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SUPREME COURT OF THE STATE OF WASHINGTON

In re the Motion for Discretionary Review of:

ALAN MEIRHOFER,

Appellant.

STATE'S SUPPLEMENTAL BRIEF

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I. INTRODUCTION

Alan Meirhofer is a serial rapist who has refused all treatment since his commitment as a sexually violent predator (SVP) in 2000. Each year since then, as required by statute, the State has shown that he continues to suffer from several mental abnormalities and a personality disorder that make him likely to commit additional sexual offenses if not confined. In 2011, Meirhofer requested a new trial pursuant to RCW 71.09.090, arguing that the State had not made a prima facie showing for continued detention because the State's expert had modified one of the mental abnormality diagnoses presented at his civil commitment trial and because the score on an actuarial instrument used in the State's expert's overall risk assessment was below 50%. These, he argued, along with the opinions of his own retained expert on diagnosis and risk, were "changes" entitling him to a new trial. On appeal, he argued that, if he could not make such challenges within the context of a show cause proceeding, he must be able to raise them in a personal restraint petition (PRP).

The State made a prima facie showing of grounds for continued detention, and the "changes" alleged by Meirhofer do not negate the State's prima facie case. Nor can Meirhofer circumvent the requirements of the sexually violent predator statute through a PRP. This Court should affirm.

II. ISSUES PRESENTED FOR REVIEW

- A. Where the State presented evidence that Meirhofer suffers from two different mental abnormalities and a personality disorder and is likely to reoffend if released, did the State make a prima facie showing for continued confinement despite the fact that evidence is not identical to that presented at the initial commitment trial?
- B. Does the filing of a PRP allow Meirhofer to avoid the requirements of the SVP statute and obtain a new trial where those requirements have repeatedly been upheld as constitutional, where other remedies are available to him, and where he presents no material new evidence?

III. STATEMENT OF THE CASE

In its unpublished opinion upholding Meirhofer's commitment as an SVP, the Court of Appeals described four of Meirhofer's offenses, three of which occurred on a single night. That night Meirhofer, armed with a knife, broke into the homes of three different 13-year-old children. *Meirhofer v. State*, 109 Wn. App. 1057, 2001 WL 1643535 (*Meirhofer I*) at *1. He raped two of the children, one boy and one girl. *Id.* Six months later, he again broke into a home, this time abducting a 13-year-old boy. *Id.* After raping the boy, he returned the boy to his home, threatening to burn the boy's home down if he told. *Id.* He was eventually apprehended; charges in two of the four cases were dismissed in exchange for pleas of first degree rape and second degree kidnapping in the other two. *Id.* Meirhofer was also a suspect in two additional cases involving children who were nine and 10 years old. App. A at 5-6. In 1996, when Meirhofer was about to be released following these convictions, the State filed a petition alleging that he was an SVP. At his initial commitment trial in 2000, Dr. Anna Salter, Ph.D., testified

that Meirhofer suffered from three different mental disorders: Pedophilia, Paraphilia Not Otherwise Specified (NOS): Nonconsent, and Personality Disorder NOS with Antisocial Features. App. B at 25, 32-34; App. A at 19.¹ A unanimous jury found that Meirhofer was an SVP and he has been confined at the Special Commitment Center (“SCC”) since that date. He has refused all treatment since commitment. App. A at 8.

Since commitment, Meirhofer’s mental condition has been reviewed annually pursuant to RCW 71.09.070. In 2011, the State submitted an annual review by Dr. Robert Saari of the SCC. App. A. Dr. Saari concluded that Meirhofer “suffers from a number of mental abnormalities that predispose him to sexually reoffend.” *Id.* at 9-10. Applying the diagnostic criteria in the American Psychiatric Association’s *Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision* (“DSM-IV-TR”), he assigned three diagnoses. First, he diagnosed Meirhofer with Paraphilia NOS: Hebephilia, which involves sexual attraction “to pubescent boys who are underage.”² *Id.* at 10. Meirhofer, he wrote, has “repeatedly acted on this attraction by seducing and raping underage boys.” *Id.* at 9. In an interview with Dr. Saari in 2010, Meirhofer estimated that he had had sexual relations with about ten boys under age sixteen, and admitted to raping two boys who were just thirteen. *Id.* at 9. He opined that Meirhofer’s “history of sexual

¹ Unless otherwise noted, all appendices referenced herein refer to the appendices attached to the State’s Answer in the Court of Appeals.

