NO. 92035-4

SUPREME COURT OF THE STATE OF WASHINGTON

In re the Detention of Dennis Breedlove

DENNIS BREEDLOVE,

Petitioner.

STATE'S ANSWER TO PETITION FOR REVIEW

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I. COUNTERSTATEMENT OF THE ISSUES PRESENTED

This is an appeal regarding a trial court granting an unconditional release trial to Dennis Breedlove, a sexually violent predator (SVP) and convicted child molester. Before the court could order a new trial, Breedlove had the burden of proving that probable cause existed that he had undergone a substantial change in his mental condition, as a result of positive response to continuing participation in treatment, such that he no longer met the definition of a sexually violent predator. The Court of Appeals accepted review and reversed the trial court's decision. Relying on the plain language of RCW 71.09 *et seq.* and this Court's recent decision in *In Re the Pers. Restraint of Meirhofer,* 182 Wn.2d 632, 343 P.3d 731 (2015), the Court of Appeals found Breedlove presented no evidence of change in his mental condition and observing Breedlove had presented no evidence that he had undergone any sex offender treatment, and no evidence that he had undergone any treatment at all that effected his relevant mental condition. Without such evidence, awarding a costly and time-consuming trial to Breedlove would be a tremendous waste of resources and would have the potential to result in the unconditional release of a completely untreated and dangerous sexual predator of children into the public.

There is no basis for this Court's review of the Court of Appeals' decision pursuant to RAP 13.4. If this Court were to accept review, the following issues would be presented:

> **Where this court has already held that an unconditional release trial under RCW 71.09 is warranted only where an SVP has demonstrated a substantial change in his mental condition as a result of positive response to continuing participation in treatment, and where Breedlove presented no supporting evidence that his condition had changed due to continuous participation in treatment, and who submitted an expert report merely collaterally attacking the initial commitment, did the trial court err by ordering an unconditional release trial pursuant to RCW 71.09.090?**

II. COUNTERSTATEMENT OF THE CASE

A. Breedlove's Sexually Violent History

Dennis Wayne Breedlove has been convicted of multiple sexually violent offenses as that term is defined in RCW 71.09.020(17). Breedlove has a lengthy, well-documented history of pedophilia and has disclosed many child victims. CP at 110. His arousal to children is also documented in early treatment records from the Sexual Offender Treatment Program (SOTP) at Twin Rivers Correctional Center in Monroe. In the SOTP Breedlove disclosed that nearly all of his sexual fantasies involve young girls ages 12 and older, and that he liked the ones that were just starting to develop and had a "look of innocence." CP at 129. He admitted to looking at pornography involving young girls for hours every day. *Id.* Breedlove

participated in penile plethysmograph testing on at least two occasions. *Id.* During the most recent test, his strongest response was to visual images of females aged 7 to 17 years, audiotapes of compliant female child sex, the fondling of female children and compliant male child sex. *Id.*

Breedlove committed his first sexually violent offense at age 24. CP at 126. In September 1987, Breedlove forced an 11-year-old girl behind a building where he raped her. *Id.* Breedlove was arrested and charged with Indecent Liberties by Forcible Compulsion. *Id.* He pleaded guilty to that charge and was sentenced to 20 months in prison. *Id.* He was released on May 12, 1990. *Id.*

Breedlove committed his second sexually violent offense in October 1996, when he was 33. *Id.* He followed a 13-year-old girl into her bedroom where he fondled her vagina on top of her underwear. *Id.* The girl's brother came in the room and Breedlove fled the house. *Id.* When police located Breedlove in Vancouver, Washington, they found him in possession of computer disks containing pictures of naked minors, some of whom were engaged in sexual acts. CP at 127. Breedlove pleaded guilty to Child Molestation Second Degree and Possession of Depictions of Minor Engaged in Sexually Explicit Conduct on July 3, 1997. *Id.* He was sentenced to 48 months for the first charge and 12 months for the second, to run concurrently. *Id.* Released in 2000, Breedlove violated the terms of

his community custody by viewing child pornography on a computer in 2001. *Id.* Breedlove accessed websites with depictions of minors engaged in sexually explicit conduct. *Id.* In some photographs, girls of approximately five to ten years of age were being vaginally and anally penetrated by an adult penis; in other photographs, young boys between the ages of approximately 10 to 14 years were masturbating each other. *Id.* Many of the photographs appeared to have been taken by the adult who was perpetrating the sexual abuse. *Id.*

Breedlove was again charged with Possession of Depictions of Minor Engaged in Sexually Explicit Conduct. *Id.* He pleaded guilty and was sentenced to 12 months in prison. *Id.*

In 2004, the trial court entered an order civilly committing Breedlove to the custody of the Department of Social and Health Services (DSHS) as an SVP pursuant to RCW 71.09.060(1). CP at 110. *Id.* Each year since commitment, Breedlove has been evaluated and determined to still meet SVP criteria.

