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Division I
State of Washington

NO. 72290-5-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

IN RE DETENTION OF CURTIS BROGI

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

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

A. ARGUMENT 1

Mr. Brogi met his prima facie burden requiring the court to order a trial on his continued confinement under RCW ch. 71.09 by showing his participation in a treatment program changed his mental condition and risk of re-offense 1

1. The State misunderstands the issue in the case at bar 1

2. HB 1059 does not apply to Mr. Brogi, whose show cause hearing occurred long before the statute changed 6

B. CONCLUSION 7

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

In re Cascade Fixture Co., 8 Wn.2d 263, 111 P.2d 991 (1941) 6

In re Det. of Ambers, 160 Wn.2d 543, 158 P.3d 1144 (2007) 2

In re Det. of Elmore, 162 Wn.2d 27, 168 P.3d 1285 (2007) 3, 6

Statutes

RCW 71.09.090 ..... 1, 3, 6

Other Authorities

Martha Bellisle, *Center for Sex Predators Told to Reform or Be Sued*, Seattle Times (Oct. 31, 2015) 4

A. ARGUMENT.

Mr. Brogi met his prima facie burden requiring the court to order a trial on his continued confinement under RCW ch. 71.09 by showing his participation in a treatment program changed his mental condition and risk of re-offense

1. The State misunderstands the issue in the case at bar.

RCW 71.09.090(4)(b)(ii) requires a committed person show that he has changed through a "positive response to continuing participation in treatment." The State's response brief spends many pages arguing that treatment is intended by the Legislature, pointing to the references to treatment in various statutes, court decisions, and statements of intent. *See, e.g.*, Response Brief at 6-14. But no one disputes that some treatment is necessary to meet the prima facie burden under RCW 71.09.090(4), and this treatment must have the effect of changing a person's mental condition.

What is also plain is that the Legislature did not dictate the precise mechanism of this treatment in the version of RCW 71.09.090(4) in effect at the time of the show cause hearing. It did not say that the only kind of treatment a person may use as the basis of showing a changed mental condition is one singular treatment modality designated by authorities at the Special Commitment Center. The issue

in this case is not whether the controlling statute required a prima facie showing of treatment that resulted in a changed mental condition for a person who had been committed due to a finding of a mental abnormality or personality disorder causing the person lack of control over predatory sexual behavior, contrary to the State's lengthy discussion of this issue. Instead, the issue is whether the statute demanded only a single type of treatment developed by the SCC's administrators when the stature did not clearly specify this treatment modality.

In *In re Detention of Ambers*, 160 Wn.2d 543, 557-59, 158 P.3d 1144 (2007), the Supreme Court ruled there was sufficient evidence for Mr. Ambers to meet his burden under RCW 71.09.040 when only treatment mentioned in the opinion was treatment that occurred in prison. The State responds that it does not see the word prison in the *Ambers* opinion. Resp. Brief at 17. However, it misreads the decision. In *Ambers*, the State criticized Mr. Ambers for failing to show that his change was based on treatment success. 160 Wn.2d at 558. The Supreme Court rejected that claim, explaining the evaluator's "report and deposition" had "discussed the treatment Ambers received while incarcerated and discussed how this treatment has been beneficial to

Ambers," as well as his intermittent, lapsed treatment later. *Id*. at 558-59.

The *Ambers* Court held that Mr. Ambers met the terms of RCW 71.09.090(4) because he offered a qualified expert opinion, based on a detailed evaluation, that his mental condition had changed through treatment. *Id*. It was this expert's opinion, not the type of treatment, or how or when it was delivered, that was necessary to satisfy the statute.

The same analysis governs the case at bar. An indisputably qualified psychologist evaluated Mr. Brogi and filed a detailed report concluding that he had changed due to his treatment participation. This report is supplemented with, but not defined by, the explanation of the Native American healing program provided by the facilitator. Like *Ambers*, the court defers to the qualified expert's opinion that change based on treatment reduces the risk of re-offense.

