

FILED

MAY 21 2007

80144-4

No.  
COA No. 56604-1-1

CLERK OF SUPREME COURT  
STATE OF WASHINGTON

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IN RE THE DETENTION OF:

KIM SMITH,

Petitioner.

FILED  
COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON  
2007 MAY -3 PM 4:53

ON APPEAL FROM THE SUPERIOR COURT OF  
THE STATE OF WASHINGTON FOR SNOHOMISH COUNTY

The Honorable George N. Bowden

PETITION FOR REVIEW

THOMAS M. KUMMEROW  
Attorney for Petitioner

WASHINGTON APPELLATE PROJECT  
1511 Third Avenue, Suite 701  
Seattle, Washington 98101  
(206) 587-2711

TABLE OF CONTENTS

A. IDENTITY OF PETITIONER ..... 1

B. COURT OF APPEALS DECISION..... 1

C. ISSUES PRESENTED FOR REVIEW ..... 1

D. STATEMENT OF THE CASE ..... 2

E. ARGUMENT ON WHY REVIEW SHOULD BE GRANTED..... 4

THE COURT’S APPLICATION OF THE 2005  
AMENDMENT WAS A RETROACTIVE  
APPLICATION WHICH DEPRIVED MR. SMITH OF  
DUE PROCESS AND VIOLATED THE SEPARATION  
OF POWERS DOCTRINE ..... 4

1.. The application of the 2005 amendments to RCW  
71.09.090 was a retroactive application..... 4

2. Application of the amended RCW 71.09.090 to Mr.  
Smith’s case deprived him of due process. .... 5

a. The language of RCW 71.09.090 lacks a clear  
expression of legislative intent for retroactive  
application..... 7

b. The 2003 amendment of RCW 71.09.090 was not  
curative. .... 8

c. The application of the 2005 amendments deprived  
Mr. Smith of a vested right. .... 10

3. Applying the 2005 amendment to RCW 71.09.090  
to Mr. Smith violated the separation of powers  
doctrine..... 11

F. CONCLUSION ..... 13

TABLE OF AUTHORITIES

UNITED STATES CONSTITUTIONAL PROVISIONS

U.S. Const. amend. V.....6

FEDERAL CASES

*Calder v. Bull*, 3 Dall. 386, 1 L.Ed. 648 (1798) .....7

*Dash v. Van Kleeck*, 7 Johns. 477 (N.Y.1811) .....7

*Landgraf v. USI Film Prods.*, 511 U.S. 244, 114 S.Ct. 1483, 128  
L.Ed.2d 229 (1994).....6, 7

*Lynce v. Mathis*, 519 U.S. 433, 117 S.Ct. 891, 895, 137 L.Ed.2d 63  
(1997) .....5

*Society for the Propagation of the Gospel v. Wheeler*, 22 F. Cas.  
756 (C.C.N.H. 1814).....7

*Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 96 S.Ct. 2882, 49  
L.Ed.2d 752 (1976).....6

WASHINGTON CASES

*Aetna Life Ins. Co. v. Washington Life & Disability Insurance  
Guaranty. Association*, 83 Wn.2d 523, 520 P.2d 162 (1974).....5