² Pedophilia, on the other hand, involves sexual arousal to *pre*-pubescent children. DSM-IV-TR at 572.

offending indicates an abnormal sexual object choice of underage boys and some evidence of a paraphilic arousal to rape.” *Id.* This “clear sexual attraction,” coupled with Meirhofer’s rape behavior, provided the rationale for a Paraphilia NOS: Hebephilia diagnosis. *Id.* at 10. Dr. Saari also diagnosed Meirhofer with Paraphilia NOS: Nonconsent, a sexual disorder involving arousal to nonconsenting sex. In doing so, Dr. Saari pointed to two offenses, occurring roughly a year apart, in which the victims reported having been grabbed, bound and anally raped. App. A at 11. Meirhofer told evaluators that he had later fantasized about one of these rapes. *Id.* at 2. Meirhofer was also a suspect in a number of other similar cases involving the forceful rape of young boys. *Id.* at 11. Dr. Saari concluded that there was “a clear enough pattern of rape behavior to indicate a rape paraphilia.” *Id.* Dr. Saari also rendered a “Rule-Out” diagnosis for Pedophilia, one of the three diagnoses originally assigned at the time of trial. *Id.* at 10-11. Finally, Dr. Saari diagnosed Meirhofer with a Personality Disorder NOS with Antisocial and Borderline Traits. *Id.* at 9. These three disorders, along with factors relevant to his comprehensive risk assessment, supported Dr. Saari’s conclusion that Meirhofer continues to meet commitment criteria.

In response, Meirhofer submitted a report by his own expert, Dr. Rosell, and moved for an evidentiary hearing pursuant to RCW 71.09.090(2). After a contested hearing, the trial court entered an order finding that the State had met its prima facie burden and Meirhofer had failed to show probable cause for a new trial. App. C. Meirhofer sought review, filing both a motion

for discretionary review and a PRP, which were consolidated on appeal. The Court of Appeals, in an unpublished decision, denied both his motion and his PRP. *In re Meirhofer*, 175 Wn. App. 1049, 2013 WL 3867834 (*Meirhofer II*). He then filed a motion for discretionary review (“Motion”), which this Court granted.

IV. ARGUMENT

Meirhofer argues that the State did not make a prima facie showing for continued commitment because Dr. Saari concluded, and his own expert agreed, that 1) “there was no longer sufficient evidence” that Meirhofer suffers from Pedophilia; and 2) Meirhofer’s “likelihood of re-offense under the actuarial risk assessment tools was no longer above 50%.” Motion at 2. He further argues that his constitutional rights were violated when the Court of Appeals denied his PRP. *Id.* at 2-3.

Meirhofer’s arguments rely entirely upon a mischaracterization of the State’s evidence and a misunderstanding of the requirements of the law. He asks this Court to ignore the plain language of Dr. Saari’s report, which clearly articulates a basis for continued detention, and to conclude that, because Dr. Saari’s assessment is not identical to that of the State’s trial expert 11 years earlier, the State failed to make a prima facie showing. Meirhofer also seeks to invalidate the State’s prima facie showing by presenting a report from an expert who disagrees with the State’s expert’s conclusions, effectively asking this Court to “weigh” these competing opinions against one another. Finally,

he attempts to use the mechanism of a PRP to avoid the statute's requirements of change through treatment or incapacitation. Meirhofer is not entitled to a new trial.