B. Breedlove's Current Petition for Unconditional Release

In 2013, Breedlove exercised his right to petition for unconditional release, and supported his petition with an evaluation completed by Christopher Fisher, Ph.D. CP at 146-205. At the resulting show cause hearing, the State presented the most recent annual review which

determined that Breedlove still met SVP criteria, and thus moved for an order continuing his commitment. VRP at 3-5. The State also responded to Breedlove's petition. CP at 11-78.

The primary issue at the hearing was whether Breedlove's evidence established that his mental condition had so changed due to a positive response to a continuing participation in treatment. VRP at 31. More specifically, the issue was whether Breedlove had participated in "treatment" as intended by the legislature and whether his participation was "continuing." *Id.*

Breedlove's expert, Dr. Fisher, opined that Breedlove was still a pedophile. CP at 172, 184. He disagreed, however, with the State's risk assessment, opining that Breedlove is not, and has never been, likely to reoffend if released. CP at 184-86. Dr. Fisher's report indicated his belief that Breedlove's risk is below the "more likely than not" threshold for two reasons, neither of which satisfy the statutory criteria. First. Dr. Fisher's interpretation of actuarial instruments indicate Breedlove was *never* more likely to reoffend. Second, Dr. Fisher believes the relevant scientific standards and principles have changed over the years, and reinterpretation of Breedlove's information under the current science indicates that Breedlove is not likely to reoffend. *Id.* Fisher indicated that Breedlove has "generally matured" over the years. CP at 186.

Dr. Fisher indicated that Breedlove was "ambivalent" to treatment and that he was like others who did not "participate in focused sex offender treatment." CP 191, 192. He nevertheless concluded that Breedlove should be unconditionally released, opining that he had changed "through treatment" and no longer met the definition of Sexually Violent Predator (SVP). CP at 186.

The trial court found that Breedlove's expert, Dr. Fisher, referenced "the Biblical Counseling Foundation self-confrontation course" as the "treatment" supporting his conclusion that "Breedlove has changed through treatment since his initial commitment." VRP at 32. The trial court noted that Dr. Fisher was "unclear" as to how this constituted treatment. *Id.* The trial court also stated that it did not know what either "continuing" or "treatment" meant. VRP at 31-32.The court further acknowledged that Dr. Fisher's reference to "so changed through treatment" was in support of the conditional "LRA" release petition, not the unconditional release petition. *Id.* The trial court nevertheless found probable cause to believe that Breedlove's condition had so changed, through "treatment," and ordered an unconditional release trial. *Id.*; CP at 10.

The State moved for reconsideration, citing additional legal authority that addressed the trial court's concern that there was no legal

definition of "treatment" in RCW 71.09. CP at 3-9. The State provided legislative intent documentation, Washington Administrative Code provisions regarding treatment, and excerpts from RCW 71.09 indicating that "treatment" means "sex offender specific treatment." On July 19, 2013, the trial court denied the State's Motion to Reconsider, stating:

> The WAC sections referenced in Petitioner's Motion do specify that Respondent's individual treatment plan (ITP) must address sex offender specific treatment. RCW 71.09.090(4)(b)(ii) neither defines "treatment" nor references "sex offender" treatment or "treatment as defined under ITP." For these reasons the Motion to Reconsider is DENIED.

CP at 1.

The State then filed a Motion for Discretionary Review in the Court of Appeals. The Motion asserted that the trial court committed obvious error in granting a release trial, where Breedlove showed no evidence of change under the statutory criteria. The Commissioner granted the State's Motion, concluding: "The Trial court's grant of a release trial in this case constitutes obvious error warranting discretionary review." *Id.*

A panel of judges then held oral argument on the sole issue in this matter: Did the trial court err in finding that Breedlove had met his burden of probable cause to show Breedlove's mental condition had substantially changed as a result of continuous participation in treatment such that he no

longer met the definition of a sexually violent predator? The Court considered both of the State's arguments on the issue: that the trial court failed to apply the correct definition of "treatment" in its analysis, and regardless of the definition of treatment, that Breedlove failed to present evidence that his mental condition had so changed through treatment that he no longer met the definition of a sexually violent predator. The Court of Appeals reversed the trial court in an opinion, finding that Breedlove's expert opinion was not substantiated by the evidence and did not support a finding that his condition had changed through treatment. *In re Detention of Breedlove*, 187 Wn. App 1029, WL 2372720 4-5, (2015), attached as Appendix 1. Breedlove petitioned this Court for review.

