No. 81644-1

OWENS, J. (dissenting) -- A "'[s]exually violent predator'" (SVP) is a person who has already been found, beyond a reasonable doubt, to be "likely to engage in predatory acts of sexual violence if not confined in a secure facility." RCW 71.09.020(18). Rejecting the careful determination of the Washington legislature, the majority essentially creates a situation in which a single doctor, without ever examining the SVP in question, can put an SVP one step closer to release. The majority even allows this when there is no evidence that an SVP has changed in the years since his underlying commitment. This greatly undermines the legislature's careful decision that the 2005 amendments to section 71.09.090 of the sexually violent predators statute (the SVP statute), chapter 71.09 RCW, were necessary to promote 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." Laws of 2005, ch. 344, § 1.

The majority makes two glaring legal errors. First, it mischaracterizes a procedural due process issue as a substantive due process issue, inappropriately subjecting the law to heightened scrutiny. When we properly apply the procedural due process standard to the 2005 amendments to the SVP statute, due process is not violated. Second, even if substantive due process were warranted, the majority also fails to use the proper "strict scrutiny" test to determine the constitutionality of the 2005 amendments. Because the 2005 amendments to the SVP statute readily pass constitutional muster, I must respectfully dissent.

I. David McCuistion's Challenge to the 2005 Amendments to RCW 71.09.090 is Governed by the Standards of *Procedural* Due Process

McCuistion argues that the 2005 amendments to RCW 71.09.090 violate due process. The majority holds that these amendments violate substantive due process because they divorce the annual review inquiry from the standard set out in *Foucha v. Louisiana*, 504 U.S. 71, 112 S. Ct. 1780, 118 L. Ed. 2d 437 (1992). The majority especially highlights the constitutional significance that we have attached to the SVP statute's annual review process. Majority at 4-5.

An examination of substantive due process indicates that it is not the appropriate standard here. "The substantive component of the due process clause protects against certain government actions 'regardless of the fairness of the procedures used to implement them.'" *In re Pers. Restraint of Bush*, 164 Wn.2d 697,

706, 193 P.3d 103 (2008) (quoting *Daniels v. Williams*, 474 U.S. 327, 331, 106 S. Ct. 662, 88 L. Ed. 2d 662 (1986)); *see Zinermon v. Burch*, 494 U.S. 113, 125, 110 S. Ct. 975, 108 L. Ed. 2d 100 (1990). Substantive due process, in essence, prevents the government from performing certain actions no matter how many procedural protections there are or how fair those procedural protections may be, unless the governmental action meets strict scrutiny. Examples of activities protected by substantive due process include consensual sex within one's home, *Lawrence v. Texas*, 539 U.S. 558, 578, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003), and the use of contraceptives, *Griswold v. Connecticut*, 381 U.S. 479, 485, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965). *Foucha* establishes that McCuistion has a substantive due process right to not be held unless he is currently mentally ill and dangerous. *Foucha*, 504 U.S. at 80.

McCuistion does not contest the State's power to detain him under any circumstances; he argues only that the procedures used were inadequate. He does not argue that the State does not have the power to continue to detain him. In contrast, he merely asks for *procedural* safeguards at a particular hearing. This type of challenge is governed by principles of procedural due process, which require that the State must not deprive an individual of a protected liberty interest without appropriate *procedural* safeguards. *Bush*, 164 Wn.2d at 704. The majority implicitly acknowledges that this

case concerns only what procedures are necessary to deprive an SVP of liberty, given that the remedy it provides is additional procedures. The majority mandates that a trial court consider additional types of evidence at the annual show cause hearing beyond merely (1) evidence of an identified physiological change and (2) evidence of a change in an SVP's mental condition brought about through positive response to continuing participation in treatment. *See* majority at 1-2. Substantive due process analysis requires that there be no possible procedures sufficient to excuse a governmental action, yet the majority requires additional procedures to ensure that liberty is protected. For this reason, it is self-evident that this is not an issue of substantive due process. Since McCuistion asks for additional procedural safeguards at the annual review hearing, this is an issue of procedural due process.

II. The 2005 Amendments to RCW 71.09.090 Do Not Violate the Flexible Standard of Procedural Due Process

When reviewing claims of violations of due process, we must remember that "due process is a flexible concept." *In re Det. of Stout*, 159 Wn.2d 357, 370, 150 P.3d 86 (2007). Procedural due process requires, at minimum, notice and an opportunity to be heard, but its requirements vary depending on the context. *Id*. (citing *Mathews v. Eldredge*, 424 U.S. 319, 334, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976)). "In determining what procedural due process requires in a given context, we [have] employ[ed] the *Mathew*s test, which balances: (1) the private interest affected; (2) the risk of

erroneous deprivation of that interest through existing procedures and the probable value, if any, of additional procedural safeguards; and (3) the governmental interest, including costs and administrative burdens of additional procedures." *Id*. (citing *Mathews*, 424 U.S. at 335).