A. Dr. Saari's Report Establishes the State's Prima Facie Case

At the show cause hearing, the State "shall present prima facie case evidence establishing that the committed person continues to meet the definition" of an SVP. RCW 71.09.090(2)(b). At that hearing, the State may rely exclusively on the annual report prepared under RCW 71.09.070. *Id.* The court, in determining whether the State has made its prima facie case, assumes the truth of the evidence presented and does not weigh asserted facts against potentially competing ones. *State v. McCuiston*, 174 Wn.2d 369, 382, 275 P.3d 1092 (2012). Rather, the trial court "can and must determine whether the asserted evidence, if believed, is sufficient to establish the proposition its proponent intends to prove." *Id.* A trial court's determination of probable cause is reviewed *de novo*. *Id.*

The State satisfied its prima facie burden by submitting the report of Dr. Saari who, after conducting a comprehensive evaluation that included both an assessment of Meirhofer's mental condition and his risk to reoffend, concluded that Meirhofer continued to meet commitment criteria. App. A at 14. There is no requirement that his opinion be identical to that presented at the commitment trial 11 years earlier, and Meirhofer's arguments to the contrary fail.

1. An Adjustment In Diagnosis Does Not Entitle Meirhofer To A New Trial

Meirhofer's argument that he is entitled to a new trial based on a minor adjustment in diagnosis fails for at least three reasons: First, as a factual matter, Meirhofer mischaracterizes Dr. Saari's report, which clearly sets forth facts sufficient to establish the State's prima facie case. Second, Washington precedent establishes that a diagnosis of mental illness need not be perfectly static to justify continued civil commitment. Third, United States Supreme Court authority recognizes that a diagnosis of mental illness justifying civil commitment is necessarily subject to change, but that such changes do not affect the constitutionality of a continued civil commitment.

Characterizing Pedophilia as "the primary diagnosis at his original commitment trial," (Motion at 10; *see also* PRP at 8³), Meirhofer states that Dr. Saari determined that this diagnosis had "changed significantly since the original commitment," and that there is "no longer" sufficient evidence of Pedophilia (Motion at 2, 10, 11, 12, 14). Pedophilia, however, was only one of several diagnoses assigned by the State's expert at the initial commitment trial, along with Paraphilia NOS: Nonconsent and Personality Disorder NOS with Antisocial Features. App. B at 25, 32-34; App. A at 19. There is no evidence that any one of these diagnoses was the "primary" diagnosis. While Dr. Saari believes that a

³ Meirhofer's PRP asserts that "...new evidence shows *the basis* for Mr. Meirhofer's original commitment no longer exists..." (PRP at 8) (emphasis added), and that Pedophilia "was *the basis* of his original commitment" *Id.* at 9, 11 (emphasis added).

diagnosis of Hebephilia more accurately captures Meirhofer's offending than the previously assigned diagnosis of Pedophilia, this slight shift is merely a change in nomenclature, and does not reflect any change in Meirhofer's underlying mental condition.

This Court has rejected precisely the argument Meirhofer now makes. In *State v. Klein*, 156 Wn.2d 103, 124 P.3d 644 (2005), an insanity acquittee argued that, because her current diagnosis was not identical to that diagnosed at the time of initial commitment, she no longer had a "mental disease or defect" and was entitled to release. Rejecting this argument, this Court noted that "Klein's construction of the statute would require difficult, if not impossible, comparisons between the original and present mental conditions of an acquittee," and noted that the "feasibility of such comparisons is doubtful" in light of the "uncertainty of diagnosis in this field and the tentativeness of professional judgment." *Id.* at 120 (citing *Jones v. United States*, 463 U.S. 354, 365 n. 13, 103 S. Ct. 3043, 77 L. Ed. 2d 694 (1983)). Noting that the DSM acknowledges that "the subjective and evolving nature of psychology may lead to different diagnoses that are based on the very same symptoms, yet differ only in the name attached to it," this Court concluded that "release based on mere semantics would lead to absurd results and risks to the patient and public..." *Id.* at 120-121.

Klein is dispositive of this issue. Just as in *Klein*, the SVP statute requires that the committed person continue to suffer from "a" mental abnormality or personality disorder, rather than "the" mental abnormality, and just as in *Klein*, the

diagnosis here was closely related to the original diagnosis: Dr. Saari's minor adjustment of his diagnosis does not affect the validity of the commitment.

