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DIVISION ONE

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NO. 56604-1-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

In re the Detention of:

KIM SMITH,

Appellant,

v.

STATE OF WASHINGTON,

Respondent.

BRIEF OF RESPONDENT

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STATE OF WASHINGTON
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I. ISSUES PRESENTED

Appellant, Kim Smith, appeals the trial court's June 29, 2005, Order finding that the May 2005 amendments to the Sexually Violent Predator Act, chapter 71.09 RCW (SVPA), preclude holding the post-commitment trial scheduled to commence on July 18, 2005. Brief of Appellant (BOA) at 1. Mr. Smith raises the following issues:

1. **Did the trial court violate Mr. Smith's right to due process when it applied the May 2005 amendments to grant summary judgment?**
2. **Did the application of the May 2005 amendments deprive Mr. Smith of a vested right?**
3. **Did the application of the May 2005 amendments violate the separation of powers doctrine?**

As the trial court's application of the May 2005 amendments to Mr. Smith's case was not error, the State respectfully requests this Court affirm the grant of summary judgment in this case.

II. STATEMENT OF THE CASE

Mr. Smith's appeal involves the post-commitment procedures of chapter 71.09 RCW, the Sexually Violent Predator Act (SVPA).

A. Factual Background

After a bench trial, Mr. Smith was determined to be a Sexually Violent Predator (SVP) and was committed to the Department of Social and Health Services (DSHS) on March 11, 2002. CP 509-515. Since his

commitment, Mr. Smith has resided at the Special Commitment Center (SCC) for detention and treatment. CP 101. Pursuant to RCW 71.09.070, Dr. Jason Dunham, a psychologist employed by DSHS at the SCC, conducted two annual reviews of Mr. Smith. CP 101-185.

The 2003 annual review revealed that, while Mr. Smith made progress in treatment over the review period, he had not so changed as to no longer meet the definition of an SVP or so that release to a less restrictive alternative (LRA) would be in his best interest. CP 101, 119-148. After a hearing, the trial court continued Mr. Smith's commitment. CP 150-152.

The 2004 annual review indicated that Mr. Smith had regressed in treatment over the past year, was not participating in the treatment program, and had not so changed as to no longer meet the definition of an SVP or so that release to an LRA would be in his best interest. CP 101, 154-185. In response, Mr. Smith submitted a report from Dr. Luis Rosell, indicating that Mr. Smith had "so changed" such that he no longer meets the definition of an SVP and release to an LRA would be in his best interest. CP 187-205. After a hearing, the trial court ordered that trial on these issues commence on April 25, 2005.[1] CP 207.

---

[1] This date was continued, by agreement of the parties, to July 18, 2005. VRP 4/15/05 at 13-15.

On March 18, 2005, the State filed a motion requesting the trial court vacate the order for trial on the merits pursuant to Civil Rule 60(b)(11), as the trial court's order was based upon Dr. Rosell's report, which was, in turn, based upon faulty assumptions and factual misunderstandings. CP 288-294. The State maintained that Dr. Rosell's opinions did not established prima facie evidence that Mr. Smith had "so changed" to warrant trial on the merits under the SVPA. *Id.* The trial court denied the State's motion.

At his post-commitment trial, Mr. Smith sought both unconditional release and release to an LRA. As Mr. Smith submitted no proposed LRA plan meeting the statutory requirements, the State moved for summary judgment. After a June 29, 2005, hearing, the trial court granted the State's motions for summary judgment pertaining to the proposed LRAs.

Before Mr. Smith's post-commitment trial commenced, the Washington Legislature amended the SVPA to clarify the proof necessary to obtain a new trial revisiting a committed person's indefinite civil commitment. RCW 71.09.090(4); CP 97-99.

The trial court determined that the May 2005 amendments precluded Mr. Smith's post-commitment trial from being held; and, therefore, struck the trial date. Specifically, the trial court found that Dr. Rosell's opinion that there had been a fundamental change in

Mr. Smith's condition that would affect his status as an SVP was predicated upon a change in demographics – the effect of Mr. Smith's age as it affected the testing instruments. VRP 6/29/05 at 22. The trial court found that the May 2005 amendments preclude Mr. Smith's post-commitment trial on his status as a SVP from being held and granted summary judgment for the State. *Id.* at 23. Mr. Smith appeals this decision. BOA at 1.