*Carrick v. Locke*, 125 Wn.2d 129, 882 P.2d 173 (1994).....11

*In re Detention of Thorell*, 149 Wn.2d 724, 72 P.3d 708 (2003).....6

*In re Detention of Young*, 122 Wn.2d 1, 857 P.2d 396 (1995).....6

*In re Estate of Burns*, 131 Wn.2d 104, 928 P.2d 1094 (1997).....4

*In re F.D. Processing, Inc.*, 119 Wn.2d 452, 832 P.2d 1303  
(1992) .....7, 8

*In re Juvenile Director*, 87 Wn.2d 232, 552 P.2d 163 (1976).....12

<i>In re the Detention of Ward</i> , 125 Wn.App. 381, 104 P.3d 747 (2005) .....	9
<i>In re the Detention of Young</i> , 120 Wn.App. 753, 86 P.3d 810, review denied, 152 Wn.2d 1007, 99 P.3d 896 (2004).....	9
<i>Johnson v. Morris</i> , 87 Wn.2d 922, 557 P.2d 1299 (1976) .....	9
<i>Oelsen v. State of Washington</i> , 78 Wn.App. 910, 899 P.2d 837 (1995) .....	10
<i>State v. Bennett</i> , 92 Wn.App. 637, 963 P.2d 212 (1998).....	10
<i>State v. Cruz</i> , 139 Wn.2d 186, 985 P.2d 384 (1999).....	5, 7
<i>State v. Dunaway</i> , 109 Wn.2d 207, 743 P.2d 1237 (1987)....	8, 9, 12
<i>State v. Hennings</i> , 129 Wn.2d 512, 919 P.2d 580 (1996) .....	10
<i>State v. Moreno</i> , 147 Wn.2d. 500, 58 P.3d 265 (2002) .....	12
<i>State v. Osloond</i> , 60 Wn.App. 584, 805 P.2d 263, review denied, 116 Wn.2d 1030 (1991) .....	11
<i>State v. Smith</i> , 144 Wn.2d 665, 30 P.3d 1245 (2001) .....	8
<i>Zylstra v. Piva</i> , 85 Wn.2d 743, 539 P.2d 823 (1975) .....	12
STATUTES	
RCW 71.09.050 .....	6
RCW 71.09.090 .....	passim

A. IDENTITY OF PETITIONER

Kim Smith asks this Court to accept review of the Court of Appeals decision terminating review designated in part B of this petition.

B. COURT OF APPEALS DECISION

Pursuant to RAP 13.4 (b), petitioner seeks review of the Court of Appeals published decision in *In re the Detention of Kim Smith*, \_\_\_\_ Wn.App. \_\_\_\_, 153 P.3d 226 (2007). A copy of the decision is in the Appendix at pages A-1 to A-12.

Mr. Smith moved the Court of Appeals for reconsideration of its decision which was denied on April 4, 2007. A copy of the order is in the Appendix at pages B-1.

C. ISSUES PRESENTED FOR REVIEW

1. A statutory amendment is presumed to apply prospectively. The amendment may apply retroactively where the Legislature clearly expresses an intent it apply retroactively, or where it is curative or remedial, and the amendment would not otherwise deny the individual due process. Where the 2005 amendment to RCW 71.09.090 was not expressly made retroactive, the amendment did not clarify but sought to overrule prior decisions of this Court, and the amendment was not remedial

because it was a substantive change in the law, did the amendment apply retroactively to permit the trial court to vacate its order directing a new trial for Mr. Smith?

2. Did the retroactive application of the 2005 amendment to RCW 71.09.090 deprive Mr. Smith of a vested right?

3. Did the retroactive application of the 2005 amendment to RCW 71.09.090 violate the separation of powers doctrine where it expressly sought to overrule prior decisions of this Court?

#### D. STATEMENT OF THE CASE

On November 3, 2004, the trial court issued an order granting Mr. Smith's motion for a new trial pursuant to RCW 71.09.090 to determine whether he still met the definition of a sexual violent predator (SVP) based upon his increased age and decreasing risk of reoffending. CP 430.

On May 9, 2005, while motions to reconsider by both the State and Mr. Smith were pending, the Legislature passed SB 5582, amending RCW 71.09.090 regarding petitions for conditional release or unconditional discharge by sexually violent predators. Specifically, the amendment added subsection (4) defining when a person's condition had so changed that the individual no longer met the definition of a sexually violent predator. *Id.* The amendment

stated that “a change in a single demographic factor, without more, does not establish probable cause for a new trial proceeding.”

Laws 2005 c 344 § 2. The amendment defined a “single demographic factor” to include a change in chronological age.

On June 29, 2005, the trial court applied the amendment to RCW 71.09.090 to Mr. Smith’s case concluding it barred a new trial, and entered an order vacating the trial date in his petition, found his claim to be moot, and dismissed the petition. CP 12-15. In its oral ruling, the court reasoned the changes brought by the amendment were procedural rather than substantive because “they deal with the issues to be presented at trial and the evidence that may be considered.” 6/29/05 RP 21.

On appeal, the Court of Appeals ruled the application of the 2005 amendment to Mr. Smith was not a retroactive application. Decision at 12.<sup>1</sup>

---

<sup>1</sup> On May 1, 2007, Division Two in *In re the Detention of Fox*, No. 34145-0-II (May 1, 2007) in a published decision agreed with Division One’s analysis in *Smith* in finding the 2005 amendments did not apply retroactively but were merely a clarification. Slip op. at 17.