This conclusion is consistent with Supreme Court precedent. After initial commitment, the constitution requires that continued detention be "subject to periodic review of the patients' suitability for release." *Jones*, 463 U.S. at 368. There is no requirement, however, that that condition be precisely the same condition diagnosed at the time of his initial commitment, and the United States Supreme Court has never relied on the semantics of particular diagnostic classifications. Rather, the Court has repeatedly acknowledged "the uncertainty of diagnosis in this field and the tentativeness of professional judgment" (*Greenwood v. United States*, 350 U.S. 366, 375, 76 S. Ct. 410, 100 L. Ed. 412 (1956)) and has noted that reported cases "are replete with evidence of the divergence of medical opinion in this vexing area." *O'Conner v. Donaldson*, 422 U.S. 563, 579, 95 S. Ct. 2486, 45 L. Ed. 2d 396 (1975) (C.J. Burger, concurring). Psychiatry "is not. . . an exact science, and psychiatrists disagree widely and frequently on what constitutes mental illness, on the appropriate diagnosis to be attached to given behavior and symptoms, on cure and treatment, and on likelihood of future dangerousness." *Ake v. Oklahoma*, 470 U.S. 68, 105 S. Ct. 1087, 84 L. Ed. 2d 53 (1985). More recently and in the SVP context, the Court has observed that the term "mental illness" is "devoid of any talismanic significance," *Hendricks*, 521 U.S. at 358-59, and that "the science of psychiatry, which

informs but does not control ultimate legal determinations, is an ever-advancing science, whose distinctions do not seek precisely to mirror those of the law.” *Kansas v. Crane*, 534 U.S. 407, 413, 122 S.Ct. 867, 151 L.Ed.2d 856 (2002).

Meirhofer has a long history of sexual assaults on young males. One of the three diagnoses originally assigned was Pedophilia, appropriate where the object of the offender’s sexual attentions are prepubescent (generally 13 years or younger). App. A at 19; DSM-IV-TR at 572. In his report, Dr. Saari explained that, while he believed prior evaluators were correct in that diagnosis and he suspected the disorder was still present, he could not make such a diagnosis without a sexual history polygraph in order to clarify the full range of Meirhofer’s sexual history and arousal patterns. *Id.* at 10-11. Instead, he assigned a diagnosis of *Hebephilia*, in which the object of desire is the post-pubescent child. *Id.* at 10. While different evaluators may disagree as to the way to best characterize the disorder that drives an adult male to abduct, gag, threaten and anally rape 13- year-old children, there is no question that it is a disorder, and a very serious one. To characterize this minor adjustment in diagnosis is “significant” or to suggest that a jury might believe that the abduction and anal rape of a 13-year-old child does not involve a mental disorder because “attraction to pubescent individuals” is “far too widespread” (Motion at 10) to be a mental disorder is absurd. Just as in *Klein*, “the subjective and evolving nature of psychology” has led to “different diagnoses

that are based on the very same symptoms, yet differ only in the name attached to it.” *Klein*, 156 Wn. 2d at 120-121.

Nor does Meirhofer’s challenge to the diagnosis of Hebephilia have merit. As noted, the court at the show cause hearing “assumes the truth of the evidence presented and does not weigh asserted facts against potentially competing ones.” *McCuiiston*, 174 Wn.2d at 382; *see also In re Detention of Petersen*, 145 Wn.2d 789, 42 P.3d 952 (2004). By challenging the diagnosis of Hebephilia, Meirhofer asks the Court to weigh his expert’s opinion against that of the State’s expert. Even if Meirhofer were permitted to challenge the diagnosis of Paraphilia NOS: Hebephilia by asking the trial court to weigh Dr. Saari’s opinion against that of his own expert, this challenge would fail because the diagnosis is widely accepted both by the courts and the relevant professional community.