B. Post-commitment Procedures

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 reflect both of these concerns and provide that a post-commitment trial may be held only where there is evidence to believe the person's condition has changed since commitment such that he 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.

In enacting the SVPA, 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 the SVPA. 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." *Young*, 122 Wn.2d at 39. The Court later expanded upon this, holding that "[o]ur 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 Petersen*, 138 Wn.2d 70, 81, 980 P.2d 1204 (1999) (*Petersen I*).

2. The annual review procedures provide for a new trial only where the person's condition has changed and he no longer meets the definition of an SVP

The annual review procedures of the SVPA reflect the relatively long period of time required to reduce the risk an SVP poses to the community through treatment of the underlying mental disorder. The SVP statute, therefore, provides that post-commitment 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 no longer meets the definition of an SVP. RCW 71.09.090.

DSHS conducts an annual review of the mental condition of each SVP, addressing whether he continues to meet the definition of an SVP and whether conditional release to an LRA is appropriate. RCW 71.09.070. DSHS must also provide the SVP with written notice of his right to petition the trial court for unconditional release. RCW 71.09.090(2)(a). Unless the SVP 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.*

Probable cause to order a post-commitment trial may be found in one of two ways -- either failure in the State's proof, or through proof presented by the SVP. The evidence presented by the State 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). Even if the State's evidence is sufficient, however, the SVP 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. *Detention of Petersen v. State*, 145 Wn.2d 789, 798-99, 42 P.3d 952 (2002) (*Petersen II*). In determining whether there is probable cause to order a post-commitment 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*

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 appellant in *Young AR,* Andre Young, was committed as an SVP in 1991. Mr. Young's annual

[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).

review expert, Dr. Barbaree, concluded Mr. Young's condition had changed since his commitment in 1991 such that he no longer met the definition of an SVP. *Young AR*, 120 Wn. App. at 756, 760-61. The change offered was not the result of any treatment gains made by Mr. Young or any debilitating health problems, but 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 commitment supported the conclusion that rapists released after age 60 rarely ever sexually reoffend. *Id.* at 760-61. The trial court rejected Dr. Barbaree's opinion, denying Mr. Young's request for a recommitment trial. *Id.* at 756, 759.

The *Young AR* Court reversed, 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 and triggering the right to a post-commitment trial. *Id.*

4. The Legislative response to *Young AR*

After *Young AR,* the Legislature passed the May 2005 amendments; they became effective on May 9, 2005, after Mr. Smith's

post-commitment trial was ordered, but before it was held. These amendments clarify the Legislature's intent regarding the nature of the changes in an SVP's condition that will trigger a post-commitment trial.

In findings prefacing the amendments, the Legislature echoed its 1990 findings when the SVP statute was enacted. 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 [SVP] population for treatment and the equally long-term needs of the community for protection from these offenders." CP 97. The statute serves these goals by mandating treatment of SVPs in a secure facility. *Id.* For those who make sufficient progress in treatment, the statute provides for transition to an intensively monitored community placement. *Id.*

The Legislature found that the result in *Young AR* runs contrary to the spirit of the SVP commitment scheme. *Id.* It recognized that "severe medical conditions like stroke, paralysis, and some types of dementia" can render a person unable to sexually reoffend. *Id.* 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 post-commitment trial solely on the basis of an increase in age seriously undermines the goals of the statute and removes the incentive to engage in

treatment. *Id.* *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.*

The amendments expressly define the nature of the change in a committed person's condition required before a post-commitment trial, "may be ordered, or held." RCW 71.09.090(4)(b); CP 98-99. Pursuant to these amendments, the change in a committed person's condition that will trigger a post-commitment 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); CP 98-99.

In addition, the May 2005 amendments specify the relevant time frame in which these changes must occur. Only changes in the SVP's condition that have occurred "since the person's last commitment trial proceeding" are relevant and may require a post-commitment trial. *Id.*

The Legislature's purpose in amending the statute was not to preclude an SVP from presenting claims such as those found in *Young AR* but to encourage SVPs to progress towards release by engaging in treatment. The amendments do not foreclose SVPs from obtaining relief based upon generally accepted advances in relevant scientific areas such as risk assessment. Claims such as those made in *Young AR* may still be made to the trial court through CR 60(b), the traditional avenue reserved for the presentation of claims based upon newly discovered evidence that could not have been discovered at the time of trial.

