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COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

In re Detention of Curtis Brogi,

ANSWER TO APPELLANT'S OPENING BRIEF

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The Respondent is the State of Washington, by and through Robert W. Ferguson, Attorney General, and Joshua Studor, Assistant Attorney General.

II. DECISION BELOW

Brogi appeals the July 31, 2014, Order on Show Cause Hearing (show cause order), entered by Island County Superior Court Judge Vickie Churchill.

III. RESTATEMENT OF THE ISSUES

A person civilly committed as a Sexually Violent Predator (SVP) is entitled to annual review of his condition. An SVP can obtain an unconditional release trial if the State fails to meet its burden to show he continues to meet criteria at the show cause hearing, or if the SVP presents evidence that his mental condition has changed, since his initial commitment or his last less restrictive alternative (LRA) revocation proceeding, due to continuing participation in sex offender treatment. RCW 71.09.090(4)(a).

A. Where, in order to be granted an unconditional release trial on his own petition, Brogi was required to show substantial change in his mental condition as the result of a positive response to continuing participation in treatment, and Brogi had not participated in sex offender treatment at the Special Commitment Center, was he entitled to an unconditional release trial?

IV. RESTATEMENT OF THE CASE

The Sexually Violent Predator Act (SVPA), which was codified in 1990, was designed to protect the public from "a small but extremely dangerous group of sexually violent predators[1]" who have personality disorders and/or mental abnormalities and who need long-term treatment using modalities that are "very different than the traditional treatment modalities for people appropriate for commitment under the involuntary treatment act." RCW 71.09.010. A person determined to be an SVP is committed to the custody of the Department of Social and Health Services (DSHS) until such time as his condition changes so that he no longer meets the statutory definition or the person can be released to an LRA. RCW 71.09.060.

During the late 1980s to mid-1990s, Curtis Brogi, the appellant, committed numerous acts of sadistic sexual violence against young girls and women. CP at 244-246. While in the community, Brogi raped women

[1] "Sexually violent predator" means any person who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility. RCW 71.09.020(18).

until they vomited, forced anal sex upon them, slapped them, and threatened to kill them. *Id.* His most recent sex offense, which involved the manipulation, binding, threatening, and forced fondling of a 35-year-old woman, resulted in a conviction of second degree assault with sexual motivation in November 1996. CP at 246. Brogi was sentenced to 15 months in prison. *Id.* Prior to his release, which was scheduled for August 1997, the state filed an SVP petition under RCW 71.09. *Id.*

In 2000, Brogi, a diagnosed anti-social sexual sadist, was found by an Island County jury to be an SVP. CP at 35. Following the trial, the court ordered that Brogi be confined at the Special Commitment Center (SCC) for care, control, and treatment until he no longer meets that definition or could be conditionally released to an LRA. *Id.* Brogi has remained at the SCC since his commitment.

Among the various responsibilities assigned to the SCC by the SVPA is the responsibility to provide individualized treatment to the residents committed under the SVPA. RCW 71.09.080(3). In a general sense, the treatment program at the SCC involves a cognitive-behavioral approach called the Risk-Need Responsibility (RNR) model. CP at 147. The model is widely used and "has become influential in assessment and treatment of offenders." *Id.* The program "is designed to help residents understand the constellations of attitudes, behaviors, and environmental

factors that place them at risk to sexually re-offend and to learn to manage these well enough to ensure a safe return to the community." CP at 250. The RNR model employs a formal didactic methodology in which residents participate in group therapy sessions guided by SCC counseling staff and complete various assigned tasks, which include written assignments. CP at 147. Prior to participating in the formal treatment program, residents are required to attend the Awareness and Preparation "introductory group that prepares SCC residents for entering a sex offender treatment program." CP at 253. As a part of the treatment program, the SCC must keep records of the resident's treatment, which must be made available to various individuals or entities upon request. RCW 71.09.080.

While the SCC does not provide individual treatment meetings with assigned therapists, it does assign a psychology associate to each resident as a case manager. CP at 251. The case manager meets with his or her resident for an hour each month. The meetings do not involve any specific work on sex offender treatment issues but do help the residents deal with the day-to-day operating of the SCC. *Id.*, CP at 214. Even residents refusing to participate in treatment are provided basic case management services. CP at 214.

The SCC also develops individual treatment plans (ITP), which are specific to the individual resident and are created with input from a group of treatment providers, called the Senior Clinical Team, as well as the resident. WA ADC 388-880-010. The Senior Clinical Team is made up of clinical professionals who are "professionally qualified persons employed by the department" including "contracted community psychologist with advanced forensic assessment and treatment expertise." *Id.* The ITP outlines the most current diagnosis of the resident; the resident's treatment status; the resident's treatment needs, goals, and interventions; and various other pro-social considerations like vocational and educational activities. CP at 97-102. The ITPs cover both the challenges and successes of the resident in a variety of areas including in formalized treatment, substance abuse issues, life skills, social support, recreation, and the person's spiritual activities. CP at 205. The senior clinical team reevaluates the ITPs approximately every six months. CP at 203.

In addition to formal sex offender treatment, the SCC provides for recreational, educational, vocational, and spiritual activities. CP 217-219. Specifically, the SCC provides opportunities for residents to participate in "major religions either through the SCC Chaplains or through qualified volunteers." CP 219. It offers modified menus for religious-based diets,

the ability for residents to practice their faith within institutional limits, and for both group and individual activities. *Id.*

Native American-focused religious activities are organized by a volunteer named Brad Mix, who is a "Metis Liaison and spiritual advisor who was invited by the SCC Chaplain to organize and lead a healing program for the residents." CP 176. Those activities include Healing Circles, Talking Circles, Sweat Lodges, the Medicine Wheel, and a 12-step substance abuse support program. *Id.* Mr. Mix is a graphic designer by trade and has no experience or training in social work, counseling, or psychology. CP at 62-63. The various rituals and ceremonies are not supervised by any SCC treatment staff, the SCC Senior Clinical Team, or the clinical director. CP at 67. Rather, a community-based Native American Elder provides some supervision over the activities. *Id.* The only SCC employee involved in providing any oversight over the religious activities is the SCC chaplain. CP at 68.

Mr. Mix is clear that while the activities may provide psychologically beneficial effects, "Native American practices are not... psychotherapy." CP at 70. The ceremonies are private and nothing requires Mr. Mix to report any disclosures made by residents during the various ceremonies and activities. CP at 78. In fact, the activities "would be like practicing any other religion from the institution's point of view."

CP at 74. The activities are described by Mr. Mix as "ceremonies," "practices," "prayer" (CP 84), and are, in part, guided by the Medicine Wheel, which "is kind of like, you might say, the Native American Bible." CP at 81.

Following commitment, an SVP's mental and physical condition is evaluated on an annual basis. RCW 71.09.070. As a part of the periodic review process, the state must present *prima facie* evidence that the person continues to meet the statutory definition of an SVP and that release to a proposed less restrictive alternative is not in the person's best interest and that the proposed plan does not contain conditions that would adequately protect the community. RCW 71.09.090(2)(b). If the state fails to present sufficient evidence, a trial on the issue of the SVP's release is set.