Both Paraphilia NOS: Hebephilia and Paraphilia NOS: Nonconsent fall within the Paraphilia NOS category in the DSM. The specifiers—Hebephilia and Nonconsent—identify the target of the person’s sexual deviance—post-pubescent children and nonconsenting persons—respectively. Paraphilia NOS is a diagnostic classification in the DSM “included for coding Paraphilias that do not meet the criteria for any of the specific categories.” DSM-IV-TR at 576. Essentially, it is a “residual category” which “encompasses both less commonly encountered paraphilias and those not yet sufficiently described to merit formal inclusion.” *In re Pers. Restraint of Young*, 122 Wn.2d 1, 29, 857 P.2d 989 (1993). Meirhofer’s argument against Paraphilia NOS: Nonconsent is

indistinguishable from that rejected by this Court in *Young*, and this Court has repeatedly upheld commitments based on this diagnosis since that time.⁴ Moreover, it is widely accepted across the country. See *McGee v. Bartow*, 593 F.3d 556, 581 n.16 (7th Cir. 2010) (citing cases nationwide).

Notwithstanding the opinion of certain experts cited by Meirhofer, Paraphilia NOS: Hebephilia is also widely accepted among mental health experts. Dr. James Cantor at the University of Toronto medical school has compiled a list of 100 texts that include Hebephilia. App. D.⁵ These texts span “multiple academic fields, multiple countries, and multiple decades, long predating the current DSM.” See also App. E, “Peer Reviewed Research Articles Providing Data on Hebephilia (1972-2010).”⁶ The diagnosis has been referenced in criminal cases (see, e.g. *State v. Lamure*, 846 P.2d 1070, 1073 (N.M. App. 1992); *U.S. v. Polizzi*, 549 F.Supp.2d 308, 337-38 (E.D.N.Y. 2008); *U.S. v. C.R.*, 792 F.Supp.2d 343, 408 (E.D.N.Y. 2011)) as well as numerous civil commitment cases across the United States and involving the testimony of many different experts.⁷ Meirhofer’s claim that this diagnostic

⁴ See, e.g., *Young*, 122 Wn.2d at 28-29; *In re Detention of Stout*, 159 Wn.2d 357, 363, 150 P.3d 86, 90 (2007); *In re Detention of Halgren*, 156 Wn.2d 795, 800-01, 132 P.3d 714 (2006); *In re Detention of Marshall*, 156 Wn.2d 150, 155, 125 P.3d 111, 113 (2005); *In re Detention of Campbell*, 139 Wn.2d 341, 357, 986 P.2d 771, 779 (1999). See also *In re Detention of Berry*, 160 Wn. App. 374, 248 P.3d 592 (2011).

⁵This list can be found at http://individual.utoronto.ca/james_cantor/page21.html

⁶This article can be found at http://individual.utoronto.ca/james_cantor/

⁷ See e.g., *In re Martinelli*, 649 N.W.2d 886, 890-891 (Minn. App. 2002) (Dr. Fox and Dr. Alberg); *In re Civil Commitment of V.A.*, 813 A.2d 1252, 1254 (N.J.Super.A.D. 2003) (Dr. LoBiondo); *In re Johnson*, 85 P.3d 1252, 1255 (Kan. App. 2004) (Dr. Huerter); *In re Civil*

category is invalid was properly rejected by both the trial court and the Court of Appeals.

2. A Change In The Score Of A Single Actuarial Instrument That Does Not Affect The Expert's Ultimate Conclusion That The Person Is Likely To Reoffend Does Not Negate The State's Prima Facie Case

Meirhofer argues that, because “the State’s expert concluded that Mr. Meirhofer’s likelihood of re-offense under the actuarial risk assessment tools was no longer above 50%,” the State did not make a prima facie showing of risk. Motion at 2. This characterization conflates the State’s ultimate burden—that is, to make a prima facie showing that Meirhofer is more likely than not to reoffend—with the score on a particular actuarial instrument. Dr. Saari’s risk assessment was not limited to the scoring of a single actuarial instrument, and the score on that instrument is not dispositive of his risk to reoffend.