III. ARGUMENT

A. The trial court did not err when it applied the May 2005 amendments to preclude trial in this matter

1. Retroactivity is not necessary for application

The May 2005 amendments specifically provide that a post-commitment proceeding "may be ordered, or held, only when [one of the statutory provisions applies] and the evidence presents a change in condition since the person's last commitment trial proceeding."

RCW 71.09.090(4)(b); CP 99. While Mr. Smith's post-commitment trial had been ordered prior to the amendment of the statute, ***as it had not yet been held***, the May 2005 amendments operated to preclude the trial, regardless of whether those amendments are deemed to apply retroactively.

Mr. Smith argues that, prior to the May 2005 amendments, he possessed a right to petition the trial court for a post-commitment trial based upon a change in his condition, even if that change was only one of chronological age, and that this right vested once he filed the petition. BOA at 13-14. Nothing in the May 2005 amendments alters Mr. Smith's right to petition the trial court for a post-commitment trial, based upon any reason whatsoever. Mr. Smith goes on to argue that application of the May 2005 amendment "deprived him of this vested right since it deprived him of the reasonable expectation of release based upon his petition." *Id.* at 14. Here, Mr. Smith makes an unwarranted leap of logic. While he had, and retains, the right to petition the trial court for release, that right does not give rise to any reasonable expectation of release, either prior to or after the May 2005 amendments.

The May 2005 amendments operate prospectively to prohibit holding a post-commitment trial, even if previously ordered; however, that result does not require the amendments be applied retrospectively and

does not operate to deprive Mr. Smith of any vested right based upon his claimed "reasonable expectation of release."

2. The May 2005 amendments may be applied retroactively

If this Court should determine that the trial court applied the May 2005 amendments "retroactively" in this case, such application was permissible and does not constitute error.

"Wherever possible, it is the duty of [the reviewing] court to construe a statute so as to uphold its constitutionality." *Addleman v. Board of Prison Terms and Paroles*, 107 Wn.2d 503, 730 P.2d 1327 (1986). The Washington Supreme Court has recognized that "subsequent enactments that only clarify an earlier statute can be applied retrospectively." *In re Matteson*, 142 Wn.2d 298, 12 P.3 585 (2000). Further, "it is not necessary that a statute expressly state that it is intended to operate retrospectively if such an intention can be obtained by viewing its purpose and the method of its enactment." *Id.* The Washington Court has also found legislation to have retroactive, curative effect when "it clarifies or technically corrects an ambiguous statute." *Id.* Curative or remedial statutes may be applied retroactively:

> an amendment may be retroactively applied if the legislature so intended or if the amendment is "clearly curative". . . Additionally, "remedial" amendments may be retroactively applied under certain circumstances.

In re F.D. Processing, Inc., 119 Wn.2d 452, 832 P.2d 1303 (1992) (internal citations omitted). As the 2005 amendments operate to clarify the statutory criteria, they are both curative and remedial.

Indeed, the Washington Supreme Court has specifically indicated that "when an amendment clarifies existing law and where that amendment does not contravene previous constructions of the law, the amendment may be deemed curative, remedial, and retroactive. This is particularly so where an amendment is enacted during a controversy regarding the meaning of the law." *In re Matteson*, quoting *Tomlinson v. Clarke*, 118 Wn.2d 498, 510-11, 825 P.2d 706 (1992).

Mr. Smith argues that the May 2005 amendments are neither curative nor remedial because they contravene previous constructions of the law, specifically the *Young AR* and *Ward*[3] decisions. BOA at 10, 15. He is mistaken. In both the *Young AR* and *Ward* decisions, the Courts held that trial courts may not weigh evidence at annual review show cause hearings pursuant to RCW 71.09.090. The Courts did not hold, in either case, that age was sufficient change to warrant a post-commitment trial on the merits; all such indications in both cases were dicta and do not constitute "previous constructions of the law." The Legislature prudently acted to clarify what appeared to be judicial confusion over the

[3] *In re Detention of Ward*, 125 Wn. App. 381, 104 P.3d 747 (2005).

terminology in the statute to avoid ambiguity; however, the Legislature's action does not elevate the language of those cases into "previous constructions of the law" which would negate the application of the very clarifying amendments intended to avoid such a result.