In addition to the annual review of an SVP's mental condition required by statute, an SVP may petition the superior court for unconditional release at any time. RCW 71.09.070, 090(2). In order to prevail on his petition, the SVP must present probable cause evidence to believe his condition has change so that he no longer meets the statutory definition of an SVP. RCW 71.09.090(2)(c). The statute further clarifies that an SVP has "so changed" only when he can show "a substantial change in the person's physical or mental condition such that the person either no longer meets the definition of a sexually violent predator..."

RCW 71.09.090(4)(a)(2). Additionally, if the SVP is petitioning based on an alleged change in his mental condition, he must present "current evidence from a licensed professional" that shows that the change was "brought about through positive response to continuing participation in treatment..." RCW 71.09.090(4)(b)(ii). Though undefined at the time of the hearing on Brogi's petition, the legislature has since provided a formal definition of "treatment," which "means the sex offender specific treatment program at the special commitment center or a specific course of sex offender treatment pursuant to RCW 71.09.092(1) and (2)." RCW 71.09.020(20), H.B. 1059, 64th Leg., Reg. Sess. (Wash. 2015).

The Department of Social and Health Services has submitted an annual review to the trial court each year since Brogi's commitment in 2000. Each evaluation has been conducted by a qualified psychologist, and each has concluded that Mr. Brogi continues to meet the definition of an SVP and is not safe to be conditionally released to an LRA. Each year the State has met its prima facie burden of showing that Brogi continues to meet the definition of an SVP.

In 2014, Dr. Rob Saari, a forensic psychologist, conducted an annual review of Brogi. CP at 242. At the close of the evaluation, Dr. Saari opined that Brogi continued to suffer from mental abnormalities and a personality disorder that make him more likely than not to reoffend

if not confined in a secure facility. CP at 255. Dr. Saari based his opinion, in part, on Brogi's diagnosis of

- Sexual Sadism;
- Pedophilia, Sexually Attracted to Females, Nonexclusive Type, Rule Out;
- Alcohol Use Disorder, In a Controlled Environment;
- Stimulant Use Disorder (Amphetamine-type Substance), In a Controlled Environment;
- Rule Out Cannabis Use Disorder;
- Major Depressive Disorder, Recurrent; and
- Antisocial Personality Disorder

CP at 246-249.

Dr. Saari also considered Brogi's treatment history at the Special Commitment Center noting: "Mr. Brogi's records for this annual review period did not reflect any participating in sex offender treatment... Mr. Brogi's case management sessions did not involve any specific work on sex offender treatment issues; however, Mr. Brogi did express an interest in resuming sex offender treatment." CP at 251.

As a part of the annual review process, Brogi filed a petition for unconditional release, supported by an evaluation conducted by Dr. Robert Halon, a declaration of Mr. Mix, and several other documents. CP at 114-230. *Inter alia*, Brogi argued that the he provided sufficient proof to warrant the granting of a trial on the issue of whether he continues

to meet the definition of a sexually violent predator.[2] CP at 125. Brogi alleged his residency at the SCC, participation in Native American activities, and involvement in substance abuse self-help groups (CASH), constituted sex offender treatment as intended by the legislature. CP at 119. At the show cause hearing, Superior Court Judge Vickie Churchill rejected Brogi's petition for an unconditional release trial concluding that he had failed to show substantial change in his mental condition "through a positive response to continuing participation in sex offender treatment..." CP at 7. The court also found Brogi had "not recently participated in sex offender treatment at the Special Commitment Center." CP at 6.

Brogi now appeals the superior court's denial of his petition for unconditional release and assigns error to the court's determination that he had failed to show change due to participation in sex offender treatment at the SCC.

[2] The superior court found the State's evidence was sufficient to establish its required prima facie burden. The sufficiency of the State's evidence at the show cause hearing is not at issue in this appeal. Further, the State agreed to set a trial on the issue of Brogi's conditional release to a less restrictive alternative because RCW 71.09.090(2)(d) allows such a hearing without requiring the SVP to show change in his condition. CP at 7.

V. ARGUMENT

A. The Superior Court properly denied the unconditional release petition of a sexually violent predator who had not participated in sex offender specific treatment at the SCC.

1. An SVP petitioning for unconditional release must show substantial change in his mental condition as the result of treatment.

In order for an SVP to be granted a trial on unconditional release, the trial court must find either the state failed to meet its probable cause burden at the show cause hearing or that the SVP has presented a prima facie case. *In re Det. of Petersen,* 145 Wn.2d 789, 798, 42 P.3d 952 (2002) (*Petersen II*). "We hold there are two possible statutory ways for a court to determine there is probable cause to proceed to an evidentiary hearing under former RCW 71.09.090(2): (1) by deficiency in the proof submitted by the State, or (2) by sufficiency of proof by the prisoner." (sic) *Id.* When petitioning for an unconditional release trial using his own evidence, an SVP must show a substantial change in his mental condition brought about through a positive response to ongoing treatment. RCW 71.09.090(2), (4). *State v. McCuistion,* 174 Wn.2d 369, 275 P.3d 1092 (2012).

McCuistion held that unconditional release trials could not be ordered where the evidence "failed to show a physiological change or treatment-induced change to his mental condition, as required by RCW 71.09.090(4)(b)." 174 Wn.2d at 382. The Court held that requiring

change as a prerequisite for an evidentiary hearing "does not offend substantive due process principles." *Id.* at 384. Substantive due process, the Court noted, "requires only that the State conduct periodic review of the patient's suitability for release." *Id.* at 385. *McCuistion* further held that amended RCW 71.09.090 did not violate procedural due process because "the procedure established by the legislature ensures that individuals who remain committed continue to meet the constitutional standard for commitment, namely dangerousness and mental abnormality" and thus is "unlikely to result in an erroneous deprivation of liberty." *Id.* at 394. The State, the Court noted, "has a substantial interest in encouraging treatment" and "by making treatment the only viable avenue to a release trial (absent a stroke, paralysis, or other physiological change)," the State creates an incentive for participation in treatment. *Id.*

2. The SVPA unambiguously requires a positive response to sex offender specific treatment in RCW 71.09.090.

As discussed above, the only method an SVP may use to challenge his indefinite commitment is to show a change in his physical or mental condition. RCW 71.09.090(4)(a). A change in mental condition must be brought about through a positive response to continuing treatment. RCW 71.09.090(4)(b)(ii). Though RCW 71.09.090 itself did not include

the phrase "sex offender" when referring to treatment, the Legislature's intent to require such treatment was not ambiguous.[3]

When interpreting a statute, precedent instructs that the court is to ascertain and carry out the legislature's intent while construing the statute as whole and harmonizing statutes on the same subject matter with each other. *In re Det. of Boynton*, 152 Wn. App. 442, 452, 216 P.3d 1089 (2009) ("Each provision [of the statute] must be read in relation to the other provisions, and we construe the statute as a whole."); *US West Communications, Inc. v. Wash. Util. & Transp. Comm'n*, 134 Wn.2d 74, 118, 949 P.2d 1337 (1997) ("Statutes on the same subject matter must be read together to give each effect and to harmonize each with the other."). Furthermore, the court's "fundamental objective is to ascertain and carry out the legislature's intent." *State v. Gray*, 174 Wn.2d 920, 927, 280 P.3d 1110 (2012).

