70750-7

70750-7

NO. 70750-7

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

In re the Detention of Dennis Breedlove

STATE OF WASHINGTON,

Appellant,

v.

DENNIS BREEDLOVE,

Respondent.

BRIEF OF APPELLANT

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I. ASSIGNMENT OF ERROR

The trial court erred in concluding that probable cause existed to warrant an unconditional release trial. This assignment of error is to both the trial court's May 22, 2013 order granting Dennis Wayne Breedlove's (Breedlove) Petition for an Unconditional Release Trial, and to the trial court's denial of the State's Motion for Reconsideration on July 19, 2013. CP at 1, 10.

II. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Whether Breedlove, a sexually violent predator (SVP) who suffers from pedophilia, failed to establish probable cause to believe his mental condition has substantially changed due to continuing participation in treatment, because he has not engaged in sex offender treatment and his petition for an unconditional release trial was based on unsupported, irrelevant and conclusory expert opinions.

III. STATEMENT OF THE CASE

A. Procedural Background

On February 4, 2004, this 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.

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. A Show Cause hearing was held on May 22, 2013, at which the State moved for a finding that Breedlove

continues to meet the criteria for commitment as an SVP. VRP at 3-5. The trial court considered two petitions Breedlove filed, one for an unconditional release trial and one for a less restrictive alternative (LRA) release trial. *Id.;* CP at 80-105, 146-205. Only the trial court's ordering of an unconditional release trial is at issue in this appeal. CP at 146-205.

The State 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.* The trial court stated that it did not know what either "continuing" or "treatment" meant. VRP at 31-32.

> Where I'm having an issue is trying to figure out, number one, what the Legislature means by continuing – I'm looking at 71.09.090, subsection (4)(b)(2). I mean, that's what everybody's focusing on, and that is what does that section mean when it says positive response to continuing participation in treatment? It's also not defined, continuing. So I don't know what continuing means and I don't think the case law is clear on what continuing means, much less what treatment means.
>
> So I don't know if that was intentionally vague by the Legislature or if they just didn't think it through. I don't know what treatment means.

VRP at 31-32.

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 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, 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 (MDR) in this Court. The MDR asserted that the trial court committed obvious error in granting a release trial, where Breedlove showed no evidence of change under the statutory criteria. Commissioner Kanazawa took into consideration the fact that Breedlove's expert agreed with the finding that Breedlove continued to suffer from pedophilia. Additionally, she considered Dr. Fisher's challenges to the initial commitment and the finding that Breedlove was an SVP. Regarding this assertion, the Commissioner wrote:

> In essence, Dr. Fisher challenges the initial commitment, finding that Breedlove was an SVP. But the initial finding is "a verity in determining whether an individual is mentally ill and dangerous at a later date." The 2005 amendments are: intended only to provide a method for revisiting the indefinite commitment due to a relevant change *in the person's condition,* not an alternate method of collaterally attacking a person's indefinite commitment for reasons unrelated to a change in condition.

Commissioner's Ruling Granting Discretionary Review at 13.

The Commissioner granted the State's MDR, concluding: "The Trial court's grant of a release trial in this case constitutes obvious error warranting discretionary review." *Id.*

B. Breedlove's Sexually Violent History:

Dennis Wayne Breedlove was born on May 14, 1963. He has been convicted of several crimes, including two sexually violent offenses as that term is defined in RCW 71.09.020(17).

Breedlove committed his first sexually violent offense at age 24. CP at 126. In September 1987, Breedlove approached L.J., age 11, at a Marysville skating rink, and forced her behind the building. *Id.* Once there, Breedlove forced her to the ground. *Id.* Breedlove removed his underwear, took off L.J.'s underwear and penetrated her vaginally with his penis. *Id.* Throughout the rape, L.J. was crying. *Id.* Shortly after Breedlove began raping L.J. a car drove by; Breedlove pulled up his pants and fled the scene. *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 molested M.H., age 13, at her home. *Id.* M.H. went into her room and Breedlove followed. *Id.* M.H. was on her stomach and Breedlove started rubbing her back and legs, then reached up under her shorts and fondled her vagina on top of her underwear. *Id.* At this point, M.H.'s brother came in the room and Breedlove left 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. *Id.*

In September, 2001, Breedlove was caught viewing child pornography on the computers at an Everett employment office. CP at 128. 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 on January 24, 2002, and was sentenced to 12 months in prison. *Id.* He was scheduled for release on August 6, 2003, but was detained on the SVP petition filed herein. *Id*

C. Factual Background From Show Cause Hearing:

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's expert, Dr. Fisher, opined that Breedlove was still a pedophile. CP at 172, 184. He disagreed, however, with the 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 because 1) his interpretation of actuarial instruments indicate Breedlove was *never* more likely to reoffend, and 2) 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.