The first factor, "the private interest affected," weighs in McCuistion's favor. The continuation of civil commitment without a release trial is certainly a significant deprivation of liberty and also is likely to create a stigma in the broader society. *Addington v. Texas*, 441 U.S. 418, 425-26, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979).

The second factor, "the risk of erroneous deprivation of that interest through existing procedures and the probable value, if any, of additional procedural safeguards," weighs strongly in the State's favor. *Stout*, 159 Wn.2d at 370. By the time of the review hearing, an SVP has already gone through a full civil commitment trial, where the State has to prove beyond a reasonable doubt that an "'individual suffers from a mental abnormality which renders him a danger to the community.'" *In re Det. of Petersen*, 138 Wn.2d 70, 78, 980 P.2d 1204 (1999) (quoting *In re Personal Restraint of Young*, 122 Wn.2d 1, 39, 857 P.2d 989 (1993)). Notwithstanding the 2005 amendments to the SVP statute, additional procedural safeguards also arise automatically every year. The secretary of the Department of Social and Health Services (DSHS) must "provide the committed person with an annual written notice of

the person's right to petition the court for conditional release to a less restrictive alternative or unconditional discharge over the secretary's objection." RCW 71.09.090(2)(a). DSHS is required to allow a qualified professional to perform an annual current examination of the mental condition of each defendant in order to determine whether the defendant still meets the definition of an SVP. RCW 71.09.070. Each defendant also has the right to have an expert of his choosing examine him. *Id*. Furthermore, each defendant has the right to a show cause hearing each year, at which if the State fails to prove a prima facie case that he has so changed that he no longer meets the definition of an SVP *or* if the defendant presents a prima facie case that he has so changed that he no longer meets the definition of an SVP, a release trial will be ordered. RCW 71.09.090(2)(a)-(c). A defendant has the right to counsel at each of these show cause hearings. RCW 71.09.090(2)(b).

Additionally, defendants are often able to challenge their commitments through other means, such as CR 60(b), personal restraint petitions, and writs of habeas corpus. These numerous protections already minimize the risk of erroneous deprivation of liberty and provide adequate assurances that McCuistion would not be unfairly held in civil commitment if he truly no longer met the definition of an SVP. This factor weighs heavily in the State's favor.

The third factor, "the governmental interest, including costs and administrative

burdens of additional procedure," also weighs very strongly in the State's favor. It is well established that the State has an interest in detaining "mentally unstable individuals who present a danger to the public." *United States v. Salerno*, 481 U.S. 739, 748-49, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987). Indeed, we have noted that SVPs are even *more* dangerous to others than other mentally ill individuals. *Young*, 122 Wn.2d at 45. We have also stated that "it is irrefutable that the State has a *compelling interest* both in treating sex predators and protecting society from their actions." *Id*. at 26 (emphasis added).

If McCuistion prevailed in his position, the costs and administrative burdens that would arise would also be unacceptably high. Here, McCuistion obtained an out-of-state expert who did not even interview him, but merely perused his records and then wrote a declaration stating that McCuistion never had a mental illness to begin with. Clerk's Papers (CP) at 616-24. Under the standard that McCuistion advocates, any expert anywhere could force a new release trial for every SVP every single year by declaring that the defendant never met the commitment definition in the first place. This is contrary to the statute's intention that SVP commitment be "for an indefinite period, until that person's condition has changed sufficiently that he or she is safe to be either at large or in a less restrictive setting." *Petersen*, 138 Wn.2d at 82. Dr. Lee Coleman did not even attempt to show that anything about McCuistion had changed in

the years since the underlying commitment. CP at 616-24. In another Court of Appeals case, Dr. Coleman unsuccessfully made the exact same argument. *In re Det. of Reimer*, 146 Wn. App. 179, 184, 190 P.3d 74 (2008). Under this standard, one doctor could easily create a problematic backlog in the courts with innumerable unmerited release trials every year. Where the State has a compelling interest in treating SVPs and protecting society from their crimes, the third factor weighs strongly in the State's favor.

When applying the *Mathews* test, we look at *all* three factors and balance the interests against each other. It is clear that in similar circumstances a compelling interest in promoting public safety can outweigh an individual's private liberty interest. The Ninth Circuit Court of Appeals, for example, in determining that it was acceptable to shift the burden of proof onto the defendant at an insanity acquiteee's release hearing, held that "[t]he state's interest in preventing the premature release of individuals who have already demonstrated their dangerousness to society by committing a criminal act outweighed the acquittee's interest in avoiding continued confinement." *United States v. Phelps*, 955 F.2d 1258, 1267 (9th Cir. 1992). This theory applies even more strongly to SVPs.