In reference to "treatment" in the context of RCW 71.09.090, the legislature was clear as to its intent. In fact, the 2005 amendments to the act included a stated purpose:

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[3] It is unclear as to whether Brogi agrees with this statement or not. Brogi argues that "[t]he only qualifying characteristic of treatment in RCW 71.09.090(4)(b)(ii) is that it enables a person to change his mental condition when positively responding to it." Opening Brief at 14-15. Brogi also seems to agree that sex offender treatment is required: "Because Mr. Brogi offered competent evidence from a qualified expert that he had positively changed through a type of *sex offender treatment* to the degree that he was safe to be unconfined, he is entitled to a new trial on the lawfulness of his continued confinement." Opening Brief at 15 (emphasis added).

> [T]he legislature finds that a new trial ordered under the circumstances set forth in *Young* at *Ward* subverts the statutory focus on treatment and reduces community safety by removing all incentive for successful treatment participation in favor of passive aging and distractive committed persons from *fully engaging in sex offender treatment.*

CP at 108 (emphasis added).

More broadly, the purpose of the SVPA is the incapacitation and treatment of dangerous sex offenders who cannot control their predatory sexual behavior. When it enacted the SVPA, the Legislature expressed its intent in the "Findings" section of the statute. RCW 71.09.010. The goal was to protect the community from "a small but extremely dangerous group of sexually violent predators" who "have personality disorders and/or mental abnormalities which are unamenable to existing mental illness treatment modalities." *Id.* The legislature recognized that "those conditions render them likely to engage in sexually violent behavior." *Id.* In drafting the law, the Legislature recognized that:

> [T]he treatment needs of this population are very long term, and the treatment modalities for this population are very different than the traditional treatment modalities for people appropriate for commitment under the involuntary treatment act.

Id. From its initial enactment forward, it was clear that the focus of the act was to detain and treat dangerous sexual offenders.

In considering what "treatment" qualifies under the statute, the court should consider other statutes or parts of the statute on the same

subject matter. *US West Communications*, 134 Wn.2d at 118. For example, the definition section of the SVPA defines a "total confinement facility" like the SCC is "a secure facility that provides supervision and *sex offender treatment services* in a total confinement setting." RCW 71.09.020(19) (emphasis added).

Further, when an SVP has successfully progressed to the point that they are eligible for release to an LRA, the legislature required that they receive additional treatment only from "certified sex offender treatment providers or certified affiliate sex offender treatment providers under chapter 18.155 RCW" with exceptions not relevant here. RCW 71.09.350(1). If the conditional release is to the Secure Community Transition Facility (SCTF), the individual is placed in a facility that "either provides or ensures the provision of sex offender treatment services." RCW 71.09.020(16). It is simply nonsensical to conclude that the Legislature intended for sex offender treatment to not be required while the SVP was in total confinement, but is required after the SVP has changed enough that release to an LRA is appropriate.

The legislative requirement for participation in sex offender specific treatment is also found in the rules that the legislature authorized DSHS to promulgate. The legislature granted authority for DSHS to adopt rules regarding "requirements for treatment plans[.]" RCW 71.09.800.

Consequently, DSHS developed detailed rules requiring an ITP for each resident. The ITP must include a "description of the person's specific treatment needs in . . . *Sex offender specific treatment[.]*" *Id.* (WAC 388-880-040(3)(a)(i)) (emphasis added).

The legislature reiterated its intent when it passed H.B. 1059 in 2015: "'Treatment' means the sex offender specific treatment program at the special commitment center or a specific course of sex offender treatment pursuant to RCW 71.09.092(1) and (2)." RCW 71.09.020(20). While H.B. 1059 was a subsequent enactment, it is internally consistent with the rest of the SVPA. It changes nothing substantively but merely provides clarity to an issue made less clear by the types of arguments put forward by Brogi. Brogi disingenuously argues the Legislature's 2014 failure to pass an earlier version of H.B. 1059 tends to show the legislature did not intend "treatment" to be limited to "sex offender treatment" while also arguing the Legislative success of H.B. 1059 one year later is somehow not indicative of the Legislature's original intent.

Brogi continually, and incorrectly, asserts that because "a prison treatment program satisfies the treatment requirement of the statute," Brogi's religious activities should pass the test. Opening Brief at 7-8, 10. In support, he cites to *In re Det. of Ambers.* 160 Wn.2d 543, 158 P.3d 1144 (2007). As Respondent has already pointed out in its Answer to the

Motion for Discretionary Review, Brogi's claim is both false and irrelevant. *See* MDR Answer at 15, FN 15. First, *Ambers* is irrelevant to the issue at hand. At issue there was the meaning of "safe to be at large" as the phrase is used in the SVPA, and the question of Ambers' treatment status was not before the court. *Ambers*, 160 Wn.2d at 547. The section cited by Brogi does not even serve as dicta to inform this court.

Second, Brogi fails to point to a single reference that shows Ambers even received treatment *in prison* in part because the reference does not exist. Nothing in the *Ambers* decision indicates he was in treatment in prison and, in fact, the decision only uses the word "prison" twice and only in contexts not related to treatment. To be generous, perhaps Brogi misinterprets the Court's use of the term "confinement" in the opening section of the opinion, which reads:

> Kevin Ambers seeks review of a trial court order denying his petition for an unconditional release trial. In 1998, Ambers stipulated to commitment as a sexually violent predator (SVP). Ambers has been confined since then..., and during his confinement he has participated in treatment.

Id. at 546. However, "confinement" in this section is not referring to DOC, but is actually pertaining to Ambers's commitment as an SVP. In fact, the court is fairly clear that Ambers was in treatment at the SCC – not prison. "Mr. Ambers' risk has been reduced since [he was committed] as a result

of having been involved in treatment for quite a number of years. *Id.* at 558-559.

Finally, any prison-based treatment would have been irrelevant in assessing any change in Ambers' mental condition because it occurred prior to his commitment. The statute is clear that change is measured "since the person's last commitment trial, or less restrictive alternative revocation proceeding..." RCW 71.09.090(4)(a). *See also In re Det. of Marcum*, ---Wn.App. ---, --- P.3d ---, 2015 WL 5933725 (2015) (SVP who refused treatment after revocation of an LRA is not entitled to a new trial because he cannot show treatment-based change since the revocation.) Since Ambers was committed as an SVP after serving his prison term and was subsequently released, temporarily, on an LRA, the only proper inquiry would be whether there was substantial treatment-based change since his last LRA revocation. *Ambers*, 160 Wn.2d at 546. The opinion does not hold, indeed it would have been impossible, that Ambers completed prison-based treatment following the revocation of his LRA.