Contrary to the State's historical analysis, the legislature added the treatment requirement to RCW 71.09.090(4)(b)(ii) in the 2005 amendment due to its displeasure with two cases where committed petitioners were granted new trials solely based on their advancing age, which reduced relevant risk assessment levels. *See In re Det. of Elmore*, 162 Wn.2d 27, 34, 168 P.3d 1285 (2007). The amendments were

promulgated to ensure that some effort must be expended by the committed person to show his improvement, as opposed to solely waiting to get old, but the statute was not changed based on the notion that only a single type of treatment could produce the necessary change in a person's mental condition.

The single approach to sex-offender specific treatment offered by the SCC is not a type of treatment that may work for everyone, such as Mr. Brogi who felt "degraded" in it and disliked its confrontational approach. CP 254. The SCC is presently trying to negotiate its way out of a lawsuit due to the failings of this singular treatment program for people outside the mainstream. Martha Bellisle, *Center for Sex Predators Told to Reform or Be Sued*, Seattle Times (Oct. 31, 2015), available at: http://www.seattletimes.com/seattle-news/center-for-sex-predators-told-to-reform-or-be-sued/. The program has only two psychologists for the more than 250 committed people, and no psychiatrist. *Id*. Treatment only consists of group therapy, not any individual therapy, and it occurs at most only a few hours a week. *Id*.; Resp. Brief at 4. Given the limited way the State provides for a meaningful treatment program, it is unreasonable to conclude the legislature intended that treatment must come from the single program

specified by the SCC when the statute did not specify such a requirement.

It is perfectly reasonable for the Legislature to have used the generally applicable dictionary definition of treatment and defer to experts in the field who may decide whether that type of treatment caused the necessary change in a person's mental condition. It is also perfectly reasonably for Mr. Brogi, who has been confined at the SCC for almost 20 years, to have sought self-improvement from a variety of sources. Where the mechanism for treatment-based change is endorsed by a qualified professional, it presents the prime facie evidence needed for a commitment trial required by the statute in effect at the time of the show cause hearing. *See, e.g.*, *Ambers*, 160 Wn.2d at 558-59. Mr. Brogi has been committed since 2000 and confined since 1997. He has not had another trial proceeding since to judge his current condition. He is entitled to receive one under the governing statute.

It is unreasonable to construe the neutral term "treatment" to mean only one specific type of treatment as defined by the SCC without language dictating this definition. The statute in effect at the

time of the hearing was not narrowed in the manner construed by the trial court.

2. HB 1059 does not apply to Mr. Brogi, whose show cause hearing occurred long before the statute changed.

Statutory amendments are presumed to apply only prospectively. *In re Cascade Fixture Co.*, 8 Wn.2d 263, 271-72, 111 P.2d 991 (1941). Deviation from this rule is rare and requires express statements of unequivocal intent. *Id*. Doubt must be resolved in favor of prospective application. *Id*.

The legislature did not expressly dictate the retroactive nature of HB 1059, even though it was aware of its obligation to do so if it intended retroactive application based on established precedent. Furthermore, the legislature's use of an emergency clause is construed to mean the amendment was not expected to be construed as retroactive. *Elmore*, 162 Wn.2d at 36. In addition, the type of substantive change to the definition of treatment, now requiring a particular kind of action and evidence to satisfy the prima facie burden in RCW 71.09.090(4)(b)(ii), would have required a different course of action by Mr. Brogi, of which he did not have notice at the time of his

show cause hearing, illustrating the unfairness of imposing a new substantive requirement after the show cause hearing is complete. *Id*.

Substantially narrowing the definition of treatment to include only "the treatment program at the special commitment center" and not any other treatment is not mere procedural change. It alters the sum and substance of the treatment that may be used to achieve a new trial. The State has not overcome the presumption that this statutory change applies retroactively to alter the definition of treatment in effect at the time of the show cause hearing at issue on appeal.

B. CONCLUSION.

For the foregoing reasons as well as those set forth in Appellant's Opening Brief, this Court should order that Mr. Brogi is entitled to a trial at which the State must prove he continues to meet the criteria for indefinite involuntary total confinement.

DATED this 4th day of January 2016.

Respectfully submitted,

s/ Nancy P. Collins

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	)	
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	)	
APPELLANT.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 4TH DAY OF JANUARY, 2016, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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