E. ARGUMENT ON WHY REVIEW SHOULD BE GRANTED

THE COURT'S APPLICATION OF THE 2005  
AMENDMENT WAS A RETROACTIVE  
APPLICATION WHICH DEPRIVED MR. SMITH OF  
DUE PROCESS AND VIOLATED THE SEPARATION  
OF POWERS DOCTRINE

1.. The application of the 2005 amendments to RCW

71.09.090 was a retroactive application. In order to obtain a new trial, Mr. Smith was required to prove that he no longer met the definition of an SVP. Former RCW 71.09.090(2)(a). In order to meet this burden, Mr. Smith had to prove that his condition was so changed that he no longer met the definition of an SVP. Former RCW 71.09.090(2)(a). Only if the court found Mr. Smith had carried his burden of proof did the trial court have the statutory authorization to grant a jury trial on the issue. Former RCW 71.09.090(3)(a). Thus to claim as the Court of Appeals did that Mr. Smith merely had to grow old, which required no activity on his part, was simply not true.

“A statute operates prospectively when the precipitating event for operation of the statute occurs after enactment, even when the precipitating event originated in a situation existing prior to enactment.” *In re Estate of Burns*, 131 Wn.2d 104, 110-111, 928 P.2d 1094 (1997); *Aetna Life Ins. Co. v. Washington Life &*

*Disability Insurance Guaranty. Association*, 83 Wn.2d 523, 535, 520 P.2d 162 (1974). In Mr. Smith's matter, the precipitating event was not merely his getting older but the fact he carried his burden of proving that he no longer met the definition of an SVP as that definition was stated in the former statute. The trial court found he had met this burden and as a result, was entitled to a jury trial. The application of the 2005 amendments eliminated that entitlement to the trial. Thus, contrary to the Court of Appeals' conclusion, the application of the 2005 amendments to Mr. Smith's matter did not merely deny him an expectation but actually denied him a trial that he was entitled to after meeting his burden of proof necessary to obtain the trial.

2. Application of the amended RCW 71.09.090 to Mr. Smith's case deprived him of due process. "The presumption against retroactive application of a statute 'is an essential thread in the mantle of protection that the law affords the individual citizen. That presumption 'is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic.'"  
*State v. Cruz*, 139 Wn.2d 186, 190, 985 P.2d 384 (1999), quoting *Lynce v. Mathis*, 519 U.S. 433, 439, 117 S.Ct. 891, 895, 137 L.Ed.2d 63 (1997). and *Landgraf v. USI Film Prods.*, 511 U.S. 244,

265, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994). The prohibition against retroactive laws is found in several provisions of the United States Constitution, including: the Ex Post Facto Clause Article I, § 10; the Fifth Amendment's Takings Clause; the prohibitions on "Bills of Attainder" in Article I, §§ 9-10; and the Due Process Clauses. *Landgraf*, 511 U.S. at 266. The prohibitions against retroactive statutes in the Due Process Clauses are concerned with "the interests in fair notice and repose that may be compromised by retroactive legislation." *Id.*, citing *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 17, 96 S.Ct. 2882, 49 L.Ed.2d 752 (1976). These principles of due process apply equally to matters dealing with sexually violent predators. See *In re Detention of Thorell*, 149 Wn.2d 724, 744, 72 P.3d 708 (2003) (quantum of evidence in SVP proceedings reviewed under criminal standard); *In re Detention of Young*, 122 Wn.2d 1, 47-48, 857 P.2d 396 (1995) (where SVP statute indicates due process protections similar to criminal proceeding, criminal law standards apply); RCW 71.09.050 (granting accused SVP rights to attorney, expert witnesses, and 12 person jury); RCW 71.09.060 (requiring State prove SVP allegations beyond a reasonable doubt and jury verdict be unanimous).

Despite the presumption of prospective application, a statute may apply retroactively if: “(1) the legislature so intended; (2) it is “curative”; or (3) it is remedial, provided, however, such retroactive application does not run afoul of any constitutional prohibition.”

*Cruz*, 139 Wn.2d at 191, *citing In re F.D. Processing, Inc.*, 119 Wn.2d 452, 460, 832 P.2d 1303 (1992).

A law is unconstitutionally retroactive if it:

takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past.

*Society for the Propagation of the Gospel v. Wheeler*, 22 F. Cas. 756 (C.C.N.H. 1814) (No. 13,156), *citing Calder v. Bull*, 3 Dall. 386, 1 L.Ed. 648 (1798), and *Dash v. Van Kleeck*, 7 Johns. 477 (N.Y.1811).

a. The language of RCW 71.09.090 lacks a clear expression of legislative intent for retroactive application.

Legislative intent for retroactivity must be clearly found within the statute’s language. *Landgraf*, 511 U.S. at 268, *Cruz*, 139 Wn.2d at 191.