Brogi's argument that "the only qualifying characteristic of treatment in RCW 71.09.090(4)(b)(ii) is that it enables a person to change his mental condition when positively responding to it," is unreasonable. Opening Brief at 14-15. As noted, the purpose of the statute is to detain and treat individuals who suffer from conditions that make them likely to

engage in sexually violent behavior. Accepting Brogi's broad definition would allow an SVP to argue he has changed because he has started to exercise more, which has improved his self-image and depression. His interpretation could also cover treatment for dyslexia. Brogi's argument is untenable because the treatment required by the statute must have at least some rational relationship to the treatment of the mental condition, i.e. mental abnormality and/or personality disorder, that lead to his commitment as an SVP.

In fact, the State Appeals and Supreme courts have taken for granted that the legislature intended sex offender treatment. For example, in *In re Det. McGary*, Division 2 affirmed the trial court's denial of McGary's petition for an unconditional release trial based on his own petition noting that "McGary has refused to participate in *sex offender* treatment since at least 2007." 155 Wn. App. 771, 784, 231 P.3d 205 (2010). The Supreme Court considered a similar issue in *In re Meirhofer,*. In its decision, the Court used "sex offender treatment" and "treatment" interchangeably. *See generally*, 182 Wn.2d 632, 639, 343 P.3d 731 (2015). The Court noted that Meirhofer had "declined treatment" in the same paragraph as recognizing the legislature intended to incentivize "sex offender treatment." *Id.* It then affirmed the trial court's denial of

Meirhofer's petition because he had failed to participate in sex offender treatment. *Id.* at 646.

The superior court in this case correctly determined the legislature unambiguously required the individual's alleged change in his mental condition happened as a result of sex offender treatment.

3. If the court finds the term "treatment" to be ambiguous in this context, it should find H.B. 1059 acts retrospectively.

a. H.B. 1059 acted, in part, to clarify the intent of the statute in regard to requiring SVPs to show change through participation in treatment.

When a statute is curative or remedial the general rule that statutes are applied prospectively does not apply. *Loeffelholz v. Univ. of Washington*, 162 Wn. App. 360, 368, 253 P.3d 483, 487 (2011) *aff'd in part, rev'd in part,* 175 Wn. 2d 264, 285 P.3d 854 (2012). "An amendment is curative and remedial if it clarifies or technically corrects an ambiguous statute without changing prior case law constructions of the statute." *State v. Markwart*, 182 Wn. App. 335, 353, 329 P.3d 108, 117 (2014) (citing *Barstad v. Stewart Title Guar. Co.,* 145 Wn.2d 528, 537, 39 P.3d 984 (2002); *In re Pers. Restraint of Matteson,* 142 Wn.2d 298, 308, 12 P.3d 585 (2000), *review granted,* 337 P.3d 327 (Wash. 2014). "A curative amendment clarifies or technically corrects an ambiguous statute." *State v. Smith*, 144 Wn.2d 665, 674, 30 P.3d 1245 (2001) (citing *In re F.D.*

Processing Inc., 119 Wn.2d 452, 461, 832 P.2d 1303 (1992)). "Thus, subsequent enactments that only clarify an earlier statute can be applied retrospectively." *Barstad* 145 Wn. 2d at 537 (internal citations omitted). While remedial statutes are exceptions to the general rule, "If a statute is remedial in nature and retroactive application would further its remedial purpose," it will be enforced retroactively. *Macumber v. Shafer*, 96 Wn.2d 568, 570, 637 P.2d 645 (1981).

Prior to the 2015 legislative session, the term "treatment" as it is used in RCW 71.09.090(4)(b)(ii) was undefined. However, in enacting H.B. 1059, the legislature defined a previously undefined term. According to the act, "'Treatment' means the sex offender specific treatment program at the special commitment center or a specific course of sex offender treatment pursuant to RCW 71.09.092(1) and (2)." RCW 71.09.020(20); H.B. 1059. The additional definition of "treatment" clarifies and technically corrects the statute. The definition does not change any prior case law regarding the definition. As such, the added definition of "treatment" should be applied retrospectively.

Notably, Brogi relies on *In re Det. of Elmore*, for support that H.B. 1059 should not be applied retrospectively. His reliance is misplaced. In *Elmore* the Court found that the 2005 amendments to the SVP act were not retroactive as applied to Elmore but for reasons inapplicable in this

case. The procedural history of that case is relevant and peculiar. The Superior Court in *Elmore* ordered a new unconditional release trial based solely on the issue of Elmore's change in age. *In re Elmore*, 162 Wn.2d 27, 34, 168 P.3d 1285 (2007). During the appeal process of that order, the Legislature enacted its amendments that excluded change based on age alone as grounds for a new trial. *Id.* The act expressly stated its purpose was to override the court's existing decisions in *Young*[4] and *Ward*.[5] *Id.* The Court of Appeals found that the 2005 amendments were retroactive as applied to Elmore and ruled in favor of the State. *Id.*

However, the Supreme Court reversed and held that the amendments should not be treated as retroactive because they clarified the legislature's intent in a way that changed prior case law. *Id.* at 36. "A court may only consider an amendment curative and remedial if the amendment 'clarifies ... an ambiguous statute without changing prior case law constructions of the statute.'" *Id.* quoting *Barstad*, 145 Wn.2d at 536-37. The Court then concluded the 2005 act was not curative or remedial and, therefore, not retroactively applicable. Here, the legislature did not act to overrule existing case law or authority. In fact, the appellate courts have never ruled on what the definition of treatment is in the SVP

[4] *In re Det. of Young*, 120 Wn. App. 753, 86 P.3d 810 (2004).
[5] *In re Det. of Ward*, 125 Wn. App. 381, 104 P.3d 747 (2005).

context despite numerous opportunities to do so. Therefore, the holding in *Elmore* is not instructive.

In his opening brief, Brogi argues that if this court finds part of H.B. 1059 is intended to be retroactive, curative, or remedial, the entire bill must be. Brief at 19. However, he provides no support or authority for this assertion. Nothing prohibits this court from finding the definition of "treatment" was intended retrospectively.

Brogi also places weight on the act's emergency clause as evidence the act is not retroactive. The presence of an emergency clause is merely a fact that weighs against retroactivity – it is not dispositive. *Elmore*, 162 Wn.2d at 36. Notably, H.B. 1059 involved multiple changes to the SVPA, including the addition of a definition of "treatment." The bill's emergency clause did not indicate which of its provisions were affected by the clause. CP at 112. Rather, the clause simply indicated the bill should "take[] effect immediately." *Id.* More importantly, the existence of an emergency clause is only one factor when considering if the enactment is to be enforced retrospectively.

b. Applying H.B. 1059 retrospectively does not affect a substantive or vested right.

If a statute is curative or remedial, the court must also inquire as to whether applying the statute retrospectively would affect a substantive or

vested right. *Houk v. Best Dev. & Const. Co., Inc.*, 179 Wn. App. 908, 914, 322 P.3d 29, 32 (2014)(internal citations omitted). If the new statute affects a substantive right it may not be enforced retrospectively. *Id.* However, if the statute affects a procedural right, it may be given effect. *Id.* "Substantive law creates, defines, and regulates primary rights, while procedures involve the operations of the courts by which substantive law, rights, and remedies are effectuated." *Putman v. Wenatchee Valley Medical Center, P.S.,* 166 Wn.2d 974, 984, 216 P.3d 374 (2009)(internal citations omitted).