IV. STANDARD OF REVIEW

This Court reviews de novo a trial court's legal determination of whether evidence meets the probable cause standard in an RCW 71.09.090 show cause hearing. *In re Detention of Jones*, 149 Wn. App. 16, 23, 201 P.3d 1066 (2009) (citing *In re Detention of Peterson*, 145 Wn.2d 789, 799, 42 P.3d 952 (2002) (*Petersen* II).

V. ARGUMENT

Breedlove does not participate in sex offender treatment. The trial court's conclusion that his participation in religious activities constituted treatment, and that he had shown, prima facie, a substantial change in his condition through continuing participation in treatment, was clearly error. This Court should vacate the order granting Breedlove an unconditional release trial.

A. Statutory Framework – Annual Review Show Cause Hearing

1. Overview and Standard of Proof

An individual determined to be an SVP[1] is committed to the custody of DSHS for placement in a secure facility:

> for control, care, and treatment until such time as: (a) The person's condition has so changed that the person no longer meets the definition of a sexually violent predator; or (b) conditional release to a less restrictive alternative as set forth in RCW 71.09.092 is in the best interest of the person and conditions can be imposed that would adequately protect the community.

RCW 71.09.060(1). DSHS is required to conduct a yearly evaluation of the SVP's mental condition in order to determine whether he continues to meet the statutory criteria for commitment. RCW 71.09.070. Unless the SVP affirmatively waives the right to a hearing, the trial court must schedule a show cause hearing. RCW 71.09.090(2). An SVP may also submit his own expert evaluation to the court at any time. *Id.*

The standard of proof at a show cause hearing is "probable cause." *State v. McCuistion,* 174 Wn.2d 369, 382, 275 P.3d 1092 (2012) *cert. denied,* 133 S.Ct. 1460, 185 L.Ed.2d 185 (2013). While the probable cause standard is not a stringent one, it allows the court to perform a critical gate-keeping function:

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[1] An SVP is defined as a person who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder that makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility. RCW 71.09.020(18). "Likely to engage..." means that the person more probably than not will engage in such acts if unconditionally released. RCW 71.09.020(7).

> Under this standard, a court must assume the truth of the evidence presented; it may not 'weigh and measure asserted facts against potentially competing ones.' At the same time, the court can and must determine whether the asserted evidence, if believed, is *sufficient* to establish the proposition its proponent intends to prove.

Id. (emphasis in original; internal citations omitted).

The Legislature specifically found that the SVP population is extremely dangerous and their treatment needs are very long term, implying the statute contemplates a prolonged period of treatment. RCW 71.09.010; *In re Petersen*, 138 Wn2d 70, 78, 980 P.2d 1204 (1999) (*Petersen* I). The statute involves indefinite commitment, "not a series of fixed one-year terms with continued commitment having to be justified beyond a reasonable doubt *annually* at evidentiary hearings where the State bears the burden of proof." *Id.* at 81 (emphasis in original). Consequently, the show cause hearing is "in the nature of a summary proceeding" consistent with the "Legislature's wish that judicial resources not be burdened annually with full evidentiary hearings for sexually violent predators absent at least some showing of probable cause to believe such a hearing is necessary." *Id.* at 86.

2. State's Prima Facie Burden of Proof

At a show cause hearing, the State bears the burden to present prima facie evidence that the person continues to meet the definition of an SVP and that conditional release to a less restrictive alternative would not

be appropriate. RCW 71.09.090(2)(c); *McCuistion,* 174 Wn.2d at 380. The State may rely on the DSHS annual review to satisfy this burden. RCW 71.09.090(2)(b).

If the State cannot or does not prove this prima facie case, there is probable cause to believe continued confinement is not warranted and the matter must be set for a trial. RCW 71.09.090(2)(c); *In re the Detention of Petersen,* 145 Wn.2d 789, 798, 42 P.3d 952 (2002) (*Petersen II*).

