IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. DAVID W. McCUISTION, Petitioner.	NO. 81644-1 EN BANC Filed September 2, 2010

STEPHENS, J.—This case involves a constitutional challenge to the 2005 amendments to the annual review process under Washington's sexually violent predator (SVP) statute, chapter 71.09 RCW. David McCuistion was indefinitely committed as an SVP in 2004. In 2006, the Pierce County Superior Court held a show cause hearing for the consolidated periods of 2004-2006. It concluded that McCuistion failed to establish probable cause to believe his condition had "so changed" under RCW 71.09.090 as to require a trial on his continued confinement. McCuistion challenges this provision, arguing that, as amended, it offends both due process and the separation of powers. We hold that the 2005 amendments, which

limit the facts that can be considered to establish probable cause, violate substantive due process. Accordingly, we reverse and remand for a show cause hearing under the prior version of RCW 71.09.090.

FACTS AND PROCEDURAL HISTORY

McCuistion has a history of sex crimes reaching back to 1980, including a 1993 conviction for third degree rape. At a trial in 2003, he was found to meet the criteria for an SVP under chapter 71.09 RCW and involuntarily committed. Pursuant to RCW 71.09.070 and .090, the State reevaluated McCuistion's mental health in 2004 and 2005 to determine whether he continued to meet the SVP definition and thus remained subject to commitment. Each evaluation concluded that McCuistion continued to meet the definition. During his commitment, McCuistion has refused sexual deviancy treatment.

An annual review hearing for 2004 through 2006 was held on October 27, 2006. At the hearing, the State submitted evaluations from two psychologists supporting its position that McCuistion should remain committed. McCuistion retained his own expert, Dr. Lee Coleman, who criticized the State's evaluations and reported his professional opinion that McCuistion did not meet the definition of an SVP. McCuistion also presented several declarations from employees of the facility in which he was housed, which attested to his good behavior. He maintained that he had matured and lost his impulsiveness during his years of incarceration and argued that the court was required to consider the effect of his age on his risk of recidivism. The Pierce County Superior Court found that while McCuistion had behaved well in the

facility, there was no evidence that his underlying condition had changed. Concluding that Dr. Coleman's report was "contrary to the conclusions reached by previous examiners" and was "essentially a re-argument" of the original commitment decision, the court determined that Dr. Coleman's disagreement "with past examiners and fact-finders does not, itself, make his opinion the correct one." Clerk's Papers at 585. The court therefore held that McCuistion continued to meet the definition of an SVP and ordered that he remain in custody.

McCuistion unsuccessfully sought review in the Court of Appeals. We granted McCuistion's petition for discretionary review at 164 Wn.2d 1029, 196 P.3d 138 (2008).

ANALYSIS

McCuistion argues that the 2005 amendments to RCW 71.09.090, the statutory provision governing annual reviews, violate due process and the separation of powers. Whether a statute violates the constitution is an issue of law reviewed de novo. *In re Parentage of C.A.M.A.*, 154 Wn.2d 52, 57, 109 P.3d 405 (2005).

The SVP statute provides for the civil commitment of an individual who has been convicted of a crime of sexual violence and who suffers from a mental abnormality making him likely to reoffend. The legislature intended the SVP law to increase public safety in two ways: by incapacitating dangerous offenders and by treating them to eliminate the danger. RCW 71.09.010; *In re Pers. Restraint of Young*, 122 Wn.2d 1, 10, 857 P.2d 989 (1993). Since 1990, when the civil commitment scheme was first created, we have consistently upheld the legislature's

approach to the difficult problem of recidivism among SVPs. *See Young*, 122 Wn.2d at 26 ("[T]here are no substantive constitutional impediments to the sexually violent predator scheme.").