The procedure outlined in RCW 71.09.090 does not affect a substantive right. The substantive right – the right to periodic review of an SVP's mental condition – is derived from the Constitution and subsequent case law. *McCuistion*, 174 Wn.2d at 385. The statutory procedural rights (the show cause process, the petition process, the unconditional release trial process) were developed to enforce the substantive right. In other words, the statute creates the procedure by which an SVP obtains his periodic review. "A committed person's statutory right to show his condition has 'so changed' provides additional safeguards that go beyond the requirements of substantive due process." *Id.*

An SVP's right to periodic review is simply not impacted by H.B. 1059. The legislature acted only to clarify its intent and refine the

procedure by which an SVP enforces a statutory method for challenging his continued confinement. The curative statute does not infringe on Brogi's right to periodic review. Brogi continues to have the right to an annual review (RCW 71.09.070), an annual show cause hearing (RCW 71.09.090), and has a right to petition the court for a new trial at any time (RCW 71.09.090(2)). H.B. 1059 merely clarifies the working of a procedural process by which Brogi enforces his substantive right.

Further, applying H.B. 1059 retrospectively does not affect a vested right. "Vested right" as a term is not applicable in this context. "A vested right involves "more than ... a mere expectation;" the right must have become "a title, legal or equitable, to the present or future enjoyment or property." *F.D. Processing, Inc.*, 119 Wn.2d at 463 (*quoting Miebach v. Colasurdo*, 102 Wn.2d 170, 181, 685 P.2d 1074 (1984)). A future, hypothetical trial is not a "vested right." Consequently, H.B. 1059 does not affect a substantive or vested right but merely clarifies an arguably ambiguous statute in order to correct a procedural flaw.

The provision regarding the definition of "treatment" is properly considered an expression of legislative intent not as an enactment of something entirely new. If the definition would have been changed all together or enacted in a way that contradicted a previous understanding of the definition, the analysis would necessarily be different. As is,

H.B. 1059 in this context acts to clarify an arguably ambiguous term and, therefore, is remedial and should be applied retroactively.

c. Appling H.B. 1059 retrospectively does not offend Brogi's equal protection rights.

Brogi claims that applying the definition section of H.B. 1059 retrospectively to the analysis of whether Brogi was in treatment at the time of his petition would violate his equal protection rights. As H.B. 1059 was passed more than a year after the trial court's order, it is impossible the trial court erred in applying it. Instead, his argument appears to be an attempt to preempt an argument from the State that the bill applies retrospectively. Brogi's argument fails because he does not present a cogent equal protection argument.

A statute is presumed to be constitutional, and the party challenging its constitutionality bears the burden of proving its unconstitutionality beyond a reasonable doubt. *State v. Myles,* 127 Wn.2d 807, 812, 903 P.2d 979 (1995). Wherever possible, "it is the duty of this court to construe a statute so as to uphold its constitutionality." *State v. Reyes,* 104 Wn.2d 35, 41, 700 P.2d 1155 (1985).

The equal protection clause requires that "persons similarly situated with respect to the legitimate purpose of the law must receive like treatment." *State v. Manussier*, 129 Wn.2d 652, 672, 921 P.2d 473 (1996).

An SVP is not a member of a suspect or semi-suspect class. *In re Detention of Brooks,* 94 Wn. App. 716, 720–21, 973 P.2d 486 (1999), *aff'd in part, rev'd in part,* 145 Wn.2d 275, 299, 36 P.3d 1034 (2001). Washington courts review equal protection challenges to the SVP Act under the rational basis test. *In re Turay,* 139 Wn.2d 379, 409–10, 986 P.2d 790 (1999), *cert. denied,* 531 U.S. 1125, 121 S.Ct. 880 (2001). "This standard is highly deferential to the legislature, and even 'rational speculation unsupported by evidence of empirical data' prevents a court from finding the law unconstitutional under rational basis review." *Detention of Fox v. State, Dept. of Social and Health Svcs.*, 138 Wn. App. 374, 400-01, 158 P.3d 69 (2007), *quoting In re Det. of Thorell,* 149 Wn.2d 724, 749, 72 P.3d 708 (2003). The burden is on the party challenging the classification to prove that the law is "purely arbitrary." *Id.*

Washington courts apply a three-part test to determine whether a statute survives rational basis scrutiny: (1) does the classification apply equally to all class members, (2) does a rational basis exist for distinguishing class members from non-members, and (3) does the classification bear a rational relationship to the legislative purpose. *Morris v. Blaker,* 118 Wn.2d 133, 149, 821 P.2d 482 (1992); *In re Pers. Restraint of Silas,* 135 Wn. App. 564, 570, 145 P.3d 1219 (2006). In a typical equal

protection argument, the appellant's complaint is that he or she is being denied a benefit not denied to others who are similarly situated.

Brogi's claim is essentially the reverse of an equal protection argument: he claims he is different but is being treated the same. Opening Brief at 25. In support of his argument, Brogi cites to *State v. Sisouvanh*, for the premise that "culturally competent treatment is an established principle in delivering meaningful mental health profession (sic) and is a necessary aspect of fair and consistent application of law." Opening Brief at 26. However, *Sisouvanh* is not a treatment case. In fact, the word "treatment" never appears in the opinion. Rather, the case focused on the need for a forensic evaluator to possess a minimum level of cultural competency when he or she conducts a competency evaluation. *Sisouvanh*, 175 Wn.2d 607, 625, 290 P.3d 942 (2012). In a footnote, the Supreme Court in *Sisouvanh*, mentions the need for sufficient cultural competency for equal protection and due process reasons. *Id.* at FN 4. However, the Court did not apply those principles to the case.

Further problematic for Brogi's claim is the fact that H.B. 1059 treats him the same as every other resident at the SCC. Brogi – like every other SVP in total confinement – must show change through sex offender specific treatment offered by the SCC in order to get a trial on his petition. Like every other SVP, Brogi may add a cultural component to his

treatment by participating in religious or spiritual activities. The SCC Chaplain provides religious opportunities for every major religion either directly through the Chaplain or through qualified volunteers. CP at 219. It provides opportunities that "include group activities and private counsel." *Id.* The SCC makes allowances for religious-based diets and the possession of sacred objects within institutional limits. *Id.*

During the course of this case, Brogi has argued the SCC "disregards" or "denigrated" Brogi's cultural differences by citing to a partial quote from a treatment plan. Opening Brief at 27; MDR at 16. In fact, the full quote shows that the SCC believes its counselors are trained in understating Native American cultural differences and that Brogi's distrust of the providers presents a barrier to his advancement in treatment:

> Mr. Brogi reports that through participation in the Native American Circle and using the Medicine Wheel he has done treatment work and wishes to be acknowledged for that work. ***Continuing to hold this belief and not address his deviant sexual behaviors could impede his ability to progress in treatment.*** Mr. Brogi's reported belief that the therapists at SCC do not have an understanding of the Native American Culture is a barrier to establishing trust in the treatment process.