3. SVP's Prima Facie Burden of Proof

The second way probable cause for a new trial may be established is through the SVP's proof. *See, e.g., Petersen II,* 145 Wn.2d at 798. "Probable cause" as it pertains to the SVP's proof is defined in RCW 71.09.090(4)(a).[2] A new trial will be granted only if an SVP presents evidence that he has "so changed" such that he either no longer meets the definition of an SVP, or release to a less restrictive alternative is appropriate. *See* RCW 71.09.090(2)(c). However, RCW 71.09.090(4) requires that very specific criteria be met in order for the SVP to satisfy the "so changed" requirement. The SVP must show that since his last

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[2] RCW 71.09.090(4)(a) provides:

Probable cause exists to believe that a person's condition has "so changed," under subsection (2) of this section, only when evidence exists, since the person's last commitment trial, or less restrictive alternative revocation proceeding, of 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 or that a conditional release to a less restrictive alternative is in the person's best interest and conditions can be imposed to adequately protect the community.

commitment trial or LRA revocation proceeding, there has been a "substantial change" in condition due to either (1) a permanent physiological change that renders him unable to reoffend; or (2) a change in mental condition due to a "positive response to continuing participation in treatment[.]" RCW 71.09.090(4)(a), (b). If the SVP makes the required showing, there is probable cause to order a new trial. RCW 71.09.090(2)(c).[3]

B. The Trial Court Erred When It Concluded That Breedlove's Condition Had Changed Through Continuing Participation In Treatment

The trial court erred by concluding that Breedlove has presented sufficient evidence to warrant an unconditional release trial. The court's conclusion that religious activities satisfy the Legislature's intent that sexually violent predators engage in sex offender treatment clearly conflicts with the purposes of RCW 71.09, which are to protect the public and provide long-term intensive sex offender treatment to the highest risk sexual predators.

1. The Legislature Intended That SVPs Engage In Sex Offender Treatment

Ascertaining legislative intent is the fundamental objective of statutory interpretation. *In re Detention of Mines*, 165 Wn. App. 112, 120,

[3] The constitutionality of the amendment requiring either a permanent physiological change or a treatment-based change was recently upheld by this Court in *McCuistion,* 174 Wn.2d at 369.

266 P.3d 242 (2011); *Rozner v. City of Bellevue,* 116 Wn.2d 342, 347, 804 P.2d 24 (1991). This Court will avoid unlikely, strained, or absurd interpretations of statutory language. *Thurston County v. City of Olympia,* 151 Wn.2d 171, 175, 86 P.3d 151 (2004).

The Legislature found, when adopting the 1990 Community Protection Act, that the prognosis for sex offenders is poor and their treatment needs are very long term. RCW 71.09.010. The State therefore has a substantial interest in encouraging treatment. *McCuistion,* 174 Wn.2d at 394. The Legislature's primary mechanism for encouraging treatment is making it a requirement for release:

> 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. This court gives "substantial deference" to the Legislature's finding that the mental conditions of SVPs are "severe and chronic" and unlikely to remit over time. *Id.* at 391.

The Legislature clearly indicated its intent that SVPs engage in long-term, intensive sex offender treatment. It then delegated the duty of creating and administering a treatment program to the agency with expertise, DSHS, and required it to adopt treatment plans. RCW 71.09.800. DSHS adopted rules requiring individual treatment plans (ITP) for each resident. WAC 388-880-040. All ITPs require a "description of the person's specific treatment needs in . . . **Sex offender**

specific treatment[.]" WAC 388-880-040(3)(a)(i) (emphasis added). Thus, the Legislature's clear intent and delegation of authority created a requirement that every person civilly committed as a sexually violent predator engage in "sex offender specific treatment."