III. ARGUMENT

Breedlove asserts three arguments, all without merit. First, he argues that the trial court properly granted Mr. Breedlove an unconditional release trial despite the absence of the required treatment-based change. Second, he asserts that the Court of Appeals decision in this case conflicts with *In Re the Pers. Restraint of Meirhofer,* 182 Wn.2d 632, 343 P.3d 731 (2015) and with the Court of Appeals decision in *In Re Det. of Sease*, COA No. 45512-9-II[1]. And lastly, he ignores the record by claiming that the Court of Appeals considered issues the State did not properly preserve.

[1] Publication granted September 9, 2015.

None of his arguments have any basis in law or fact. Additionally, Breedlove fails to establish any basis for acceptance of discretionary review.

Breedlove fails to establish that this matter should be reviewed pursuant to conflict with Supreme Court authority, conflicting Court of Appeals Authority, or as a significant question of law under the Constitution. Pet. Brief at 5-6; RAP 13.4(b)(1), (2), (3).

The Court of Appeals opinion in this matter is not in conflict with the Supreme Court's decision in *Meirhofer*. The decision in *Sease* is similarly concordant with the underlying opinion.

Finally, the underlying decision in this matter does not raise "a significant question of law under the Constitution of the State of Washington or of the United States." RAP 13.4(b)(3). Breedlove cites two United States Supreme Court decisions for the sole purpose of establishing that, generally, persons must be mentally ill and dangerous to be confined under SVP laws. There is no dispute of this core concept; mental illness and dangerousness must be present in every civil commitment matter. Simply claiming depravation of liberty without due process does not create "a significant question of law under the Constitution." This Court recently rejected similar conclusory claims of reviewable matters:

> While constitutions of both Washington and the United States are controlling in cases involving deprivation of liberty. Johnson does not elaborate on this sentence at all. Where a petitioner makes a due process challenge, " '[N]aked castings into the constitutional seas are not sufficient to command judicial consideration and discussion.' " *State v. Blilie,* 132 Wn.2d 484, 493 n. 2, 939 P.2d 691 (1997) (alteration in original) (internal quotation marks omitted) (quoting *In re Rosier,* 105 Wn.2d 606, 616, 717 P.2d 1353 (1986)).

State v. Johnson, 179 Wn.2d 534, 558, 315 P.3d 1090, 1102, *as amended* (Mar. 13, 2014), *cert. denied*, 135 S. Ct. 139, 190 L. Ed. 2d 105 (2014).

Here, the sole question is whether the trial court improperly ordered an unconditional release trial for Mr. Breedlove without the proper evidentiary basis. The Court of Appeals ruled that the trial court did not have an evidentiary basis to do so. This is not a significant question of constitutional law.

A. The Court of Appeals Decision Here Does Not Conflict with *Meirhofer* or *Sease*

Breedlove claims that the Court of Appeals decision in this matter is in direct conflict with Supreme Court authority in *Meirhofer* and with the Court of Appeals decision in *Sease*. Breedlove's argument is based on a misrepresentation of both the facts below and of the decision of the Court of Appeals, and is a misapprehension of the law.

The issue before the Court of Appeals was straightforward: Did the trial court err in finding Breedlove's evidence established probable cause

that his mental condition had significantly changed through continuous participation in treatment so that he no longer met the definition of a sexually violent predator?

To that end, the State presented two arguments. The trial court did not apply the definition of "treatment" as clearly intended by the legislature as a prerequisite to release, and even if the applied definition was correct, there was no evidence supporting Dr. Christopher Fisher's conclusory opinion that Breedlove's mental condition had "so changed." The Court of Appeals agreed with the latter argument, opining that the trial court erred in finding evidence that Breedlove's mental condition had "so changed." COA Opinion at 8-9. This opinion obviated the need to reach the remaining argument. *Id* at 9.[2]

Breedlove claims that the decision below is in direct conflict with decisions in *Meirhofer* and *Sease*.[3] The first paragraph of the decision in Sease plainly states that the decision is not only consistent with *Meirhofer*, but based upon that ruling:

> Based on the plain language of RCW 71. 09.090, and the recent opinion from our Supreme Court, *In re the Matter of the Pers. Restraint of Meirhofer*, 182 Wn.2d 632, 343 P.3d

[2] Coincidentally, on the same day the Court of Appeals filed its opinion in this matter, Governor Inslee signed a *clarifying* amendment to RCW 71.09 et seq. into law that established that "treatment" was defined as the sex offender treatment program at the Special Commitment Center, which was the State's position in the present case.

> 731 (2015), we hold that the State established a prima facie case showing that Sease still met the definition of a SVP, and that Sease failed to present probable cause to believe his mental condition had " so changed" that he no longer met the definition of a SVP.

In Re Det. of Sease, COA No. 45512-9-II at 1. The Sease Court relied, in the vast majority of the opinion, on the Supreme Court's decision in *Meirhofer*, citing to the opinion more than 40 times.