CP at 204. In the same ITP, the SCC sets as an "intervention" that "Mr. Brogi will incorporate the knowledge he has gained by doing Native American treatment work into his participation in treatment." CP at 205. Throughout the ITP, the SCC encourages Brogi to continue his participation in Native American activities while engaging in mainstream sex offender treatment. This evidence shows the SCC is sensitive to

Brogi's cultural differences and treats him the same as everyone else who is similarly situated. Brogi has failed to meet his burden or even to show *any* indication how applying H.B. 1059 retrospectively creates disparate treatment among SVPs at the SCC. Under H.B. 1059, Brogi – and every other SVP – would have to show he has changed through participation in the SCC's sex offender treatment program.

d. The Court need not consider Brogi's due process argument because it is unsupported by authority or argument

Brogi claims the definition section of H.B. 1059 cannot be applied retrospectively because doing so would violate his due process rights. Opening Brief at 19-20, 26. However, Brogi fails to cite to any authority or argument that supports his claim. As noted above, Brogi bears the burden of proving the section's unconstitutionality beyond a reasonable doubt. *Myles,* 127 Wn.2d at 812. Aside from simply claiming the right, Brogi does not develop his argument and does not come close to meeting his burden.

Appellate courts should not consider meritless constitutional claims. *In re Request of Rosier*, 105 Wn.2d 606, 616, 717 P.2d 1353 (1986). "As expressed by the Eighth Circuit, 'naked castings into the constitutional sea are not sufficient to command judicial consideration and discussion.'" *Id.* (*citing United States v. Phillips*, 433 F.2d 1364, 1366 (8th Cir.1970)); *Pub. Hosp. Dist. No. 1 of King Cnty v. Univ. of Washington,*

182 Wn. App. 34, 48, 327 P.3d 1281 (2014). Because statutes are presumed to be constitutional and Brogi's constitutional claim is not supported by sufficient argument, Brogi has failed to meet his burden and his argument should be rejected without further consideration. *Pub. Hosp. Dist. No. 1 of King Cnty,* 182 Wn. App. at 49.

Notably, the SVPA has continually held up to scrutiny on the due process grounds. "...Due process is a flexible concept. At its core is a right to be meaningfully heard, but its minimum requirements depend on what is fair in a particular context. *In re Det. of Stout*, 159 Wn.2d 357, 370, 150 P.3d 86 (2007) (*citing Mathews v. Eldridge,* 424 U.S. 319 (1976); *Demore v. Kim,* 538 U.S. 510, 551 (2003). Notably, the SVPA has continually held up to scrutiny on the due process grounds. *See Kansas v. Hendricks,* 521 U.S. 346, 358, (1997)); *Thorell*, 149 Wn.2d at 731-32; *In re Young*, 122 Wn.2d 1, 857 P.2d 989 (1993); *Turay*, 139 Wn.2d at 422; *In re Det. of Morgan,* 180 Wn.2d 312, 323, 330 P.3d 774 (2014); *McCuistion*, 174 Wn.2d at 392 and *In re Det. of Reimer*, 146 Wn. App. 179, 190 P.3d 74 (2008) (finding 2005 amendments requiring treatment did not offend due process); *Stout*, 159 Wn.2d at 370 (finding no due process right to confront witnesses). Nothing argued by or cited by Brogi in this case supports a legitimate due process challenge to retrospective application of a definition that does not affect prior case law.

4. Brogi failed to provide probable cause evidence that his mental condition had changed as a result of continuing sex offender treatment.

As previously discussed, an SVP petitioning for an unconditional release trial must provide probable cause to believe his mental condition has substantially changed and that change was "brought about through positive response to continuing participation in treatment..." RCW 71.09.090(4)(b)(ii). As established, the statute requires sex offender treatment. At the hearing on an SVP's petition, the court "must assume the truth of the evidence presented; it may not 'weigh and measure asserted facts against potentially competing ones.'" *McCuistion*, 174 Wn.2d at 382 (quoting *Petersen*, 145 Wn.2d at 797). "While the court does not weigh the evidence, it is entitled to consider all of it." *Meirhofer*, 182 Wn.2d at 638 (citing *Petersen*, 145 Wn.2d at 798).

In this case, Brogi failed to provide any evidence to the trial court that would establish the change in his mental condition was brought about through sex offender treatment. However, the fact that Brogi refused to participate in sex offender treatment was well established. The Court considered the annual review by Dr. Saari that Brogi had not been in treatment. CP at 251. Brogi even admitted he was not in treatment during Dr. Saari's clinical interview of him: "Mr. Brogi is reportedly considering resuming sex offender treatment." CP at 253. Furthermore, the ITPs

submitted as evidence (both by Brogi and the State) repeatedly referenced Brogi's non-treatment status. CP 97, 203 ("Intermediate Goals: Overcome barriers to entering treatment."); CP 98 ("Mr. Brogi has made the choice at least twice in the past to begin Core Sex Offense Treatment. In his last attempt he presented with inconsistent attendance and participation. He repeated his previous pattern of starting treatment and quitting after becoming upset at some of the cohort interaction. As a result of this repeated inconsistent commitment to treatment he has shown no gain or advancement in his phase of treatment.) Even Brogi's own expert, Dr. Halon, acknowledged he was not in sex offender treatment. CP at 136-137. It was well established at the show cause hearing that Brogi was not in sex offender treatment. Therefore, the court did not err in finding Brogi failed to meet his burden.

B. Even if RCW 71.09.090 does not require the SCC's sex offender specific treatment, Brogi failed to show he was in treatment.

As outlined above, the SVPA requires the SVP petition for release to show change through sex offender treatment at the SCC. Even if the court finds no particular program was required when Brogi petitioned for a new trial, Brogi still fails to show he was in any form of treatment. His argument is based on the mistaken belief that the activities he participated in constituted a "culturally competent" treatment program that satisfies the

RCW 71.09.090 burden. Brogi's argument fails because of the key factual differences between his activities and other established sex offender treatment programs that incorporate Native American cultural elements.

When Judge Churchill announced her decision on the record, she properly found that Native American activities at the SCC have therapeutic value but are not treatment.

> [I]t is totally understood... that this has to be treatment for sexual offenders. And I don't see that the ... Native American Healing Program fits under that category. It is, perhaps, a very good enhancement; but it is not a substitution.

VRP at 35. Using the evidence Brogi provided, the judge correctly assessed the activities he had participated in as not qualifying under the statute.

1. Native American activities at the SCC do not comply with treatment standards that exist in other Native American and Aboriginal treatment programs.

Mainstream treatment of sex offenders is best when they incorporate cognitive-behavioral elements. MDR App. D at 14. "Treatment should be cognitive-behavioral in orientation, should include Relapse Preventions, should focus on skills acquisition, and should explicitly target those criminogenic need factors identified during initial assessment." *Id.* "Many experts believe that cognitive-behavioural therapy combined with Relapse Prevention can produce at least mild to moderated

treatment effects, particularly with offenders who are at high risk of reoffending." *Id.* at 13. In his evaluation of Brogi, Dr. Halon pointed out that cognitive-behavioral models are influential in the treatment of sex offenders. CP at 147.