Mr. Smith also claims that application of the amendments is barred by the *ex post facto* clause. This argument was rejected long ago by *Young*, 122 Wn.2d 1 and *Kansas v. Hendricks*, 521 U.S. 346, 117 S. Ct. 2072, 138 L. Ed. 2d. 501 (1997). Because RCW 71.09 is a civil commitment law, the *ex post facto* clause does not apply. *Young.* 122 Wn.2d at 18.

3. The Statute does not impermissibly encroach upon the Judiciary

Mr. Smith asserts that the May 2005 amendments violate the separation of powers doctrine because they encroach upon the authority of the judicial branch. BOA at 15. This argument should be rejected because the Legislature's amendments are facially neutral and do not make a "case by case application of the law to a particular set of facts." *Port of Seattle v. Pollution Control Hearing Bd.*, 151 Wn.2d 568, 626, 90 P.3d 659 (2004).

The separation of powers doctrine, which appears in neither the state nor the federal constitutions, is presumed from the division of

government into different branches. *Carrick v. Locke*, 125 Wn.2d 129, 134-5, 882 P.2d 173 (1994). It does not demand that the branches be "hermetically sealed" from each other because they must "remain partially intertwined" to function properly. *Id.* at 135. The doctrine is "grounded in flexibility and practicality, and rarely will offer a definitive boundary beyond which one branch may not tread." *Id.* (citing *Matter of Salary of Juvenile Director*, 87 Wn.2d 232, 240, 552 P.2d 163 (1976)).

Here, the Legislature has decided generally that such conditions as age and marital status shall not be a defense in SVP cases. This is no more than what the Legislature routinely does in other areas, such as when it establishes the elements to a crime or the permissible defenses to a criminal charge. Such legislation does not demand a result in any particular case, but merely sets out the framework for the court to follow. For example, the Legislature has plenary power to set terms of punishment for the crimes that it has defined. *State v. Thorne*, 129 Wn.2d 736, 767, 921 P.2d 514 (1996). It has the power to provide the structure within which a court can exercise its discretion, such as in sentencing. *State v. Ammons*, 105 Wn.2d 175, 181, 718 P.2d 796 (1986). It can even totally exclude the court's discretion. *Thorne*, 129 Wn.2d at 767; *State v. Fuller*, 89 Wn. App. 136, 142, 947 P.2d 1281 (1997).

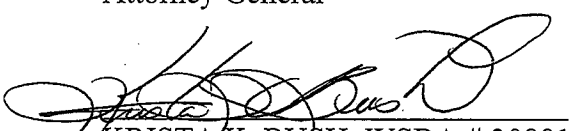
In clarifying the "so changed" provision of RCW 71.09.090, the Legislature has not unacceptably encroached upon judicial authority.

IV. CONCLUSION

This Court should affirm the trial court's grant of summary judgment in this matter. The trial court properly determined that the May 2005 amendments to the SVPA preclude Mr. Smith's scheduled post-commitment trial. As the trial court's decision was not error, this Court should affirm.

RESPECTFULLY SUBMITTED this 9th day of June, 2006.

ROB MCKENNA
Attorney General



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NO. 56604-1-I

COURT OF APPEALS FOR DIVISION I
STATE OF WASHINGTON

In re the Detention of: KIM SMITH, Appellant, v. STATE OF WASHINGTON	DECLARATION OF SERVICE

GRACE M. SUMMERS declares as follows:

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STATE OF WASHINGTON
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On June 9, 2006, I deposited in the United States mail, first-class postage affixed, addressed as follows:

THOMAS M. KUMMEROW
WASHINGTON APPELLATE PROJECT
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SEATTLE, WA 98101-3647

a copy of the following documents: BRIEF OF RESPONDENT 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 9th day of June, 2006, at Seattle, Washington.

Grace M. Summers

GRACE M. SUMMERS