The *Sease* decision also harmonizes with the Court of Appeals opinion in this matter. It is true that Sease's diagnostic nomenclature of his "mental disorder" had changed whereas Breedlove's "mental disorder" had not. However, both of the opinions stand for the premise that the SVP's "mental disorder" diagnosis is not the sum total analysis regarding a SVP's "mental condition" but is something to consider when evaluating whether the SVP has undergone "change as a result of a positive response to continuing participation in treatment."

Meirhofer, *Breedlove*, and *Sease* each stand for the premise that "mental condition" encompasses more than just a DSM diagnosis. Breedlove acknowledges that *Meirhofer* held that a change in diagnosis alone does not show the requisite change, citing 182 Wn.2d at 644, and argues: "But here, the court concluded Mr. Breedlove cannot establish a change in condition without establishing a change in diagnosis." Pet. Brief at 8-9. This was not the holding and the characterization of the Court of

Appeals opinion is objectively false. The Court did observe that even Breedlove's expert found no change in Breedlove's mental *disorder of pedophilia*, which is undisputed. Opinion at 7.

Breedlove claims that the Court stopped its analysis with that conclusion. On the contrary the Court then proceeded to review (for the majority of its analysis) the lack of evidence supporting Dr. Fisher's conclusory opinions regarding future dangerousness.

> Essentially, Dr. Fisher challenges the initial commitment finding that Breedlove met the criteria for an SVP. This issue was recently addressed in *McCuistion*[4], where the Supreme Court held that evidence from a detainee that he was not and had never been mentally ill, would not support relief through the annual review process because it was in effect a collateral attack on the initial order of commitment. 174 Wn.2d at 386. The initial finding is "a verity in determining whether an individual is mentally ill and dangerous at a later date." *McCuistion*, 174 Wn.2d at 384-85.

COA Opinion at 7-8.

Only after fully and completely analyzing Breedlove's "evidence" presented regarding both his mental *disorder* and future dangerousness did the Court opine that there was no evidence of a change in Breedlove's mental *condition*, much less a substantial one.

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[4] *In re McCuistion* 174 Wn.2d 369, 275 P.3d 1092 (2012)

> "Dr. Fisher's conclusory opinion is that Breedlove never was an SVP. Dr. Fisher's report did state that Breedlove had changed through treatment, but failed to substantiate that statement with any evidence of that change."

Opinion at 7-8.

The Court of Appeals' opinion, which is based in large part on *Meirhofer*, relies on established law requiring courts to look beyond an expert witness' stated conclusions and establish that there a factual basis for those conclusions. When it did this required analysis, the Court of Appeals concluded none of the expert conclusions regarding change were supported by fact. It also opined that even Dr. Fisher's opinions of completion of treatment were unsupported by underlying facts:

> Indeed, the evidence is conflicting as to whether the treatment was 12 or 24 weeks long. No specific evidence of the content of the meetings was presented. Further, the awareness program that Breedlove did complete was merely an informational course about the treatment offered.
> ....
>
> The State put forth evidence that Breedlove continued to show sexual interest in children even when he was in custody.
>
> Dr. Fisher's report fails to cite any changes that Breedlove has made. Attending a group based on "biblical principles" does not demonstrate change. It only demonstrated participation.

Opinion at 8-9.

After a complete analysis, The Court properly found that Dr. Fisher's report was a collateral attack on the initial commitment, which cannot be the basis for a new trial, citing *McCuistion* and the stated legislative intent. Opinion at 8. The claim that the Court concluded Mr. Breedlove cannot establish a change in condition without establishing a change in diagnosis is simply not supported. The Court began with the undisputed fact that Breedlove continues to suffer from a mental abnormality as the first part of its long and thorough analysis of why Breedlove's petition was utterly devoid of evidentiary support.

The Court's decision is in complete harmony with multiple sources of Supreme Court authority, including *Meirhofer*, *McCuistion*, *Petersen*[5], and *Ambers*[6]. Opinion at 5 and 7. There is no conflict and further review is not warranted.