Cognitive-behavioral treatment methods attempt to treat the offender by having him identify his risk factors and learn ways to deal with them. CP at 150. It operates under the scientifically validated premise that negative and inappropriate behavior is often linked to learned negative thoughts. MDR App. D at 8. The purpose of the treatment model is to confront and unlearn the negative thoughts thus eliminating the inappropriate behaviors associated with the negative thoughts. *Id.* Relapse Prevention is often incorporated into cognitive-behavioral treatments. *Id.* at 10. Theoretically, Relapse Prevention teaches the sex offender how to avoid or deal with risky situations and promote "effective self-management." *Id.* "According to [Relapse Prevention], the best way to reduce recidivism rates is to identify and reduce or eliminate an individual's array of dynamic risk factors." CP at 151.

Some Native American/Aboriginal sex offender treatment programs may add to cognitive-behavioral treatment. (See generally Aboriginal Sex Offenders: Melding Spiritual Healing with Cognitive-Behavioural Treatment; MDR App. F). Brogi's own evidence at the trial

court was clear on this point: incorporating Native American healing *adds* to the effectiveness of Cognitive-Behavioral treatment but does not *replace* it. *Id.* Nearly all of the examples of Native American Healing Programs Brogi presented to the trial court include Cognitive-Behavioral treatment within their program descriptions:

- La Macaza Clinic, Quebec: "[W]hile conventional treatment is still very useful, adding cultural components to it can enhance participation by aboriginal offenders." *Id.* at 3.

- Native Clan Organization – Forensic Behavioural Management Clinic, Manitoba: "They are involved in healing rituals, and provide guidance on integrating traditional healing practices with conventional sex offender therapy." *Id.*

- Native Clan Organization – Stony Mountain, Rockwood, Manitoba: "Again, this approach is a meld of cognitive-behavioural interventions with spiritual healing." *Id.* at 4

- Stony Mountain Institution, Manitoba: "The treatment delivered by the Forensic Behavioural Management Clinic is cognitive..." *Id.*

- Clearwater aboriginal Sex Offender Program, Saskatchewan: "Services were integrated with a multidisciplinary treatment team, and were part of an integrated service." *Id.* at 5. '

- Aboriginal Sex Offender Healing Program, Bowden Institution, Alberta: "The programme is a blend of core programme teaching with service being provided by an Elder to cover spirituality and culture." *Id.* at 8.

- Intensive Sex Offender Program For aboriginal Men, Mountain Institution, British Columbia: "The Program will be provided by a male Spiritual Advisor, a qualified and experienced male sex-offender therapist and a female correctional practitioner who is specifically trained to deliver aboriginal sex-offender treatment." *Id.* at 10.

- Tsow Tun le lum Substance Abuse Treatment Centre: "In general, the clients attend 5 hours per week of cognitive-didactic or psycho-educational sessions focusing either on sexual offending behaviour or on alcohol and drug issues." *Id.* at 15.

- Canim lake Family Violence Program: "The treatment intervention takes a cognitive-behavioral approach, and the polygraph is used to provide additional monitoring." *Id.*

Additionally, Dr. John H. Hylton's book, which was cited by Brogi, concludes that

> Generally, Aboriginal sex offenders are most likely to benefit from treatment programs with the following characteristics:
>
> 1. the treatment program focuses specifically on sexual offending;
>
> ...
>
> 9. the program is based on a cognitive-behavioural model and it also incorporates content specific to Relapse Prevention...

"Aboriginal Sex Offending in Canada" MDR App. D at 27-28.

The Center for Sex Offender Management (CSOM), a project supported by a federal U.S. Department of Justice grant, also recommends treatment of American Indians is based in a cognitive-behavioral model.[6] "Cognitive-behavioral treatment has a long history in the mental health field and is an evidence-based model to address a range of psychological disorders. Such a model for sex offender treatment is supported by current research and it is the most common approach used in sex offender

[6] http://csom.org/tribal-action-guide/treatment-continued.htm (last viewed Oct. 26, 2015)

programs nationwide." *Id.* In the methodology espoused by Brogi, native healing is incorporated into a larger cognitive behavior treatment program.

The Native American activities available at the SCC do not independently form a sex offender treatment program. Brogi's activities did not incorporate any cognitive-behavioral methodology, a focus on Relapse Prevention, or any other recognized therapeutic method for treatment of sex offenders. As described earlier, the activities Brogi participated in were not psychotherapy. Mr. Mix explained, "...Native American practices are not – it is not psychotherapy." CP at 70.

The activities Brogi actually participated in involve spiritual practices like the Medicine Wheel and Sweat Lodge, which were organized by a spiritual leader. CP at 181. The activities are supervised by a tribal elder and the SCC chaplain; not members of a treatment team. CP at 67-68. At times Mix has worked with Dr. Holly Coryell, the SCC clinical director, in a collaborative way. CP at 67. However, Mix does not share the content of the various rituals with the clinical staff as those ceremonies are "meant to be private." CP at 71. Further, the female members of the clinical staff are excluded from participating in a meaningful way but may be permitted to pour water from the door of the sweat lodge. CP at 70.

As Brogi's own evidence indicates, spiritual activities are a potentially positive adjunct to an existing cognitive behavioral treatment approach but do not operate alone in any treatment methodology. Just like the trial court found, native healing is intended to work with sex offender treatment modalities. Brogi fails to present any evidence that his activities are like those detailed in his briefing, exhibits, or presentation to the trial court, because they are not combined with sex offender specific treatment. If he were to enter the actual treatment program at the SCC, it is likely that his spiritual activities with Mr. Mix would effectively provide the culturally competent treatment he seeks.

2. Native American activities at the SCC are not operated by a mental health professional.

Treatment should, at a minimum, be conducted by individuals trained in mental health counseling; a fact recognized by the Legislature when it passed RCW 18.225.005:

> The legislature finds that licensed advanced social workers and licensed independent clinical social workers represent different specializations within the social work profession, with each license signifying the highest degree of licensure as it pertains to each specialty. The legislature further finds that practitioners in each specialty exercise independent judgment and operate independently within their area of practice.

In recognizing the importance of reputable mental health providers, the RCWs require licensure of individuals who do mental health counseling, psychology, marriage counseling, etc. RCW 18.225.090, WAC 246-809.

Even more specialization is required when treating sexual offenders under the Special Sex Offender Sentencing Alternative Program (SSOSA), which is intended for low-risk sexual offenders. RCW 18.155.020. The Legislature found that sex offender therapists play a vital role in public safety and that specialization insures a regulated practice that avoids the variation in "qualifications, practices, techniques, and effectiveness of sex offender treatment providers." RCW 18.155.010. The Legislature further required that the treatment of SVPs in the community on an LRA must be conducted by a certified sex offender treatment providers, certified affiliate sex offender treatment providers, or employees of DSHS (and other exceptions not applicable here). RCW 71.09.350. If the licensing, oversight, and management of mental health providers is so important when dealing with non-SVP sexual offenders and SVPs on LRAs, it is only logical to conclude that at least the same – if not more – oversight should be required of those treating the riskiest sex offenders.