At the same time, we have recognized that, because the SVP statute contemplates indefinite civil commitment, it presents substantive due process concerns.[1] *Id.* at 25-42 (exploring several aspects of due process). Civil commitment impairs an individual's fundamental right to liberty and so is subject to strict scrutiny. *Id.* at 26. Strict scrutiny requires that any deprivation of a fundamental right be narrowly tailored to the State's compelling interests. *Id.* The United States Supreme Court and this court have held that the State has a compelling interest in civilly committing only those who are both mentally ill and dangerous to themselves or others. *Foucha v. Louisiana*, 504 U.S. 71, 75-76, 112 S. Ct. 1780, 118 L. Ed. 2d 437 (1992); *Young*, 122 Wn.2d at 27. At the initial commitment proceeding, the SVP statute satisfies strict scrutiny by requiring the State to prove beyond a reasonable doubt that the individual suffers from a mental disorder and is dangerous. *Young*, 122 Wn.2d at 27-33.

Because commitment for SVPs is indefinite in nature, the due process

[1] The dissent's insistence that this case is about procedural (not substantive) due process misapprehends the issue. The "procedure" required under a constitutionally valid SVP statute reflects substantive limits on the power of the legislature to restrict an individual's fundamental rights. As our opinion in *Young* makes clear, the question is not what procedures are required under a balance of competing interests, but rather whether the procedures set forth in the statute are *narrowly tailored* to meet the State's compelling interest in continuing to confine mentally ill and dangerous persons. *See Young*, 122 Wn.2d at 25-42. This is and always has been a question of substantive due process. *Id.* at 27; *Foucha v. Louisiana*, 504 U.S. 71, 80-83, 112 S. Ct. 1780, 118 L. Ed. 2d 437 (1992).

requirement that an SVP be mentally ill and dangerous is ongoing. *Foucha*, 504 U.S. at 77 ("[T]he acquittee may be held as long as he is both mentally ill and dangerous, but no longer."); *accord O'Connor v. Donaldson*, 422 U.S. 563, 574-76, 95 S. Ct. 2486, 45 L. Ed. 2d 396 (1975). This is true because a law allowing the detention of individuals who are no longer mentally ill or dangerous would not be narrowly tailored to the State's compelling interests. *Id.* We have therefore attached constitutional significance to the SVP statute's annual review process, whereby the State must show that the SVP continues to meet the standard for commitment. *Young*, 122 Wn.2d at 39; *see also In re Det. of Ambers*, 160 Wn.2d 543, 553 n.4, 559 n.7, 158 P.3d 1144 (2007) (noting the constitutional implications of annual reviews); *In re Det. of Elmore*, 162 Wn.2d 27, 36 n.8, 168 P.3d 1285 (2007) (same); *In re Det. of Petersen*, 145 Wn.2d 789, 795-96, 42 P.3d 952 (2002) (attaching constitutional significance to the burden of proof in annual reviews). In *Young*, we recognized that meaningful annual review is central to the SVP statute's constitutionality. We held that SVP commitment is narrowly tailored in part because it is "not subject to any rigid time limit," but rather is "tailored to the nature and duration of the mental illness," and because "the Statute's release provisions provide the opportunity for periodic review of the committed individual's current mental condition and continuing dangerousness to the community." *Young*, 122 Wn.2d at 39.

Each year the State must evaluate committed individuals to determine if they continue to meet the definition of an SVP. RCW 71.09.070. If the State determines

that an individual is no longer mentally ill or dangerous, the State authorizes him to petition for release or transfer to a less restrictive alternative confinement. RCW 71.09.090(1). The SVP may also petition the court without the State's authorization and obtain a show cause hearing. RCW 71.09.090(2). At this hearing, the State must present prima facie evidence that the petitioner still meets the SVP definition. RCW 71.09.090(2)(b). Then, if the committed person produces evidence establishing probable cause to believe that he has "so changed" as to no longer meet the definition of an SVP, he is entitled to a full hearing. RCW 71.09.090(2)(c)(ii). He makes this showing by presenting prima facie evidence to support the finding that he no longer meets the SVP definition, with the ultimate burden remaining on the State. *Petersen,* 145 Wn.2d at 796, 798-99. At the full hearing, which may be a jury trial, the State must once again prove beyond a reasonable doubt that the committed person is mentally ill and dangerous. RCW 71.09.090(3).

