitutional. *See e.g., Williams v. Wallis*, 734 F.2d 1434, 1441 (11<sup>th</sup> Cir. 1984).

Finally, the committed person has numerous other procedural avenues through which to present any challenges to his commitment that are not cognizable via RCW 71.09.090. He or she remains free to bring these claims in the trial court through a motion to vacate, in the Court of Appeals pursuant to a personal restraint petition, or in federal court through a petition for a writ of habeas corpus. CR 60(b)(3), (11); RAP 16.4; 28 U.S.C. §2241-2254. The availability of these other avenues to challenge a commitment determination has been found to weigh in favor of upholding the constitutionality of the commitment statute's release provisions in the face of a procedural due process challenge. *United States v. Wattleton*, 296 F.3d at 1199, fn. 27.

The probable value of adopting Mr. Elmore's proposed interpretation of what due process requires in the annual review context is nil. Indeed, it will do much harm. Mr. Elmore's proposed constitutional rule guarantees an SVP an unconditional release trial any time the SVP presents an expert opinion that he or she does not meet the definition of an SVP. This conclusion is inescapable because the trial court cannot weigh the evidence at the annual review hearing, but must assume it is true. *Petersen II*, 145 Wn.2d at 798.

The result of adopting Mr. Elmore's proposed rule, then, will very likely be rampant abuse of the annual review process. For example, it would permit an SVP to obtain an unconditional release trial every year by recycling his or her expert's opinion each year, even if he or she has previously abandoned it and stipulated to commitment, or it has been rejected by a jury. Such a scenario makes a stipulation to commitment or a jury verdict in an SVP case not worth the paper on which it is written.<sup>7</sup>

In addition, Mr. Elmore's proposed constitutional rule would fundamentally alter the indefinite nature of SVP commitment and turn it into a series of fixed, one-year commitment terms. This runs directly contrary to the legislative intent underlying the SVP statute, as well as this Court's repeated holdings that SVP commitment is indefinite and dependent upon the amelioration of the mental disorders that drive predators to commit sexual offenses. RCW 71.09.010; *Petersen I*, 138 Wn.2d at 81; *In re Young*, 122 Wn.2d at 39.

### **3. The Annual Review Procedures Serve the State's Compelling Interests in Treatment and Public Safety.**

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<sup>7</sup> This illustrates in stark terms why it is appropriate to require committed persons to bring challenges to commitment that are not based on treatment-induced changes, or fundamental changes in physical condition, through the traditional routes approved for such collateral attacks on the commitment decision: CR 60(b), personal restraint and habeas petitions. If such challenges must be made pursuant to these procedural vehicles, the court considering them can, unlike at the annual review hearing, weigh the evidence presented and determine whether it is sufficient to justify reopening the commitment decision and ordering a trial.

The treatment and public safety goals furthered by the SVP statute are compelling State interests that are served by the annual review provisions of RCW 71.09.090. The State's ability to achieve these compelling interests would be fatally undermined by a commitment system that severs the link between treatment progress or a permanent decline in physical condition, and the release trial. Courts have repeatedly recognized that these compelling State interests outweigh the committed person's private interest when judged in the context of post-commitment review since the person's commitment was triggered by his or her commission of a criminal offense. *See e.g., United States v. Phelps*, 955 F.2d 1258, 1267 (9<sup>th</sup> Cir. 1992), citing, *Williams v. Wallis*, 734 F.2d 1434, 1440 (11<sup>th</sup> Cir. 1984) ("The State's interest in preventing the premature release of individuals who have already demonstrated their dangerousness to society by committing a criminal act outweighed the [insanity] acquittee's interest in avoiding continued confinement.").

The State also has a substantial financial interest that will be harmed if unconditional release trials are not tied to treatment progress or a permanent impairment of the physical ability to reoffend. Several courts have rejected due process arguments similar to those made by Mr. Elmore because the fiscal and administrative burdens of the proposed procedural safeguards on the State would greatly outweigh any minimal protection

they would provide. *Williams v. Wallis*, 734 F.2d at 1439 (11<sup>th</sup> Cir. 1984); *In re Harhut*, 385 N.W.2d 305, 312 (Minn. S.Ct. 1986). Indeed, this Court recently rejected the argument that due process requires the right to personally confront witnesses in an SVP case, in part because of the “heavy financial burden that would be attendant with requiring live testimony of out-of-state witnesses.” *In re Stout*, slip op. at 14. This reasoning applies even more strongly in this matter because the financial burden imposed by Mr. Elmore’s proposed constitutional rule would be much greater than that considered in *Stout* in that it would require an entire new commitment trial, not just the personal attendance of a witness.

Finally, the State’s interest in the continued treatment of SVPs would be harmed by repeated unconditional release trials that are unrelated to treatment progress. Treatment providers and their patients - those committed as SVPs - would necessarily be involved in these unconditional release trials, interrupting the consistent treatment needed to ameliorate the risk of sexually violent recidivism. As the Supreme Court has recognized, the presence of treatment providers “in courtrooms and hearings [is] of little help to patients.” *Parham v. J.R.*, 442 U.S. 584, 605-06, 99 S.Ct. 2493, 61 L.Ed.2d 101 (1979) (rejecting argument that due process requires adversarial hearings for children sought to be civilly committed to State’s custody by their parents.).

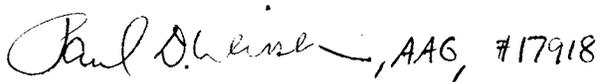
Application of the *Mathews* test to Mr. Elmore's due process claim demonstrates he cannot carry his heavy burden of proving RCW 71.09.090 is unconstitutional. On the contrary, the *Mathews* test demonstrates that the annual review procedures strike the appropriate balance between the private and governmental interests at issue and ensures that the right to an unconditional release is triggered only by a meaningful change in the committed person's condition arrived at through treatment or by a permanent decline in the physical ability to sexually reoffend.

#### V. CONCLUSION

For the foregoing reasons, the State respectfully requests this Court affirm the Court of Appeals' decision.

RESPECTFULLY SUBMITTED this 12<sup>th</sup> day of February, 2007.

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NO. 79208-9

**SUPREME COURT OF THE STATE OF WASHINGTON**

KEITH W. ELMORE,

Appellant,

v.

STATE OF WASHINGTON,

Respondent.

DECLARATION OF  
SERVICE

CLERK

DARLENE JACOBS declares as follows:

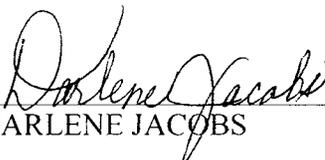
On February 12, 2007 , I deposited in the United States Mail, with first-class postage affixed, addressed as follows:

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

a copy of the following documents: STATE'S SUPPLEMENTAL BRIEF;  
and DECLARATION OF SERVICE.

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

DATED this 12<sup>th</sup> day of February, 2007, at Seattle, Washington.

  
DARLENE JACOBS