The use of actuarial instruments as part of a comprehensive risk assessment is well-accepted. *In re Detention of Thorell*, 149 Wn.2d 724, 755, 72 P.3d 708 (2003). Such instruments are not, however, dispositive of the ultimate issue of risk. Because actuarial measurements only evaluate a “limited set of predictors” often involving statistical analysis of small sample sizes, the

Commitment of A.H.B., 898 A.2d 1027, 1030 (N.J.Super.A.D. 2006) (Dr. Zeiguer); *In re Hehn*, 745 N.W.2d 631, 633 (N.D. 2008) (Drs. Belanger and Sullivan); *State v. Donald N.*, 881 N.Y.S.2d 542, 544 (N.Y.A.D. 2009); *People v. McRoberts*, 101 Cal.Rptr.3d 115, 117 (Cal.App. 2009) (Dr. Musacco); *In re Hanenberg*, 777 N.W.2d 62, 63 (N.D. 2010) (Dr. Sullivan); *In re Commitment of Rachel*, 782 N.W.2d 443, 450 (Wis.App. 2010) (Dr. Harasymiw); *In re G.R.H.*, 793 N.W.2d 460, 468 (N.D. 2011) (Dr. Coombs); *U.S. v. Wetmore*, 766 F.Supp.2d 319, 329 (D.Mass. 2011) (Dr. Prentky); *In re Williams*, 253 P.3d 327, 330 (Kan. 2011) (Dr. Reid); *In re Berg*, 342 S.W.3d 374, 379 (Mo.App. S.D. 2011) (Dr. Leavitt); *In re Civil Commitment of Navratil*, 799 N.W.2d 643, 648 (Minn.App. 2011) (Dr. Hoberman).

results “have a variety of potential predictive shortcomings” (*Id.*, 149 Wn.2d at 753) and may underestimate the risk of re-offense. *See, e.g., In re Detention of Kelley*, 133 Wn. App. 289, 296, 135 P.3d 554 (2006); *see also In re Detention of Lewis*, 134 Wn. App. 896, 906, 143 P.3d 833 (2006). For these reasons, experts sometimes adjust the results of an actuarial risk assessment by “considering potentially important factors not included in the actuarial measure.” *Thorell*, 149 Wn.2d at 753. This consideration can include various “other dynamic risk factors” that identify the offender as a high risk to reoffend. *Lewis*, 134 Wn. App. at 906.

In addition to considering Meirhofer’s 10-year risk on the Static-99R (“about 30%”),⁸ Dr. Saari considered dynamic risk factors such as Meirhofer’s deviant sexual interests (as shown by his “history of raping young teenage boys”), sense of sexual entitlement, use of sex in order to cope with feelings of loss, hurt and resentment, social rejection/loneliness, lack of concern for others, impulsivity, negative social influences, poor cooperation with supervision, and poor self-assessment of risk. App. A at 12-13. Meirhofer, he noted, had done nothing to reduce his risk through participation in sex offender treatment, having refused all treatment since his admission to the SCC 15 years earlier. *Id.* at 13. Meirhofer “has assumed a stance that he does not have any psychological problems to address in treatment,” and “seems blind to the fact

⁸ Expert testimony in *Lewis* indicated that “the Static 99 measures reconvictions, which underestimates risk of re-offense.” 134 Wn. App. at 906.

that most people who use drugs...do not rape young teenage boys.” *Id.* at 13. Meirhofer has never undergone a sexual history polygraph to assess the true range of his offending. *Id.* at 13. Despite a history of significant alcohol and methamphetamine use, Meirhofer “has assumed an attitude that drinking is not a problem,” and “expressed no concern that drinking might place him at risk for sexual re-offense, or for relapsing to methamphetamine.” *Id.* at 13-14. Indeed, less than four months prior to Dr. Saari’s April 15, 2011 report, Meirhofer had been discovered in possession of “pruno,” or homemade alcohol. *Id.* at 12.

Based on all of the information considered, Dr. Saari concluded that Meirhofer continued to meet commitment criteria and that “his present mental condition seriously impairs his ability to control his sexually violent behavior.” *Id.* at 14. The State’s proof was sufficient.

B. Meirhofer Is Not Entitled To Relief Pursuant To A PRP.

Meirhofer’s argument that he is entitled to relief by way of a PRP misapprehends the nature of a PRP, ignores this Court’s prior jurisprudence, and misreads the Court of Appeals’ decision.