The legislature indicated its intent in other ways, as well. For example, 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). The definitions of "secure community transition facility" and "total confinement facility" both require that the facility provide or ensure "sex offender treatment services." RCW 71.09.020(16), (19). This is echoed in several other parts of the statute, requiring "sex offender treatment providers" not "treatment providers" to provide the treatment of Sexually Violent Predators.[4]

2. Breedlove's Evidence Failed to Establish "Continuing Participation in Treatment"

Breedlove failed to demonstrate "continuing participation in treatment[.]" RCW 71.09.090(4)(b)(ii). Breedlove only participated in two brief periods of sex offender treatment. CP at 168-69. The first instance was in 2007, when he completed a 12-week introductory group

[4] RCW 71.09.280; RCW 71.09.290; RCW 71.09.345.

called Awareness and Prep Group. *Id.* The second occurred in 2009, where Breedlove began a cohort treatment group for approximately one month before dropping out. *Id.* Based on "principle" Breedlove refused to discuss his past offenses, and would only agree to discuss "the spiritual aspects" of his past offenses. *Id.* Even Breedlove's expert noted that Breedlove "has proved ambivalent about participating in focused sex offender treatment[.]" CP at 201.

Although Breedlove failed to demonstrate continuing treatment participation, his expert lauded the "Biblical Counseling Foundation Self Confrontation Course." CP at 169. This course was based on biblical principles and Breedlove was supervised by Chaplain Greg Duncan. *Id.* It lasted just 12 weeks and Chaplain Duncan opined that Breedlove was by then "well equipped to succeed in the community[.]" CP at 170.

While spiritual and other beneficial activities are no doubt a fine adjunct to long-term, intensive sex offender specific treatment, the legislature never intended them to constitute a formal treatment modality to address Breedlove's pedophilia and other disorders. Certainly, the legislature could not have intended "treatment" to include a group-style meeting at church which is: 1) not monitored by any mental health professional; 2) not organized by any mental health professional; 3) not abiding by any sort of treatment plan, recognized or not; 4) not accompanied by any relapse-prevention plan (or similar structure); 5) led by participants of the group, rather than a mental health

professional; and 6) not recognized as "treatment" by any professional or expert who has actual knowledge of the activity.

Nor did Breedlove's brief participation in an informational introductory course at the SCC suffice as "continuing participation in treatment." A description of the "Awareness and Preparation" group sessions was noticeably lacking from Dr. Fisher's report. It is only an informational session that informs SCC residents about the treatment that is offered at the SCC. It, in and of itself, is not treatment. This distinction was a part of the discovery upon which Dr. Fisher purportedly relied. The following excerpt comes from Breedlove's 2008 annual review (which directly followed the attendance at "Awareness and Preparation"):

> In November and December 2007 Breedlove participated in a 6-8 session Awareness and Preparation group, ***which provides basic information about SCC's sex offender specific treatment.***

CP at 7 (emphasis added).

3. The Trial Court Erred by Concluding That A Requirement For "Sex Offender Specific Treatment" Does Not Require Participation In The SCC's Sex Offender Treatment Program And By Accepting Breedlove's "Treatment" Evidence

In accepting Breedlove's evidence as proof of "continuing participation in treatment" the trial court failed to analyze the legislative intent behind RCW 71.09 and to correctly interpret the statute and treatment regulations. The court stated it did not know what the terms "treatment" and "continuing" meant, as they are used in

RCW 71.09.090(4)(b)(2).[5] The court assumed that when Breedlove's expert characterized religious activities as "treatment," the court was required to accept that characterization. VRP at 31-32.

The court's failure to analyze the legislative intent behind "continuing participation in treatment" was error. Provided with the DSHS rules, the trial court concluded it could not know what DSHS meant by "sex offender specific treatment" unless that phrase was defined by statute. On July 19, 2013, the trial court denied the State's Motion to Reconsider, concluding:

> 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 agency's use of the term "sex offender specific treatment," however, could not be clearer, particularly given the legislative intent behind RCW 71.09.

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[5] RCW 71.09.090(4)(b)(2) provides, in pertinent part (emphasis added):

(b) A new trial proceeding under subsection (3) of this section may be ordered, or a trial proceeding may be held, only when there is current evidence from a licensed professional of one of the following and the evidence presents a change in condition since the person's last commitment trial proceeding:

. . . .

(ii) A change in the person's mental condition brought about through **positive response to continuing participation in treatment** which indicates that the person meets the standard for conditional release to a less restrictive alternative or that the person would be safe to be at large if unconditionally released from commitment.

Additionally, the trial court erred by finding that Breedlove had engaged in "continuing" treatment. RCW 71.09.090(4)(b)(ii) unequivocally required Breedlove to show change through "continuing participation in treatment." "Continuing" is defined as:

> Enduring; not terminated by a single act or fact; subsisting for a definite period or intended to cover or apply to successive similar obligations or occurrences.