Taken together, the *Mathews* factors weigh strongly in favor of the State. While McCuistion does have a strong private liberty interest at stake, existing procedural

safeguards are already adequate to prevent erroneous deprivation of his liberty interest. Furthermore, the State has compelling interests in protecting the public and treating SVPs, and heavy costs and administrative burdens would arise in the absence of the amendments. As such, I would hold that procedural due process is not violated. The 2005 amendments to the SVP statute limit the creation of a new release trial to when there is significant *reliable* evidence that an SVP has *truly* changed. These procedures do not offend procedural due process.

III. The 2005 Amendments to RCW 71.09.090 Do not Violate Substantive Due Process

Even accepting the majority's formulation of the issue as one of substantive due process, due process is not violated. This court has never before held that any element of the SVP statute violates due process. Here, the majority fails to properly apply strict scrutiny when it refuses to look at both of the State's compelling interests in protecting public safety *and* providing treatment to SVPs.

When a liberty interest is protected by substantive due process, state interference with this liberty interest is subject to strict scrutiny. *In re Parentage of C.A.M.A.*, 154 Wn.2d 52, 60-61, 109 P.3d 405 (2005). Strict scrutiny means that governmental interference with the liberty interest "'is justified only if the state can show that it has a compelling interest and such interference is narrowly drawn to meet only the compelling state interest involved.'" *Id*. at 61 (quoting *In re Custody of*

Smith, 137 Wn.2d 1, 15, 969 P.2d 21 (1998)). The State undoubtedly has compelling interests here. "[S]exually violent predators generally have personality disorders and/or mental abnormalities which . . . render them likely to engage in sexually violent behavior. . . . [Their] likelihood of engaging in repeat acts of predatory sexual violence is high." RCW 71.09.010. "[I]t is irrefutable that the State has a compelling interest both in treating sex predators and protecting society from their actions." *Young*, 122 Wn.2d at 26. The only question then is whether the 2005 amendments are narrowly drawn to meet only the compelling state interests involved. I would hold that they are.

The legislature, in enacting the 2005 amendments to RCW 71.09.090, intended to "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." Laws of 2005, ch. 344, § 1. The legislature specifically found "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." *Id*. The legislature wanted to ensure that the statutory focus remains on treatment and did not want to remove the incentive for successful treatment participation. *Id*. It was fearful that the *Young* and *Ward*[1] decisions would "subvert[] the statutory focus on treatment and

[1] *In re Det. of Ward*, 125 Wn. App. 374, 104 P.3d 751 (2005).

reduce[] community safety by removing all incentive for successful treatment participation in favor of passive aging and distract[] committed persons from fully engaging in sex offender treatment." *Id*. The legislature also stated that persons committed as SVPs "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." *Id*.

Where the State has a *compelling* interest in providing treatment *and* protecting public safety, the State's actions must be narrowly tailored to meet these interests. This "'requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed.'" *Young*, 122 Wn.2d at 33 (internal quotation marks omitted) (quoting *Jones v. United States*, 463 U.S. 354, 368, 103 S. Ct. 3043, 77 L. Ed. 2d 694 (1983)). The legislature has found that allowing evidence of actuarial models of decreased dangerousness would inhibit the incentive for committed SVPs to undergo treatment. It is vital for the legislature to ensure that committed SVPs are truly treated before their release into the community, as there is a great deal of literature discussing how recidivism rates for SVPs are considerably lower when they have completed treatment programs. *See* Resp't's Statement of Additional Authority (Grant Duwe et al., *The Impact of Prison-Based Treatment on Sex Offender Recidivism*, 21 Sexual Abuse: A Journal of Research &

Treatment 1, 12, 18 (June 2009); Friedrich Lösel et al., *The Effectiveness of Treatment for Sexual Offenders: A Comprehensive Meta-Analysis,* J. of Experimental Criminology 135, 138 (2005)). While some doctors, such as Dr. Coleman, clearly do not believe in the SVP statute, it is the legislature that must write laws that meet strict scrutiny, not Dr. Coleman. The legislature has determined, after extensive investigation, that committed SVPs only truly lose their dangerousness when they have gone through intensive treatment and that the best way to promote both treatment and public safety is to strongly incentivize treatment. We should not second-guess the legislature's judgment. Where an SVP is committed both to provide treatment and to protect the public, the 2005 amendments that incentivize treatment bear a reasonable relationship to the purpose for the commitment. *Young*, 122 Wn.2d at 33. Substantive due process is not violated.

When properly characterized as an issue of procedural due process, the procedures at the annual review hearing do not violate due process. Even framing the issue as one of substantive due process, the 2005 amendments to the SVP statute are narrowly tailored to meet the State's compelling interests. For both of these reasons, I must respectfully dissent.

AUTHOR:
Justice Susan Owens

WE CONCUR:

Chief Justice Barbara A. Madsen

Justice Charles W. Johnson

Justice Mary E. Fairhurst