In *Young*, we approved of a prior version of the SVP statute's annual review provision, finding that it satisfied substantive due process minimums. *Young*, 122 Wn.2d at 39; former RCW 71.09.090 (1992). In 2005, the legislature amended the provision in response to a pair of Court of Appeals cases suggesting that demographic or scientific changes, such as a committed person's increase in age or new diagnostic procedures, could create a prima facie case that an individual had "so changed" that he no longer met the definition of an SVP.[2] *In re Det. of Young,*

[2] Demographic changes are relevant because experts in SVP cases predict an individual's dangerousness using actuarial tables. *See In re Det. of Thorell*, 149 Wn.2d 724, 758, 72 P.3d 708 (2003) (permitting actuarial evidence). Some experts opine that older offenders are statistically less likely to reoffend. *See In re Det. of Young,* 120 Wn.

120 Wn. App. 753, 761-62, 86 P.3d 810 (2004) (age); *In re Det. of Ward*, 125 Wn. App. 381, 383, 104 P.3d 747 (2005) (diagnostic procedures); *see also Ambers*, 160 Wn.2d at 549-50 (describing these cases as the impetus behind the 2005 amendments). The 2005 amendments clarified the legislature's intent that the phrase "so changed" refers specifically to physiological and treatment-based changes, not changes of the types recognized by the Court of Appeals:

> (4)(a) Probable cause exists to believe that a person's condition has "so changed," . . . only when evidence exists, since the person's last commitment trial . . . of a substantial change in the person's physical or mental condition such that the person . . . no longer meets the definition of a sexually violent predator . . . .
>
> (b) A new trial proceeding under subsection (3) of this section may be ordered, or a trial proceeding may be 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:
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> (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); Laws of 2005, ch. 344, §§ 1-2 (expressing the intent behind the addition of subsection .090(4) to the statute). Thus, the 2005 amendments altered the standard for obtaining a full hearing during the annual review process and effectively narrowed the universe of facts relevant to this standard.

App. 753, 760-61, 86 P.3d 810 (2004) (describing such an opinion).

In *Ambers*, we heard a constitutional challenge to the new amendments based on the State's position that the phrase "safe to be at large" in RCW 71.09.090(4)(b)(ii) heightened the SVP's burden for obtaining a new trial, and that changes must be treatment-based to entitle the SVP to a new trial. *Ambers*, 160 Wn.2d at 553, 558. In dictum, we opined that, because of the State's continuing due process obligation to confine only dangerous persons, it "might be unconstitutional" to "require[] a more stringent standard at an annual review hearing than is required for initial commitment." *Id.* at 553 n.4 (citing *O'Connor,* 422 U.S. at 574-75). However, we did not directly address the issue because we interpreted "safe to be at large" to be equivalent to the pre-2005 standard and determined that Ambers' change was in fact treatment-based. *Id.* at 557, 559 n.7.

In *Elmore*, we had to decide whether the 2005 amendments applied retroactively, which would have prevented Elmore's new commitment proceeding based solely on his change in age. *Elmore*, 162 Wn.2d at 32-33, 35. We again avoided the issue of whether the 2005 amendments were constitutionally valid by interpreting them not to apply retroactively. *Id.* at 36 & n.8; *see also In re Det. of Smith*, 163 Wn.2d 699, 700-01, 184 P.3d 1261 (2008) (reversing per curiam on facts indistinguishable from *Elmore*).

Both of these cases foreshadowed that the 2005 amendments might overstep the bounds that substantive due process places upon the SVP civil commitment regime. The issue is squarely before us today, and we now elevate to a holding our dictum in *Ambers*. Because the 2005 amendments undermine meaningful annual

review of SVP status consistent with minimum standards of substantive due process, the amendments are unconstitutional.[3]

Contrasting the initial commitment proceeding with the annual review proceeding reveals how the 2005 amendments have unconstitutionally eroded the substantive due process protections for civil commitment. At the initial commitment proceeding, the State must prove beyond a reasonable doubt that the person to be committed is an SVP, RCW 71.09.060(1). Specifically, the State must prove that the person, inter alia, suffers from a mental abnormality or personality disorder and is likely to engage in predatory acts of sexual violence if not confined in a secure facility. RCW 71.09.020(18). If the alleged SVP can show, for any reason, that there is reasonable doubt as to one of these criteria, the State fails to meet its burden and the person may not be involuntarily committed. RCW 71.09.060(1).