There was nothing in the amended version of RCW 71.09.090 indicating the Legislature’s intent the statute be

retroactive. RCW 71.09.090 was originally enacted in 1990. Laws 1990 c. 3 § 1009. The statute had been amended on three prior occasions and on each occasion the amendment was explicitly made retroactive. Laws 1992 c. 45 § 7; Laws 1995 c. 216 § 9; Laws 2001 c. 286 § 9. The lack of any explicit statement of retroactivity by the Legislature with regard to this amendment implies an intent it was *not* retroactive. Because the language of the amended statute did not clearly convey the Legislature's intent for retroactive application, the presumption of prospective application continued.

b. The 2003 amendment of RCW 71.09.090 was not curative. "A curative amendment clarifies or technically corrects an ambiguous statute." *State v. Smith*, 144 Wn.2d 665, 674, 30 P.3d 1245 (2001). Legislation which merely clarifies prior statutes generally may be applied retroactively. *State v. Dunaway*, 109 Wn.2d 207, 216, 743 P.2d 1237 (1987). Where ambiguity is lacking in statutory language, the reviewing court presumes an amendment to the statute constitutes a substantive change in the law, and the amendment presumptively is not retroactively applied. *F.D. Processing*, 119 Wn.2d at 462. However, once a statute has been subject to judicial construction, subsequent "clarifying"

legislation cannot apply retrospectively, otherwise the legislature would be given “license to overrule [the judiciary], raising separation of powers issues.” *Johnson v. Morris*, 87 Wn.2d 922, 925-26, 557 P.2d 1299 (1976); *see also, Dunaway*, 109 Wn.2d at 216 n.6.

In *Dunaway, supra*, this Court refused to apply an amended statute retroactively where it contravened an earlier Court of Appeals decision. 109 Wn.2d at 216 n.6. That is precisely what happened here. In spite of the language in the Notes to RCW 71.09.090 that the amendment was meant to be a clarification, the amendment contravened the earlier decisions of the Court of Appeals in *Young In re the Detention of Young*, 120 Wn.App. 753, 762, 86 P.3d 810, *review denied*, 152 Wn.2d 1007, 99 P.3d 896 (2004), and *In re the Detention of Ward*, 125 Wn.App. 381, 386, 104 P.3d 747 (2005).

Further, the original version of RCW 71.09.090 was not ambiguous. The statute left open the question of what constituted a change in condition, recognizing the imperfect science that is involved in treating sexually violent predators. Instead of clarifying the law, the Legislature changed the law, and thus, the amendment

was not curative. *Oelsen v. State of Washington*, 78 Wn.App. 910, 914, 899 P.2d 837 (1995).

c. The application of the 2005 amendments deprived Mr. Smith of a vested right. “Retroactive application of a statute violates due process if it deprives an individual of a vested right. To establish a deprivation, the defendant must show he changed his position in reliance on the old law or that retroactive application defeats a reasonable expectation.” *State v. Bennett*, 92 Wn.App. 637, 642, 963 P.2d 212 (1998), *citing State v. Hennings*, 129 Wn.2d 512, 528, 919 P.2d 580 (1996). A vested right entitled to protection under the due process clause

must be something more than a mere expectation based upon an anticipated continuance of the existing law; it must have become a title, legal or equitable, to the present or future enjoyment of property, a demand, or a legal exemption from a demand by another.

*Hennings*, 129 Wn.2d at 528.

Prior to the 2005 amendment to RCW 71.09.090, Mr. Smith possessed a right to petition the superior court for his immediate and unconditional release based upon a change in his condition, primarily the change in his chronological age. Mr. Smith’s right to petition the court on that basis vested once he filed the petition.

Application of the 2005 amendment *after* Mr. Smith filed his petition for unconditional release deprived him of this vested right since it deprived him of the reasonable expectation of release based upon his petition.

3. Applying the 2005 amendment to RCW 71.09.090 to Mr. Smith violated the separation of powers doctrine.

One of the fundamental principles of the American constitutional system is that the governmental powers are divided among three departments--the legislative, the executive, and the judicial--and that each is separate from the other.