B. The Court of Appeals Properly Considered Both of the State's Arguments on the Sole Issue Presented.

The State has consistently made two distinct arguments regarding why the trial court erroneously found evidence establishing probable cause: the trial court's interpretation of "treatment" and Breedlove's failure to establish evidence of change. The State has made both of these arguments at all stages of this litigation. Breedlove now claims, in

[5] In re Det. of Petersen, 145 Wn.2d 789, 42 P.3d 952 (2002)
[6] In re Det. of Ambers, 160 Wn.2d 543, 158 P.3d 1144(2007).

multiple instances throughout his brief, that the State never made an argument that Breedlove had failed to demonstrate evidence of change. Pet. Brief at 2-5, 10, and 11. Breedlove claims that, throughout the litigation, the State has *only* preserved the argument regarding the definition of treatment under RCW 71.09 et seq. Pet. Brief at 4. This claim is supported by neither the trial court record nor the appellate court record. In fact, Breedlove actually argued the *opposite* position to the Court of Appeals, arguing that the State had *never* preserved its argument regarding the definition of treatment and asking the Court of Appeals to disregard that argument pursuant to RAP 2.5. *See* Breedlove's Appellate Brief to Court of Appeals at 4.[7]

Having failed below, Breedlove simply attempts the converse argument here. But the record shows that the State has argued that Breedlove has failed to establish evidence of change through treatment at every stage of litigation.

From the outset of this issue, the State has alleged that Breedlove's petition for unconditional release was unsupported by sufficient facts, did not support that he had changed, did not support that he had completed any treatment, improperly relied on alleged changes in scientific analysis,

[7] Breedlove's request was not granted by the Court.

and was merely a collateral attack on the initial commitment. The initial response brief contains all of these arguments:

> "[W]hile Dr. Fisher opines that Mr. Breedlove no longer meets the "more likely than not to reoffend" standard, he does not attribute that to the completion of any treatment at the SCC, nor does he attribute that to any major physiological change. He attributes this "change" in Mr. Breedlove's criteria solely to a reevaluation of Mr. Breedlove's initial commitment information and a "general maturation" achieved by simply growing older."

Petitioner's Trial Court Response at 2.

> RCW 71.09.090 clearly requires a showing of a "substantial change," brought about through positive response to "continuing participation in treatment." All of Mr. Breedlove's earlier treatment progress has previously been considered by this court. *He has not demonstrated any further change **nor** any further treatment* since his initial commitment, and certainly not since his last hearing.

Id at 6.

> Finally, Respondent contends that there have been a "wholesale changes in the field of risk assessment" since Respondent was committed to the SCC. Indeed, this is the primary emphasis of Dr. Fisher's report. The Legislature has specifically precluded this type of evidence as the basis for a new trial when it enacted the 2005 amendments to RCW 71.09.090.

Id at 7.

> The State maintained the same arguments to the Court of Appeals.
>
> Second, Dr. Fisher neither states, nor identifies any evidence, that Breedlove has experienced a "substantial" change, **nor** has he done so through *positive response to continuous participation in treatment.* ...[H]e argued that

> Breedlove simply never was an SVP and also that, regardless, the science no longer supports the high-risk assessment...[T]here simply is no support for the trial court's conclusion that probable cause exists to order a trial on the issue of unconditional release.

State's Motion for Discretionary Review at 19.[8]

> [Breedlove's evidence is a] collateral attack on the original commitment diagnoses [which] has no place during the probable cause hearing, and 3) that Dr. Fisher's opinion regarding the changes in the state of the science and the changes in Breedlove's actuarial scores are not, and have never been, sufficient to warrant a new trial under the probable cause standard.

State's Reply to Breedlove's First Response at 6.

> Dr. Fisher's report lacks sufficient factual bases to support his conclusory statements. As a result, probable cause cannot be based on that report as a matter of law.
>
> The bases for "change" included in Dr. Fisher's report are precisely what was deemed insufficient by the Supreme Court in *In re McCuistion* 174 Wn.2d 369, 275 P.3d 1092 (2012).

State's Reply to Breedlove's Second Response at 5.

All of these arguments were presented to the Court of Appeals on Discretionary Review which properly considered them in granting review.

Finally, the arguments were reiterated to the Court of Appeals after review was granted.

> The trial court also erred because it failed to reject Breedlove's evidence as a collateral attack on his initial

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> commitment. An SVP cannot demonstrate change through an evaluation that merely disagrees with and attacks the original basis for commitment. See *McCuistion*, 174 Wn.2d at 832.
>
> The trial court begins with the assumption that Breedlove is an SVP, and should have required him to produce evidence of a substantial change in his condition due to continuing participation in treatment. Instead, the evidence before the court was essentially an irrelevant collateral attack.
>
> Dr. Fisher stated only once in his entire report that Breedlove had changed "through treatment." CP at 186. ***But he did not state, or identify any evidence showing that, Breedlove experienced "a substantial change."*** Instead, his report constitutes an extended argument that Breedlove never was an SVP and that, even if so, the science no longer shows he is a high risk to reoffend. *Id.*

State's Appellant Brief to COA Div. 1 at 20.