Meirhofer contends that the Court of Appeals violated his constitutional right to file a PRP by denying his PRP. There is, however, no constitutional right to file a PRP. *United States v. MacCollom*, 426 U.S. 317, 323, 96 S. Ct. 2086, 48 L. Ed. 2d 666 (1976) (the Due Process Clause does not establish any right to file a collateral challenge). In any case, Meirhofer has not met the basic

requirements for relief by way of PRP. RAP 16.4(d), for example, requires the petitioner to demonstrate that “other remedies which may be available to petitioner are inadequate.” Here, other remedies are available, and Meirhofer has made use of them. Meirhofer’s initial Motion for Discretionary Review of the trial court’s decision and his PRP are indistinguishable, demonstrating that he could—and did—seek the same relief through other channels.

Meirhofer’s essential argument is that any deviation from the analysis presented at the original commitment trial constitutes “new evidence,” and that, in addition to challenging that “new evidence” on its face, he should be able to challenge its legitimacy by asking the court to weigh it against his own evidence in order to negate the State’s prima facie case. This fails for several reasons: As noted, his assertion that Dr. Saari’s report constitutes “new evidence” is based on a mischaracterization of its contents and Dr. Saari’s conclusions. Nor can the court weigh the opinion of his expert against that of Dr. Saari in order to conclude, for example, that Hebephilia is not a legitimate diagnosis, as asserted by Dr. Rosell. Meirhofer App. D to PRP at 21. If Meirhofer wishes to fundamentally challenge the way in which the court determines whether the State has made a prima facie showing so as to permit a weighing of evidence, he can do this by directly challenging the constitutionality of the statute; there is no need to file a PRP. Such a challenge is unlikely to succeed. In *Petersen*, this Court explicitly rejected the argument that “trial standards” that would allow for a weighing of evidence should apply

to show cause hearings. 145 Wn. 2d at 798. More recently, in *McCuiotion*, this Court reiterated that holding. 174 Wn.2d at 382. The fact that his argument will probably fail does not render the remedy—that is, a direct challenge to the statute—“inadequate;” it simply means that his argument lacks merit.

Meirhofer cannot avoid statutory requirements of RCW 71.09.090 by the procedural mechanism of a PRP. A PRP does not confer additional rights outside of existing law. Rather, it is simply an avenue for obtaining judicial review where other avenues are inadequate. To obtain relief under a PRP, the petitioner must show the restraint is unlawful. RAP 16.4(a). In order to determine whether restraint is unlawful, the Court must of necessity refer to the statute under which the person is being detained. In *Petersen*, this Court articulated the State’s preliminary burden in the show cause hearing, expressly rejecting the suggestion that such a hearing should involve, as Meirhofer seeks here, a weighing of the evidence. More recently, in *McCuiotion*, this Court upheld the law’s release provisions as they relate to the SVP’s burden to show change meriting a new trial. The State has shown a basis for Meirhofer’s continued detention under *Petersen*, and Meirhofer did not show probable cause for a new trial under the release provisions upheld in *McCuiotion*. Because Meirhofer cannot show his confinement is unlawful *in light of the statute*, he is not entitled to relief on a PRP.

Nor does Meirhofer present “new evidence” under RAP 16.4. To obtain relief, newly discovered evidence must be “of such significance and cogency that it will probably change the result of the trial.” *State v. Peele*, 67 Wn.2d

724, 732, 409 P.2d 663 (1966). This is an exacting standard, one which requires more than the mere possibility of a different outcome. *State v. Gassman*, 160 Wn. App. 600, 248 P.3d 155 (2011). Merely retaining a new expert who has a different opinion from petitioner's trial expert does not constitute "newly discovered evidence." *State v. Harper*, 64 Wn. App. 283, 293, 823 P.3d 1137 (1992), citing *State v. Evans*, 45 Wn. App. 611, 726 P.2d 1009 (1986).