At the annual review, the State must make a prima facie showing that the committed individual still meets the definition of an SVP, which includes a showing that he is still dangerous. The pre-2005 statute allowed the SVP to counter this showing on any number of grounds. If the committed individual produced prima facie evidence showing, for any reason, that he was not an SVP, he was entitled to a jury trial at which the State would have to prove his continued SVP status beyond a reasonable doubt. Former RCW 71.09.090 (2001). (One such reason might have been that the committed individual no longer had a high risk of recidivism.) But under the 2005 amendments to RCW 71.09.090, the SVP may counter the State's

[3] Because we hold that the 2005 amendments violate substantive due process, we do not reach McCuistion's claim that they also violate the separation of powers.

showing on only two grounds: a permanent physiological change or a treatment-based mental change. Once the State offers prima facie evidence that the individual is still an SVP, the court has no authority to order a full hearing or trial absent evidence supporting one of these grounds. *See* RCW 71.09.090(4)(b). Furthermore, the SVP may not obtain a full hearing by showing a change in a single demographic factor, even if this change would alter the outcome of an SVP determination under a multifactor analysis that previously justified SVP commitment.[4] RCW 71.09.090(4)(c).

The flaw in the 2005 amendments is that they separate the annual review inquiry from the ultimate constitutional standard under *Foucha*, 504 U.S. at 77. The SVP statute upheld in *Young* was narrowly tailored to allow the detention only of *currently* mentally ill and dangerous individuals. *Young*, 122 Wn.2d at 39. By altering the annual review standard, the 2005 amendments authorize the State to detain individuals who are no longer mentally ill and dangerous. There is a multitude of ways in which a person might potentially cease to meet the definition of

[4] Predictions of future dangerousness often rely on multifactor actuarial analyses. *Thorell*, 149 Wn.2d at 753. Statistical importance attaches to each factor; that is why each one appears in the actuarial model. *See id*. Thus, a change in a single factor may lower the risk prediction so that it no longer suggests that the individual is an SVP.

The system set up by the legislature in the 2005 amendments allows the State to prove an individual's dangerousness using actuarial tables at the initial SVP commitment hearing. But at an annual review, when the same type of table predicts that the offender is no longer dangerous (e.g., because of his increase in age, change in marital status, or other demographic factor), the prediction is excluded as "irrelevant." The only "relevant" predictors allowed are physiological or treatment-based changes. As discussed above, however, evidence that the offender is no longer currently dangerous—evidence that the legislature approves of as credible and scientific when it is used by the State to commit SVPs initially—is necessarily relevant to whether the State may continue to detain someone. *See Foucha*, 504 U.S. at 77.

an SVP and, thus, cease to be detainable under the due process standard. Yet, only two of those ways are cognizable under the 2005 amendments to the annual review provisions.[5] By artificially limiting the type of information that is relevant to continued SVP commitment, the 2005 amendments allow the detention of someone who is no longer mentally ill or dangerous, and therefore disrupt the narrow tailoring present in the preamendment SVP law. Because the SVP law, as amended, is not narrowly tailored to the State's compelling interests, we strike down the 2005 amendments as unconstitutional.[6]

The State urges that due process can be satisfied through a committed

[5] The dissent credits the legislature's enacted policy statement that SVPs' conditions are such that they do not abate without treatment. The legislature is certainly entitled to make this reasonable generalization from the available data. However, given the constitutionally protected interests at issue, the SVP statute must survive strict scrutiny. Applying this test, we do not defer to legislative pronouncements as we would under rational-basis review. It is simply not true that the *only* factors relevant to a person's current mental illness or dangerousness are permanent physiological changes or treatment-based psychological changes. The legislature cannot make this true by legislative fiat. Nor can it justify detaining individuals who are no longer dangerous because of its (admittedly) compelling interest in treating SVPs. *See Foucha*, 504 U.S. at 77 (holding that the State's compelling interest in detaining and treating the mentally ill is insufficient to permit the detention of mentally ill, but nondangerous, individuals).