> Even if the trial court's interpretation of the statutory meaning of "continuing" and "treatment" were valid, trial court lacked sufficient evidence to make its determination of probable cause.
>
> * * * *
>
> While it is true that the Respondent's hired expert, Dr. Fisher, did indeed state that Mr. Breedlove had "changed through treatment" the actual report fails to establish prima facie evidence of change.
>
> * * * *
>
> Dr. Fisher's opinion that Breedlove had changed through treatment is the type of unsupported conclusion that should be disregarded. *Ward*, 125 Wn. App. at 387[9]... [The appellate court] also ruled correctly when it found that ***Dr. Fisher's report actually failed to describe a change in***

[9] *In re Det. of Ward*, 125 Wn. App. 381, 104 P.3d 747 (2005), *superseded by statute on other grounds as recognized by McCuistion*, 174 Wn.2d at 397-98.

> ***Mr. Breedlove's mental condition,*** regardless of the other deficiencies in Dr. Fisher's report.

State's Reply at 11-13.

Breedlove is correct when he claims that the State argued that there must be a causal connection between treatment and any claimed change in mental condition. But the State also made all of the arguments Breedlove now claims were missing from the record. Based on the record in this matter it is difficult to see how Breedlove could claim that the State didn't present the arguments and the Court of Appeals panel of judges arrived at their decision *sua sponte*. Pet. Brief at 4-10.

Breedlove's claims are not consistent with any record in this matter and the arguments are, at best, disingenuous. Breedlove's arguments should be rejected.

IV. CONCLUSION

The Court of Appeals conducted a thorough and prudent analysis of this matter that was consistent with and based upon current Supreme Court authority. Discretionary review should be denied.

RESPECTFULLY SUBMITTED this 9th day of September, 2015.

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APPENDIX 1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In the Matter of the Detention of	)	
	)	No. 70750-7-I
DENNIS WAYNE BREEDLOVE,	)	
	)	DIVISION ONE
Respondent.	)	
	)	UNPUBLISHED OPINION
	)	
	)	
	)	FILED: May 18, 2015

TRICKEY, J. — An individual confined as a sexually violent predator (SVP) must present sufficient evidence that he has "so changed" to obtain an unconditional release trial. Here, the petitioner relies on a report that does not meet the necessary criteria to establish a sufficient change such that a release trial should be granted. Accordingly, we reverse the trial court's decision granting an unconditional release trial.

FACTS

Dennis Breedlove is confined as a sexually violent predator (SVP) under chapter 71.09 RCW, Washington's SVP statute. That statue requires annual review of an SVP status. RCW 71.09.070(1). Breedlove's annual reviews, since his commitment in 2004, have supported his continued detention. In June 2011, the trial court found that Breedlove continued to meet the criteria for commitment as an SVP and that he failed to present prima facie evidence that his progress warranted an unconditional release trial. Breedlove did not demonstrate that a

less restrictive alternative (LRA) was in his best interest or that conditions could be imposed that would adequately protect the community.[1]

On January 28, 2013, the Special Commitment Center (SCC) completed another review pursuant to RCW 71.09.070(1). In that review, Wendi L. Wachsmuth, Ph.D, opined that Breedlove continued to meet the criteria for commitment as an SVP and that no less restrictive alternatives could be imposed that would adequately protect the community, nor would such restrictions be in Breedlove's best interest. Dr. Wachsmuth cited specific examples of failed or ignored treatment along with a history of malfeasance at the SCC.

In 2012, Breedlove retained Christopher J. Fisher, Psy.D to assess his current condition. Dr. Fisher noted that since Breedlove's commitment in 2004, he "only participated in two brief periods of focused sex offender treatment."[2] In 2007, Breedlove was a "stellar participant" in a 12-week introductory group, "Awareness and Preparation."[3] Breedlove did not continue into the Cohort group at that time.

In early 2009 he started a Cohort group, but only stayed in the group for approximately one month. Three years later, in March 2012, Breedlove completed a 12- or 24-week "Biblical Counseling Foundation Self Confrontation Course" designed to assist individuals in changing their cognitive thoughts, feelings, and behaviors based on biblical principles.[4] After receiving a behavioral management report for marijuana possession, Breedlove attended a "Counselor Assisted Self

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[1] The Mack House (the LRA) does not provide adequate supervision for an untreated high-risk sex offender.
[2] Clerk's Papers (CP) at 168.
[3] CP at 168.
[4] CP at 169.