In addition to not being a recognized treatment methodology, the Native American activities at the SCC do not involve clinical or

counseling staff. The individual in charge of Native American spiritual activities at the SCC, Brad Mix, is a graphic designer by trade and has no experience treating sex offenders. Mix, while certainly well-meaning, has no formal training in social work, mental health counseling, or psychology. He is not a licensed mental health provider,[7] sex offender treatment provider, or social worker. He carries no advanced degrees related to the mental health profession. His training has been "traditional" and has involved talking to individuals who do sex offender treatment. CP at 92. His entire understanding of how to treat sex offenders comes from reading on his own and talking to others who do the work. As he stated in his deposition: "So, yeah, I've gotten training through, you know, the people that I've been around and asked questions of, but for the most part it's traditional." CP at 92-93.

3. NAHP does not follow the statutory requirements of record keeping.

In addition to providing treatment, DSHS has a duty to keep records regarding any treatment an SVP participates in and those records have to be made available upon request. RCW 71.09.080. Importantly, those records are only to be made available to: "The committed person, his

[7] Note that while Mr. Mix is not a licensed professional, he appears to be exempt from such a requirement under RCW 18.225.030(4). "Nothing in this chapter shall be construed to prohibit or restrict: ... (4) the practice of marriage and family therapy, mental health counseling, or social work under the auspices of a religious denomination, church, or religious organization."

or her attorney, the prosecuting agency, the court, the protection and advocacy agency, or another expert or professional person who, upon proper showing, demonstrates a need for access to such records." *Id.* (See also WAC 388-880-042 (1)(a)). In part, those records are used to monitor progress, assess treatment outcomes, develop future treatment plans, and produce the statutorily required annual reviews. RCW 71.09.070.

On the contrary, the activities organized by Mr. Mix are confidential to anyone not participating in the Sweat Lodge or Talking Circles. CP at 71. "The details of what's happened within the ceremony is meant to be private." *Id.* Mr. Mix does not produce any treatment records and does not discuss treatment needs with other counseling staff at the SCC. As such, Mr. Mix's program is either not treatment of sex offenders at the SCC or he is not following the statutory requirements of RCW 71.09.080. Ironically, if Mr. Mix created the records, under RCW 71.09.070, he would not have access to them because he is not "another expert or professional person..." Additionally, the fact that the practices – and records thereof – are not able to be reviewed by annual reviewers means that the reviewer can never have a complete picture of the individual he or she is attempting to assess.

Finally, the Native American activities are not finite and not outcome oriented. There is no way to assess progress and no way to know

whether the "treatment" has been effective. Without record keeping, the only person assessing progress is Mr. Mix, who, as noted above, has no experience or training in conducting an assessment. Furthermore, it is not even clear what progress in this kind of spiritual-based programing would even look like.

4. Mere conclusory statements by an expert need not be accepted when they do not conform with the evidence.

An SVP petitioning for an unconditional release trial must provide more than simple conclusory statements to establish probable cause. *In re Det. of McGary*, 155 Wn. App. 771, 784, 231 P.3d 205 (2010). "Mere conclusory statements unsupported by sufficient facts do not establish probable cause." *Id.* In *McGary*, the SVP evaluator concluded McGary's paraphilia was in remission but that the reason for the remission was unknown. *Id.* at 783. The evaluator pointed to treatment prior to McGary's commitment as an SVP or "perhaps self-reflection." *Id.* Division 2 affirmed the trial court concluding that McGary had not established probable cause to believe he had changed through continuing participation in treatment.

In this case, Brogi relies on bald assertions from his evaluator and fails to support those claims with evidence. For example, Dr. Halon states "Native American way-of-life is in huge measure a cognitive-behavioral

strategy just as is used at SCC in its conventional mainstream treatment." CP at 140. But it is entirely unclear how that conclusion is supported. There is simply no reference in the record to the Native American activities at the SCC being a cognitive-behavioral model of sex offender treatment with the exception of this one line from Dr. Halon's report.

Furthermore, in his evaluation, Dr. Halon repeatedly referred to the "SCC Native American Healing Program" going as far as to say "Since the [NAHP] is already designated as 'SCC's Native American Healing Program,' it would certainly be included under the rubric of 'sex offender treatment.'" CP at 146. He explains that the program is organized around the "red road," and describes a variety of activities and philosophies associated with the "red road." CP at 147. Dr. Halon then states he based his understanding of the Native American activities at the SCC on Mr. Mix's declaration. CP at 149. Dr. Halon concludes that Brogi's participation in the "SCC's NAHP" is treatment under the statute.

Problematically, Dr. Halon's conclusion is predicated, in part, on a false assertion: that the SCC established a formalized program called the "SCC's Native American Healing Program." Dr. Halon's statements about the Native American activities at the SCC are unsupported by any evidence. For example, Dr. Halon is the only person who uses the term "red road" and it is unclear where he came up with it. Certainly Mr. Mix

did not use the term either in his declaration (CP at 176-183), which comprehensively describes the activities he organizes, or during his deposition, which was submitted by the State in response to Brogi's petition (CP at 56-95). Only Dr. Halon alleges the SCC formally recognizes the Native American Healing Program, a statement that is directly contrary Mr. Mix's description of the activities: "Well, the primary thing is that it's very important to understand that the Native American practices are not – it is not psychotherapy." CP at 70.

The only evidence from the SCC regarding the nature of Native American activities come from two ITPs, which refer to the activities in context of "Cultural Issues/Spiritual/Religion" and do not reference any formalized program. CP at 204. In fact, the SCC draws a clear distinction between formal sex offender specific treatment and the Native American activities:

> As of this writing, despite his successful participation in the Native American circle and the White Bison treatment agenda, Mr. Brogi has shown no motivation to return to the sponsored treatment program at SCC.

CP at 98.

The trial court did not need to accept the opinion of Dr. Halon when it was unsupported – and contradicted – by the facts. Dr. Halon incorrectly describes the program, claims the activities are a formally

recognized SCC treatment program when they are not, and ignores statements from the organizer of the activities who says what he is doing is not psychotherapy. The trial court properly assessed the activities Brogi participated in as not being treatment under the meaning of the statute and rejected his petition for a new trial.

VI. CONCLUSION

The trial court correctly determined that Brogi had not met his burden to show that his mental condition had substantially changed due to continued participation in treatment, and consequently the denial of a new trial should be affirmed. None of Brogi's arguments have merit and this court should reject his efforts to circumvent the clear legislative mandate that sex offender treatment be the path for release for dangerous mentally ill sexual predators. For the foregoing reasons, this Court should affirm.

RESPECTFULLY SUBMITTED this 29th day of October, 2015.

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NO. 72290-5-I

WASHINGTON STATE COURT OF APPEALS, DIVISION I

In re the Detention of: CURTIS GENE BROGI, Respondent.	DECLARATION OF SERVICE

I, Elizabeth Jackson, declare as follows:

On October 29, 2015, I sent via electronic mail true and correct copies of Answer to Appellant's Opening Brief, and Declaration of Service, addressed as follows:

Nancy Collins
wapofficemail@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 29th day of October, 2015, at Seattle, Washington.

Elizabeth Jackson
ELIZABETH JACKSON