*Carrick v. Locke*, 125 Wn.2d 129, 134-35, 882 P.2d 173 (1994), citing *State v. Osloond*, 60 Wn.App. 584, 587, 805 P.2d 263, review denied, 116 Wn.2d 1030 (1991). Neither the Washington nor federal constitutions specifically enunciate a separation of powers doctrine, but the notion is universally recognized as deriving from the tripartite system of government established in both constitutions. See, e.g., Const. Arts. II, III, and IV (establishing the legislative department, the executive, and judiciary); U.S. Const. Arts. I, II, and III (defining legislative, executive, and judicial branches); *Carrick*, 125 Wn.2d at 134-35. *Carrick* recognized that although the Washington Constitution contains no specific separation of powers provision “the very division of our government

into different branches has been presumed throughout our state's history to give rise to a vital separation of powers doctrine." *Carrick*, 125 Wn.2d at 134-35, *citing Osloond*, 60 Wn.App. at 587; *In re Juvenile Director*, 87 Wn.2d 232, 238-40, 552 P.2d 163 (1976).

The fundamental principle of the separation of powers is that each branch wields only the power it is given. *State v. Moreno*, 147 Wn.2d 500, 505, 58 P.3d 265 (2002). Thus, courts have announced the following test for determining whether an action violates the separation of power:

The question to be asked is not whether two branches of government engage in coinciding activities, but rather whether the activity of one branch threatens the independence or integrity or invades the prerogatives of another.

*Carrick*, 125 Wn.2d at 135, *quoting Zylstra v. Piva*, 85 Wn.2d 743, 750, 539 P.2d 823 (1975).

Here, the impetus for the 2005 amendment to RCW 71.09.090 by the Legislature was the Court of Appeals decisions in *Young and Ward*. In essence what the Legislature attempted to do in amending the statute was to overrule the Court of Appeals' decisions. To do so invaded the provinces of this Court and the judiciary. *Dunaway*, 109 Wn.2d at 216 n.6. As a consequence, the

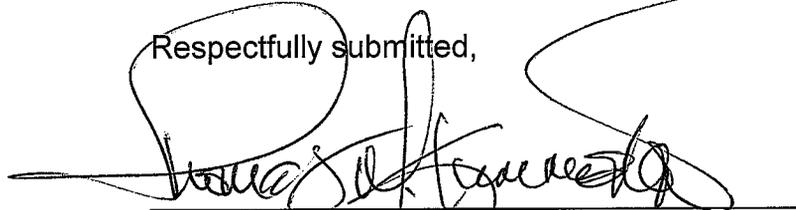
retroactive application of the amendment to Mr. Smith *after* he filed his petition violated the separation of powers doctrine.

F. CONCLUSION

For the reasons, stated Mr. Smith submits this Court must grant review, find the 2005 amendments to RCW 71.09.090 applied retroactively to him and violated his right to due process and violated the separation of powers doctrine, and reverse the trial court's order dismissing the trial date.

DATED this 3<sup>rd</sup> day of May 2007.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Thomas M. Kummerow', is written over a horizontal line. The signature is stylized and cursive.

THOMAS M. KUMMEROW (WSBA 21518)  
Washington Appellate Project – 91052  
Attorneys for Petitioner

## APPENDIX A

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

In re the Detention of:	) NO. 56604-1-I
	)
KIM SMITH,	)
	)
Appellant,	)
	)
v.	) PUBLISHED OPINION
	)
STATE OF WASHINGTON,	)
	)
Respondent.	) FILED: FEBRUARY 20, 2007

BECKER, J. – Kim Smith was committed in 2002 as a sexually violent predator. Like the detainee in this court’s decision in In re the Detention of Young,<sup>1</sup> Smith sought release on the basis of evidence that the increase in his age rendered him unlikely to commit acts of sexual violence. Consistent with Young’s interpretation of the commitment statute, the trial court ordered a trial on whether Smith was entitled to release. Before trial, the Legislature amended the

---

<sup>1</sup> In re the Detention of Young, 120 Wn. App. 753, 762, 86 P.3d 810, review denied, 152 Wn.2d 1007 (2004).

commitment statute. Under the amended version, courts are no longer allowed to hold new commitment trials when the only evidence to justify such a trial was evidence that the detainee had gotten older. Applying the new statute, the court struck the trial. Smith contends this was a retroactive application in violation of the separation of powers doctrine. But Smith has failed to show that the amendment--which bars future trials--was retroactively applied in his case. We affirm.

#### FACTS

Smith, convicted of rape in 1975 and again in 1991, was scheduled for release from prison in May 2000. The State petitioned to have him committed to the custody of the Department of Social and Health Services as a sexually violent predator. After a bench trial on the petition in March 2002, a trial court ordered Smith's commitment. He was just short of 50 years old at that time.

A sexually violent predator is a "person who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility." RCW 71.09.020(16). The Department must conduct a yearly mental examination of each person detained as a sexually violent predator and file those reports with the court that committed the detainee. RCW 71.09.070.