Help Group," in 2008 through 2009, where he was described to be diligently working on sobriety, including the relationship between his drug addiction and sexual offending.[5]

Dr. Fisher noted and agreed with the most recent annual review that focused on "Breedlove's mental disorder, namely pedophilia, and states that there is little indication that his mental disorder has changed since his initial commitment."[6]

Dr. Fisher set forth the definition of "pedophilia" in the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision (DSM-IV-TR) and had "little doubt" that Breedlove "continue[d] to show evidence of pedophilia" as defined in DSM-IV-TR.[7] Even so, Dr. Fisher criticized the annual review for its failure to address the considerable changes that have occurred in the field of sex offender risk assessment. Those changes, he opines, form the basis to judge Breedlove's risk level as quite different now from when he was first committed. As an example, he cited a 2003 chapter 71.09 RCW evaluation performed by Dr. Packard that used what Dr. Fisher described as outdated and obsolete methodologies and a "gross simplification" of an adequate sex offender risk assessment.[8]

Dr. Fisher concluded that Breedlove no longer met the definition of an SVP "by virtue of the changes he has made in himself through treatment and a generalized maturational process over the last 12 years, combined with wholesale

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[5] CP at 170.
[6] CP at 184.
[7] CP at 186.
[8] CP at 184.

changes in the field of risk assessment and large amounts of new empirical data now available that was not available at the time of his initial commitment."[9]

After review of the documents and oral argument, the trial court issued the following order:

> [P]ursuant to RCW 71.09.080 the court finds Mr. Breedlove has shown cause to schedule a trial on (1) whether he has changed [and] that he no longer meets criteria of a sexually violent predator; and (2) whether he should be released to a less restrictive alternative.[10]

The trial court denied the State's motion to reconsider the order granting Breedlove an unconditional release trial. The State does not object to a trial on whether Breedlove should be released to a less restrictive alternative.

The State filed a motion for discretionary review arguing that the trial court committed obvious error in granting a release trial when Breedlove showed no evidence of change under the statutory criteria. The State also argued that the statutory term "treatment" is limited to sex offender specific treatment and the trial court erred in failing to support the State's interpretation.

A commissioner of this court agreed that the lack of evidence of change in Breedlove's mental condition of pedophilia warranted discretionary review, but found the trial court's rejection of the State's statutory interpretation of the term "treatment" did not. Accordingly, the commissioner granted discretionary review as to only whether the trial court erred in granting an unconditional release trial on the basis that Breedlove had changed.

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[9] CP at 186.
[10] CP at 10.

ANALYSIS

A sexually violent predator is defined as "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). The standard for "[l]ikely" is "more probably than not." RCW 71.09.020(7).

Because indefinite civil commitment gives rise to serious constitutional concerns, the SVP statute contains certain procedural safeguards, including mandating annual order to show cause hearings under RCW 71.09.090. At a show cause hearing, the State must make a prima facie case that the individual still meets the criteria of an SVP. The SVP also has the opportunity to present evidence that they have "so changed" since the time of their commitment to warrant a new full evidentiary hearing or a new commitment trial. In re Meirhofer, __ Wn.2d __, 343 P.3d 731 (2015); In re Det. of Petersen, 145 Wn.2d 789, 798, 42 P.3d 952 (2002). The trial court may not weigh the evidence, but rather must simply determine whether sufficient evidence has been presented to establish probable cause that the SVP's continued civil commitment is unlawful. Petersen, 145 Wn.2d at 797-98 ("Probable cause exists if the proposition to be proven has been prima facie shown."); In re Det. of Ambers, 160 Wn.2d 543, 557, 158 P.3d 1144 (2007).

Each year, as required by statute, the State had a qualified professional review Breedlove's mental condition to determine whether or not his confinement

was still warranted. RCW 71.09.070(1); WAC 388-880-031. Under the statutory scheme, after each annual review, a show cause hearing is held to determine whether probable cause exists for a new evidentiary hearing on the civil commitment. RCW 71.09.090(1),(2)(a). The court must order a new evidentiary hearing if, at the annual show cause hearing, the State fails to present prima facie evidence establishing that the committed person "continues to meet the definition of a sexually violent predator" and that a less restrictive alternative is not warranted. RCW 71.09.090(2)(a)-(c). In making this showing, the State can rely exclusively on the annual review report. RCW 71.09.090(2)(b).

Even if the State meets its prima facie burden, the confined person may still obtain a new evidentiary hearing if the court determines that "probable cause exists to believe that the person's condition has so changed," that he is no longer a sexually violent predator, or that a less restrictive alternative than full confinement is appropriate. RCW 71.09.090(2)(c). Apart from the annual review process, the confined person may independently petition the court for release at any time. RCW 71.09.090(2)(a); WAC 388-880-050(3)(b).

As a result of legislation in 2005, the confined person cannot establish probable cause merely by showing advancing age or any other "single demographic change." RW 71.09.090(4)(c). If the State satisfies its prima facie burden, a full evidentiary hearing is available only upon a showing that the confined person has undergone either (1) a profound and permanent physiological change, such as a stroke, paralysis, or dementia, potentially rending him no longer dangerous; or (2) a profound mental change by receiving psychological treatment

services during confinement—potentially rendering him no longer mentally ill. RCW 71.09.090(4)(b)(i),(ii); State v. McCuistion, 174 Wn.2d 369, 392, 275 P.3d 1092 (2012), cert. denied, __ U.S.__, 133 S. Ct.1460, 185 L. Ed. 2d 368 (2013).