[6] At oral argument, the State maintained that a person who no longer meets the definition of an SVP would be subject to release even under RCW 71.09.090(4)'s restrictive standard. According to the State, if the SVP presented persuasive evidence that he is no longer an SVP, the State's evaluators would report this finding and authorize the SVP to petition for a hearing under RCW 71.09.090(1). The problem with this argument is that, contrary to the statute, it requires the SVP's evidence to convince the State's evaluators. It should not have to. The statute authorizes a show cause hearing upon the SVP's own petition, regardless of whether the State believes that the person has ceased to be an SVP. *See* RCW 71.09.090(2)(a) (providing for the right to petition the court without the secretary's approval). Moreover, at the show cause hearing, it is not the SVP's burden to convince the State's evaluators (or the court) that he is no longer subject to commitment. *See* RCW 71.09.090(2)(c) (requiring only probable cause at the show cause hearing). Indeed, the court does not weigh the evidence at the show cause hearing. *Petersen*, 145 Wn.2d at 803. Rather, if the SVP makes a prima facie showing that he no longer meets the definition of an SVP, he is entitled to a full trial *by a jury*. RCW 71.09.090(3)(a). The State's argument would substitute its evaluators for the jury.

person's other avenues for relief, such as a personal restraint petition (PRP). This argument proves too much. If the 2005 amendments can be saved because an unconstitutionally detained person may file a PRP seeking relief, then *any* annual review provision, no matter how alienated from the requirements of substantive due process, would be beyond scrutiny. After all, an individual can always file a PRP to seek to prove his restraint is unlawful. *See* RAP 16.4. The inquiry must focus on the annual review procedure itself. Due process requires that this procedure be narrowly tailored to meet the State's interests, which means confining only those individuals who continue to be both mentally ill and dangerous.

Because of the amendments' severability clause, Laws of 2005, ch. 344, § 3, on remand the lower court should consider McCuistion's petition under the pre-2005 show cause standard—that is, RCW 71.09.090 without subsection .090(4).[7] The relevant provision is RCW 71.09.090(2)(c), which reads:

> If the court at the show cause hearing determines that either: (i) The state has failed to present prima facie evidence that the committed person continues to meet the definition of a sexually violent predator . . . or (ii) probable cause exists to believe that the person's condition has so changed that: (A) The person no longer meets the definition of a sexually violent predator . . . then the court shall set a hearing on either or both issues.

Without subsection .090(4)'s elaboration upon the phrase "so changed," this provision allows for the full range of relevant evidence to prove that a committed person no longer meets the definition of an SVP. The evidence need not pertain to a permanent physiological or treatment-based change.[8]

[7] The 2005 amendments also made minor stylistic changes to RCW 71.09.090(1)-(2). These changes are unrelated to this case and are unaffected by our holding.

[8] Of course, the evidence must be otherwise admissible. The dissent's complaint

CONCLUSION

The 2005 amendments to RCW 71.09.090 violate substantive due process and are invalid. Accordingly, we reverse and remand for a new show cause hearing under the pre-2005 show cause standard.

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that "a single doctor, without ever examining the SVP in question, can put an SVP one step closer to release" is overblown. *See* dissent at 1. Expert opinions remain subject to challenge for admissibility under the rules of evidence and *Frye*. *See generally* ER 702-03 (regulating opinion testimony by experts); *Frye v. United States*, 54 App. D.C. 46, 293 F. 1013 (1923) (barring new scientific evidence unless it is generally accepted in the field). Furthermore, the most the doctor's testimony can do in this situation is to allow a jury to decide whether the committed individual remains an SVP.

AUTHOR:

Justice Debra L. Stephens

WE CONCUR:

Justice Gerry L. Alexander

Justice James M. Johnson

Justice Richard B. Sanders

Justice Tom Chambers