This case concerns a 2005 amendment to RCW 71.09.090, the section

governing procedures by which persons detained as sexually violent predators may gain release. Except for the new section added in 2005, this section of the statute has remained largely the same at all relevant times.

Subsection 1 gives the secretary of the Department the ability to authorize a detainee to petition the court for release. The secretary's authorization automatically entitles a detainee to a new commitment trial.

Subsection 2 gives detainees the right, even without the secretary's authorization, to petition for unconditional release and to receive notice of this right each year. RCW 71.09.090. When the detainee does not affirmatively waive the right to petition, the court must set a show cause hearing to determine whether probable cause exists to warrant a hearing on whether the detainee's condition has "so changed" that he no longer meets the definition of a sexually violent predator. RCW 71.09.090(2)(a). At the show cause hearing, the State "shall present prima facie evidence establishing that the committed person continues to meet the definition of a sexually violent predator". RCW 71.09.090(2)(b). The detainee "may present responsive affidavits or declarations to which the state may reply." RCW 71.09.090(2)(b). If the court determines, without weighing the evidence,<sup>2</sup> that probable cause exists to believe the detainee's condition is "so changed" that he no longer meets the

---

<sup>2</sup> In re the Detention of Petersen, 145 Wn.2d 789, 797, 42 P.3d 952 (2002).

definition of a sexually violent predator, “then the court shall set a hearing” on that issue. RCW 71.09.090(2)(c). This hearing is also referred to as a trial.

Subsection 3 governs the procedures to be followed at a trial ordered under subsection 1 or 2. At the trial, the detainee and the State have the right to a jury. The State has the burden of proving beyond a reasonable doubt that the detainee continues to meet the definition of a sexually violent predator and that a less restrictive alternative is inappropriate. RCW 71.09.090(3)(b).

When appellant Kim Smith was committed in 2002, the statute did not define the term “so changed” and did not place any limits on the types of changes in the detainee’s condition that could justify a new commitment trial.

In August 2003, the court conducted a show cause hearing and did not find probable cause to believe Smith was no longer a sexually violent predator. Smith remained in custody.

In March 2004, this court decided the case of In re the Detention of Young, 120 Wn. App. 753, 86 P.3d 810, review denied, 152 Wn.2d 1007 (2004). A psychologist offered an opinion that the detainee’s advanced age meant he was no longer likely to commit acts of predatory sexual violence. The opinion was based on actuarial risk assessment. We held the opinion sufficient to show probable cause warranting a new commitment trial.

Meanwhile, in the course of the Department’s 2004 review of Smith’s

status, the Department's expert concluded Smith remained a sexually violent predator and that he was unfit for release to a less restrictive alternative. In April 2004, after receiving the Department's review, Smith exercised his annual right to petition for release. In May 2004, he retained psychologist Dr. Luis Rosell. Dr. Rosell examined Smith and concluded that he, like the detainee in Young, no longer met the definition of a sexually violent predator. Dr. Rosell relied for this conclusion upon the fact that Smith, 52 years old at the time of the examination, had been incarcerated for over 14 years since his last offense. According to Dr. Rosell, research conducted since Smith's commitment showed that for sex offenders, including rapists, the risk of recidivism decreases as the offender ages.<sup>3</sup>

At the show cause hearing in October 2004, Smith cited Young and provided Dr. Rosell's report to the trial court as evidence that he had so changed as to no longer be a sexually violent predator. The State conceded that Dr. Rosell's report supplied probable cause justifying a new trial. The court ordered a trial.<sup>4</sup>

In March 2005, after taking Dr. Rosell's deposition, the State moved to vacate the order for trial. The State contended that Dr. Rosell's opinions were not supported by facts.

---

<sup>3</sup> Clerk's Papers at 449-450.

<sup>4</sup> Report of Proceedings (October 28, 2004) at 4.

The court had not yet ruled on the State's motion when, in May 2005, a newly enacted statute amending RCW 71.09.090 went into effect. The 2005 amendment is the focus of this appeal. The Legislature found that Young and another somewhat similar decision had interpreted RCW 71.09.090 contrary to legislative intent. The amendment was intended to clarify the "so changed" standard in the wake of those decisions:

The legislature finds that the decisions in In re Young, 120 Wn. App. 753, review denied, \_\_\_ Wn.2d \_\_\_ (2004) and In re Ward, \_\_\_ Wn. App. \_\_\_ (2005) illustrate an unintended consequence of language in chapter 71.09 RCW.