Meirhofer fails to meet this standard. Because they do not affect the State's prima facie case and are unrelated to treatment or incapacitation, the "changes" he alleges are not material to the considerations governing a new trial under RCW 71.09.090, and thus do not meet the requirements of RAP 16.4(c)(3). Unable to show that he has "changed in a way that satisfies the statutory scheme," he "is not entitled to sidestep the commitment statute" through a PRP. *Meirhofer II* at *5.

Moreover, his argument is virtually indistinguishable from arguments that this Court soundly rejected in *McCouston*. There, *McCouston* argued that the statute's release provisions requiring change through treatment or incapacitation "divorc[e] the ability to gain a new trial" from "the question of the person's current mental state and dangerousness," and thus violate substantive due process "because they prohibit a court from ordering a new trial even when the SVP does not meet the criteria for continued confinement." 174 Wn.2d at 387-88. Rejecting that argument, this Court held that "[s]ubstantive due process requires only that the State conduct periodic review

of the patient's suitability for release." *Id.* at 385 (citing *Jones*, 462 U.S. at 368). "[A]dditional safeguards that go *beyond* the requirements of substantive due process" are provided by the statutory right to show the one's condition has "so changed" as to merit a new trial. *Id.* (emphasis added). The statute, this Court noted, requires DSHS to authorize a petition for relief where DSHS determines that the person no longer meets criteria for commitment. *Id.* at 388. Thus, "[t]his statutory scheme comports with substantive due process because it does not permit continued involuntary commitment of a person who is no longer mentally ill and dangerous." *Id.*

Finally, Meirhofer misreads the Court of Appeals' decision. The court did not hold that he could "never file a PRP unless he is challenging his original commitment." Motion at 16. The court was not asked to consider all possible circumstances under which a PRP might be cognizable nor did it do so. Rather, the court simply ruled that, while the *McCustion* Court approved the filing of a PRP to challenge the initial commitment, it cannot be read to entitle a person who presents no "material" new evidence and who has "failed to show that he has changed in a way that satisfies the statutory scheme...to sidestep the commitment statute" by means of a PRP. Slip Op. at *9-10.

This ruling was correct. Meirhofer's purported "new evidence" appears to embrace both Meirhofer's mischaracterization of the State's evidence (i.e. that Meirhofer "no longer" suffers from Pedophilia) and the report by his retained expert, Dr. Rosell. PRP at 9. None of this, however, entitles him to

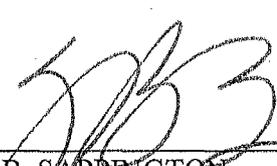
relief by way of a PRP, because it is either fictitious (as in the characterization of the contents of Dr. Saari's report) or irrelevant under RCW 71.09.090. Dr. Rosell's report cannot be "weighed" against Dr. Saari's nor, assuming his report is intended to convey "change," does it convey change of the sort required by the statute, because it does not involve change through "positive response to continuing participation in treatment" or incapacitation. RCW 71.09.090(4)(b)(i) and (ii).

V. CONCLUSION

The Court of Appeals correctly affirmed the trial court's denial of Meirhofer's request for a new trial and denied his Personal Restraint Petition. This Court should affirm.

RESPECTFULLY SUBMITTED this 17th day of March, 2014.

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NO. 89251-2

WASHINGTON STATE SUPREME COURT

In re the Personal Restraint Petition of:

ALAN MEIRHOFER,

Appellant.

DECLARATION OF
SERVICE

I, Allison Martin, declare as follows:

On March 17, 2014, I sent via electronic mail and usps a true and correct copy of Supplemental Brief and Declaration of Service, postage affixed, addressed as follows:

Lila Silverstein
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1511 Third Ave. Suite 701
Seattle, WA 98101
Lila@washapp.org

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

DATED this 17th day of March, 2014, at Seattle, Washington.


ALLISON MARTIN

OFFICE RECEPTIONIST, CLERK

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Cc: lila@washapp.org; Sappington, Sarah (ATG)
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Good afternoon,

Attached for filing is the Supplemental Brief in the above entitled case.

Filed on behalf of:

SARAH B. SAPPINGTON
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