Black's Law Dictionary 291 (5th ed.1979). Breedlove's "treatment" consisted of a brief introductory course in 2007, a failed attempt at group therapy in 2009, and brief religious counseling. Under no conception of the term could anything Breedlove attempted be considered "continuing." The trial court failed to note this unmet requirement.

Dr. Fisher's report fails to establish prima facie evidence of change because it assumes Breedlove has taken part in the "treatment" referenced in RCW 71.09.090(4)(b)(ii), when Breedlove's chaplain organized church-group meeting activities fall far outside the legislature's and DSHS' intent that SVPs receive long-term sexual offender specific treatment. It is also deficient because Dr. Fisher fails to support his opinions, or even *ever* refer to Breedlove's group meetings as treatment.

The trial court "must look beyond an expert's stated conclusion to determine if they are supported by sufficient facts." *In re Detention 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. Breedlove is a prolific and dangerous serial child molester. Further

evidence demonstrates he continues to harbor alarming sexual interest in children, even while in custody. With all due respect to the SCC chaplain and his values, there is no credible evidence that Breedlove's participation in the church group discussions and other activities is sufficient to address his serious mental disorders.

Dr. Fisher's passing implication that Breedlove's participation in treatment was "continuing" was unsupported. He could not accurately describe the length of the "treatments," failed to accurately state how many sessions Breedlove attended in the "awareness and preparation" course, and failing to be consistent, in the same paragraph, regarding the length (in time or in number of sessions) of the church-group program.[6] The trial court was tasked with evaluating the experts' opinions and their bases. Dr. Fisher's opinions were based on shaky reasoning and inconsistent facts. His report failed to describe how Breedlove's activities at the SCC could be considered treatment, much less relevant or continuing treatment. 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.

[6] The Fisher report indicates that the church-group course was, at first mention "12 weeks" and later "24 weeks." (CP at 159-160).

C. The Court Erred By Granting An Unconditional Release Trial Because Breedlove's Evidence Was An Irrelevant Collateral Attack On The Initial Commitment Determination

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

Dr. Fisher agrees that "there appears to be minimally sufficient evidence to diagnose pedophilia in [Breedlove's] case." CP at 172, 184. However, he disagrees with the diagnosis of a personality disorder. CP at 172. His disagreement with the initial diagnosis represents a collateral attack and does not demonstrate how Breedlove has substantially changed.

Dr. Fisher argues that there are substantial flaws in the diagnostic testing that supported Breedlove's civil commitment in 2004. He focuses on discrediting the actuarial instruments used, describing them as "outdated" and a "gross simplification". CP at 184. He fails, however, to provide any definitive testing of his own and uses his evaluation as a platform to voice his concerns about commonly used and scientifically supported actuarial instruments. *Id.*

It should also be noted that Dr. Fisher's report indicates, repeatedly, that Breedlove is a good candidate for a "Less Restrictive Alternative." CP at 186-193. In fact, much of Dr. Fisher's report argues that Breedlove will benefit from (and indeed, needs) a highly structured, and monitored treatment regimen. Those opinions are in direct conflict with Dr. Fisher's conclusion.

Dr. Fisher's opinions that Breedlove does not suffer from a personality disorder, and his attacks on the risk assessment instruments, are collateral attacks upon the initial commitment and fail to demonstrate any substantial change in Breedlove.

VI. CONCLUSION

Breedlove's evidence fell far short of the statutory requirement that he show a substantial change in his condition due to his continuing participation in treatment. He has not engaged in sex offender treatment, except for two brief attempts long ago. The trial court's ordering of an unconditional release trial without evidence of treatment change was error.

For these reasons, the state respectfully requests that this Court vacate the trial court's order.

RESPECTFULLY SUBMITTED this 28th day of April, 2014.

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NO. 70750-7

WASHINGTON STATE COURT OF APPEALS, DIVISION I

STATE OF WASHINGTON, Appellant, v. DENNIS BREEDLOVE, Respondent.	DECLARATION OF SERVICE

I, Joslyn Wallenborn, declare as follows:

On April 28, 2014, I sent via electronic mail and United States mail true and correct cop(ies) of Brief of Appellant and Declaration of Service, postage affixed, addressed as follows:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 28th day of April, 2014, at Seattle, Washington.

Joslyn Wallenborn
JOSLYN WALLENBORN

ORIGINAL