The Young and Ward decisions are contrary to the legislature's intent set forth in RCW 71.09.010 that civil commitment pursuant to chapter 71.09 RCW 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. The legislature finds that the 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.

The legislature finds, although severe medical conditions like stroke, paralysis, and some types of dementia can leave a person unable to commit further sexually violent acts, that 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. To the contrary, the legislature finds that a new trial ordered under the circumstances set forth in Young 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.

The Young and Ward decisions are contrary to the legislature's intent that the risk posed by persons committed under chapter 71.09 RCW will generally require prolonged treatment in a secure facility followed by intensive community supervision in the cases where positive treatment gains are sufficient for community

safety. The legislature has, under the guidance of the federal court, provided avenues through which committed persons who successfully progress in treatment will be supported by the state in a conditional release to a less restrictive alternative that is in the best interest of the committed person and provides adequate safeguards to the community and is the appropriate next step in the person's treatment.

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 of 2005, ch. 344, § 1.

The 2005 statute did not alter the underlying framework in which the detainee has the right to a new trial if there is prima facie evidence that he had "so changed" as to no longer meet the description of a sexually violent predator. The 2005 statute added a new subsection, subsection 4, articulating what is necessary to satisfy the "so changed" standard and listing certain types of evidence that do not satisfy it. As amended in 2005, the statute now states that change in age alone is insufficient:

(4) (a) Probable cause exists to believe that a person's condition has "so changed," under subsection (2) of this section, only when evidence exists, since the person's last commitment trial

proceeding, of a substantial change in the person's physical or mental condition such that the person either no longer meets the definition of a sexually violent predator or that a conditional release to a less restrictive alternative is in the person's best interest and conditions can be imposed to adequately protect the community.

(b) A new trial proceeding under subsection (3) of this section 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 which indicates that the person meets the standard for conditional release to a less restrictive alternative or 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). The State notified the trial court of this change in the law in June 2005, one month before Smith's trial was scheduled to begin.

After hearing argument on the applicability of the 2005 statute, the court found that Smith was alleging a change in his condition predicated upon the advance in his age.<sup>5</sup> The court concluded the new subsection applied to bar trial on Smith's petition because the statute now "specifically indicates that trial may

---

<sup>5</sup> Clerk's Papers at 13 (Finding of fact 4).

be ordered, or held, only where the specific articulated requirements are met.”<sup>6</sup>

Accordingly, the court struck the trial.

Smith appeals. He contends that because the 2005 amendment overrules this court’s holding in Young, giving it retroactive effect is a violation of the separation of powers doctrine.

The constitutional separation of powers doctrine “prevents the legislature from effecting a retroactive change in the law that contravenes this court’s construction of the original statute.” In re Pers. Restraint of Stewart, 115 Wn. App. 319, 342, 75 P.3d 521 (2003).

The State suggests we can sidestep the retroactivity issue and reject Smith’s appeal on the basis that the discussion in Young about aging was dicta, not a genuine holding construing the original statute. This is incorrect. While one reason for reversal in Young was that the trial court had impermissibly weighed the evidence at the probable cause hearing, that reason alone would not support our holding that the detainee was entitled to a new trial as a matter of law. Necessary to that outcome was our conclusion that an expert’s opinion based on increased age of the detainee was sufficient evidence to require a new commitment trial. That conclusion was a holding, not dicta, and it is contravened by the 2005 statute.

The Legislature is free to amend a statute in a way that contravenes a

---

<sup>6</sup> Clerk’s Papers at 14 (Conclusion of law 3).

judicial construction of the original statute so long as the change does not operate retroactively. Does the 2005 statute operate retroactively because the trial court used it as a basis for striking Smith's trial, a trial that would have gone forward under Young's interpretation of the original statute? The State regards it as self-evident that since the 2005 statute prevents trials from being ordered "or held", and since Smith's trial had not yet been held when the statute went into effect, the operation of the statute is prospective. Smith, however, regards it as equally self-evident that the statute does operate retroactively because before it passed he had the right to go to trial and now he does not.

"While statutory retroactivity has long been disfavored, deciding when a statute operates 'retroactively' is not always a simple or mechanical task."

Landgraf v. USI Film Prods., 511 U.S. 244, 268, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994).

A statute does not operate "retrospectively" merely because it is applied in a case arising from conduct antedating the statute's enactment, or upsets expectations based in prior law. Rather, the court must ask whether the new provision attaches new legal consequences to events completed before its enactment. The conclusion that a particular rule operates "retroactively" comes at the end of a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event.