This court reviews de novo a trial court's legal conclusion as to whether evidence meets the standard of probable cause required for a sexually violent predator to obtain a new commitment trial. Petersen, 145 Wn.2d at 799. The court must order a full evidentiary hearing on the person's civil commitment if the court finds either (1) a deficiency in the State's prima facie case for continued commitment, or (2) sufficiency of proof by the committed person that he has "so changed" that he no longer meets the criteria for a sexually violent predator. RCW 71.09.090(2)(c); see Petersen, 145 Wn.2d at 798.

As to the first issue, no one claims the State's evidence is deficient. As to the second issue, Breedlove's own evidence is insufficient to show that he has "so changed" that confinement is no longer warranted. Dr. Fisher's report failed to identify a substantial change in Breedlove's mental disorder, pedophilia. His report stated:

> The most recent Annual Review focuses on Mr. Breedlove's mental disorder, namely pedophilia, and states that there is little indication that this mental disorder has changed since his initial commitment. I agree with this finding.[11]

Dr. Fisher contends that Breedlove's risk level should be judged differently in light of changes in sexual recidivism risk assessment, including research findings of age as a protective factor and declining base rates of sexual recidivism in the country. Dr. Fisher criticized the risk assessment method used for

[11] CP at 184.

Breedlove's initial commitment and opined that Breedlove's risk score at his initial commitment is "now associated with dramatically lower recidivism estimates."[12]

Essentially, Dr. Fisher challenges the initial commitment finding that Breedlove met the criteria for an SVP. This issue was recently addressed in McCuistion, where the Supreme Court held that evidence from a detainee that he was not and had never been mentally ill, would not support relief through the annual review process because it was in effect a collateral attack on the initial order of commitment. 174 Wn.2d at 386. The initial finding is "a verity in determining whether an individual is mentally ill and dangerous at a later date." McCuistion, 174 Wn.2d at 384-85. The 2005 amendments are "intended only to provide a method of revisiting the indefinite commitment due to a relevant change in the person's condition, not an alternative method of collaterally attacking a person's indefinite commitment for reasons unrelated to a change in condition." LAWS OF 2005, ch. 344, § 1.

Dr. Fisher's report did not identify any evidence demonstrating that Breedlove had experienced a substantial change. As the report noted:

> [I]n examining the considerable changes to the field of sex offender risk assessment that have occurred since Mr. Breedlove's initial commitment, as well as the changes that he himself has undergone, it is far too simplistic to say that because he was once found to be an SVP, he still meets criteria today.[13]

Dr. Fisher's conclusory opinion is that Breedlove never was an SVP. Dr. Fisher's report did state that Breedlove had changed through treatment, but failed to substantiate that statement with any evidence of that change. Indeed, the

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[12] CP at 185.
[13] CP at 184.

evidence is conflicting as to whether the treatment was 12 or 24 weeks long. No specific evidence of the content of the meetings was presented. Further, the awareness program that Breedlove did complete was merely an informational course about the treatment offered.

The trial court "must look beyond an expert's stated conclusions to determine if they are supported by sufficient facts." In re Det. of Ward, 125 Wn. App. 381, 387, 104 P.3d 747 (2005), superseded by statute on other grounds as recognized by McCuistion, 174 Wn.2d at 397-98. The State put forth evidence that Breedlove continued to show sexual interest in children even when he was in custody.

Dr. Fisher's report fails to cite any changes that Breedlove has made. Attending a group based on "biblical principles" does not demonstrate change. It only demonstrated participation.

Because Breedlove has failed to demonstrate any change, we need not and do not discuss whether the trial court appropriately defined treatment. The trial court's decision to grant an unconditional release trial is reversed; the less restrictive alternative trial may proceed by agreement of the parties.

Trickey, J

WE CONCUR:

Spearman, C.J.

NO. 92035-4

WASHINGTON STATE SUPREME COURT

In re the Detention of: DENNIS BREEDLOVE, Petitioner.	DECLARATION OF SERVICE

I, Kelly Hadsell, declare as follows:

On September 9, 2015, pursuant to the Electronic Service Agreement, I served a true and correct copy of the Answer To Petition For Review and Declaration of Service via electronic mail, addressed as follows:

Gregory Link
Washington Appellate Project
greg@washapp.org
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 9th day of September, 2015, at Seattle, Washington.

Kelly Hadsell
KELLY HADSELL

OFFICE RECEPTIONIST, CLERK

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No. 92035-4
In re the Detention of Dennis Breedlove, Petitioner
State's Answer To Petition For Review

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Thank you,

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