Landgraf v. USI Film Prods., 511 U.S. at 269-270 (citation omitted).

The briefs of the parties are largely unhelpful, as they do not attempt to

compare Smith's situation to the facts of any other cases in which courts have had to decide whether a statute operates retroactively. In some cases, courts have determined whether a statute operates prospectively by identifying the precipitating event that triggers the operation of the statute. See, e.g., In re Estate of Burns, 131 Wn.2d 104, 112, 928 P.2d 1094 (1997). Accord, State v. Pillatos, No. 75984-7, 2007 Wash. LEXIS 62, at 11-14 (Jan. 25, 2007). The parties have not attempted this mode of analysis, and accordingly neither have we.

We also find no guidance in Division Two's recent decision applying the 2005 statute to reverse an order granting a new trial where the order was based on a single change in a demographic factor. In re Det. of Elmore, 134 Wn. App. 402, 413, 139 P.3d 1140 (2006), mot. for discretionary review granted, No. 79208-9 (Wash. Jan. 3, 2007). There is no indication in Elmore that the court was asked to decide whether the 2005 enactment operated retroactively when applied as a bar to a previously ordered trial.

Courts recognize that a statute may be retroactive, even if not explicitly worded to have retroactive effect, if it affects vested rights and past transactions. Landgraf, 511 U.S. at 268-69. Thus, while it may be self-evident that the Legislature intended the new criteria introduced by the 2005 statute to apply only to future scheduling or holding of trials, that is not necessarily sufficient to dispose of Smith's appeal.

Our Supreme Court has summarized Landgraf as holding that “a statute has a genuinely retroactive effect if it impairs rights a party possessed when he acted, increases his liability for past conduct, or imposes new duties with respect to completed transactions”. In re Estate of Burns, 131 Wn.2d at 110. Smith has not identified any previous action that he has taken in reliance on the previous statute or by which he acquired a right that might be described as vested. The pre-2005 version of RCW 71.09.090 as interpreted by Young permitted him to have a release trial solely because he had grown older. Growing older did not require any activity on his part. Smith also has not argued that the statute increases his liability for past conduct or that it imposes new duties with respect to completed transactions.

A vested right, entitled to protection from legislation, “must be something more than a mere expectation based upon an anticipated continuance of the existing law”. Burns, 131 Wn.2d at 116 n.2 (citations omitted). Smith expected a new commitment trial based solely on his anticipation that the criteria for release in RCW 71.09.090 would not change. This mere expectation does not give him a vested right in the pre-2005 version of the law.

We conclude the 2005 statute did not operate retroactively when the trial court used it as a basis for striking Smith’s trial. Therefore, the Legislature’s decision to contravene this court’s construction of the original statute does not violate the separation of powers doctrine.

Affirmed.

Becker, J.

WE CONCUR:

Schindler, ACJ Grosse, J

## APPENDIX B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

In re the Detention of:

KIM SMITH,

Appellant,

v.

STATE OF WASHINGTON,

Respondent.

) NO. 56604-1-I

)  
) **ORDER ON MOTION FOR**  
) **RECONSIDERATION; GRANTING**  
) **IN PART, DENYING IN PART, AND**  
) **AMENDING OPINION**

**RECEIVED**

APR - 4 2007

*Washington Appellate Project*

On September 25, 2006, this court filed its published opinion in the above-entitled action. In a motion for reconsideration, the appellant has pointed out a factual error. The error is on page 2 of the opinion, under "FACTS", in the first sentence of the first full paragraph that currently reads:

Smith, convicted of rape in 1975 and again in 1991, was scheduled for release from prison in May 2000.

This sentence needs to be corrected. Therefore the sentence quoted above shall be deleted and the following text shall be substituted:

Smith, convicted of kidnapping and robbery in 1975 and rape in 1991, was scheduled for release from prison in May 2000.

In all other respects, the appellant's motion to reconsider is denied.

Done this 4<sup>th</sup> day of April, 2007.

Scheller, A

Becker, J  
Ston, D

FILED  
COURT OF APPEALS DIV. #1  
STATE OF WEST VIRGINIA  
2007 APR -4 PM 3:53

~ DECLARATION OF SERVICE ~

Today, I deposited in the mail of the United States of America a properly stamped and addressed envelope directed Todd Richard Bowers, the attorney(s) of record of  respondent  appellant  other party, containing a copy of the document to which this declaration is affixed/attached.

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



MARIA ARRANZA RILEY, Legal Assistant

Date: May 3, 2007

FILED  
COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON  
2007 MAY -3 PM 4:53