Supreme Court No. 93195-0
(COA No. 72290-5-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IN RE THE DETENION OF

CURTIS BROGI,

Petitioner.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Curtis Brogi, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition pursuant to RAP 13.3(a)(1) and RAP 13.4(b).

B. COURT OF APPEALS DECISION

Mr. Brogi seeks review of the Court of Appeals decision dated March 21, 2016, a copy of which is attached as Appendix A. The State's motion to publish was denied on April 27, 2016.

C. ISSUES PRESENTED FOR REVIEW

1. In the years since the legislature amended the annual review statute governing civil commitment for sexual offenders under RCW ch. 71.09, to mandate that a detainee show that his mental condition has changed through treatment to obtain a trial justifying continued confinement, parties and courts have struggled with question of what type of treatment suffices. The Court of Appeals held that Mr. Brogi's legitimate participation in a culturally attuned and well-respected treatment involving a Native American healing program was insufficient to satisfy the statutorily required "treatment" because there were not enough official documents to allow for public accountability.

Is there substantial public interest in this Court's determination of a critical question left open by this Court about what type of treatment a detainee must participate in to meet his statutory and due process obligation to show that his mental condition has changed through treatment?

2. When a detainee presents prima facie evidence from a qualified expert that his mental condition has changed through long-term, continuing participation in a culturally appropriate treatment program, does it violate due process and the statutory annual review requirements to deny him a trial on his continued confinement?

D. STATEMENT OF THE CASE

Curtis Brogi has been confined at the Special Commitment Center (SCC) since 1997, having been committed in 2000. CP 128, 133. For over six years, Mr. Brogi has been actively participating in the Native American healing program. CP 152, 63, 66-67.

The Native American healing program was established by the Special Commitment Center ten years ago. Slip op. at 2. The SCC arranged for Brad Mix, a tribal leader, to oversee the program as a spiritual advisor. *Id.* Although he is not a trained sex offender treatment provider, Mr. Mix was well-versed in the spiritual healing program. *Id.*;

CP 180-81. Native American healing is well-established in Canada as a method for treating native sex offenders and used in the United States for veterans.

Dr. Halon explained that Native American healing is one of the sex offender treatment programs at SCC with the "same overarching goal to assist offenders to significantly change" as other treatment programs, aiming to help committed people so they no longer suffer from a mental abnormality or personality disorder and greatly reduce their risk of re-offense. CP 146-47. Through the Native American healing program, Mr. Brogi has worked on resolving "deep seated trauma that had afflicted him and his family for generations" and has "achieve[d] insight into his unconscious trauma" that led to his crimes and his poor decisions. CP 180. Native American healing teaches compassion, empathy, and union with all creatures, which ties the individual to the community, culturally and spiritually. CP 148. It is a "powerful therapeutic and learning base" in the context of sex offender treatment. CP 147. Mr. Brogi took part in the Medicine Wheel program, which involves confronting a person's life-development, and it enabled him to understand and accept his violent offense history. CP 149, 180. He has developed positive strategies for expressing anger and is

evolving as a caring and nurturing person and his behavior has changed as a result, according to Brad Mix, a tribal leader and spiritual advisor for the SCC's healing program. CP 180-81.

After clinically interviewing Mr. Brogi, conducting psychological tests, and reviewing his records, Dr. Hanlon concluded that Mr. Brogi benefitted from the treatment he received and no longer presented a danger of committing sexually violent offenses. CP 128, 131, 140-41. He provided a detailed written evaluation explaining his conclusion. CP 128-52.

The State's treatment providers found this program "appeared to be helping" Mr. Brogi. CP 251. He was also learning through advanced "educational pursuits" which included obtaining a bachelor's degree, with high grades, specializing in addiction and trauma. CP 251-52, 254. He became a leader in the Native American healing program. CP 251. He had attempted the SCC's formal sex offender group therapy program, but felt "degraded" in it and disliked its confrontational approach. CP 254.

The State's evaluator, Dr. Robert Saari, said he lacked the expertise to evaluate Mr. Brogi's mental change due to the Native American healing program. CP 254. He suggested Mr. Brogi find

another mental health professional to conduct an evaluation. *Id.* He noted that the SCC's treatment team agreed Mr. Brogi's Native American healing participation was benefitting him and he had made "constructive life changes." CP 251, 254. But because Mr. Brogi had not worked with SCC therapists in their conventional program, Dr. Saari found no evidence his mental condition had remitted. CP 254-55.

At the show cause hearing, the State argued that the treatment Mr. Brogi received through the Native American program was not the type of treatment the legislature intended. RP 25.[1] The court agreed with the State and held that if treatment success was not caused by the SCC's mainstream sex offender treatment program, it was not a basis for a new trial. RP 34-35. Due to the parties' separate agreement that Mr. Brogi is entitled to a trial on whether there is an available less restrictive alternative, the court set a trial on that issue only. RP 35.

The Court of Appeals agreed that the Native American healing program may be valid treatment, but does not involved record-keeping subject to sufficient public accountability to satisfy the implicit purpose

[1] RP refers to the report of proceedings from the Show Cause Hearing on June 27, 2014.

of treatment under RCW 71.09.090(4). The Court of Appeals denied the State's request to publish its opinion.

E. ARGUMENT

The Court of Appeals concocted a d a novel and unsupported definition of the type of treatment that enables a committed person to change his mental condition that is contrary to the plain language of the statute and oversteps its authority to interpret legislation.

1. The controlling statute requires probable cause based on treatment success that leads to positive change as defined by a qualified expert and which includes treatment premised on culturally-based models

Courts must "assume the legislature means exactly what it says." *State v. Delgado*, 148 Wn.2d 723, 727-28, 63 P.3d 792 (2003). Courts "cannot add words or clauses to an unambiguous statute when the legislature has chosen not to include that language." *Id.* at 727.

Using plain language, the legislature amended RCW 71.09.090 in 2005, adding section (4)(b). Laws of 2005, ch. 344, § 2. RCW 71.09.090(4)(b) says that when probable cause rests on "current evidence from a licensed professional" of "a change in the person's mental condition brought about through positive response to continuing participation in treatment" indicating the person would be safe to be at

large if unconditionally released from commitment, the court must order a trial on the person's continued confinement.

The statute did not curtail the type of treatment that could lead to a positive response in the person's mental condition. RCW 71.09.090 (4)(b) used the term "treatment" without limitation or qualification, other than requiring a qualified expert to explain that the treatment brought the necessary measure of change in a person's metanl condition. The purpose of the legislation was clarifying that a single demographic factor, like "advancing age," which might mower a person's statistical likelihood of reoffense, would not instill the necessary enduring change to qualify as the sole reason for showing a person has changed since commitment. Laws of 2005, ch. 334, § 1; *State v. McCuistion*, 174 Wn.2d 369, 391, 275 P.3d 1092 (2012).

"Absent ambiguity or a statutory definition, [a court] gives the words in a statute their common and ordinary meaning. To determine the plain meaning of an undefined term, we may look to the dictionary." *HomeStreet, Inc. v. State, Department of Revenue*, 166 Wn.2d 444, 451-52, 210 P.3d 297 (2009) (quoting *Garrison v. Washington State Nursing Bd.*, 87 Wn.2d 195, 196, 550 P.2d 7 (1976)).

The dictionary definition of medical treatment is: "1. the management and care of a patient; see also CARE. 2. the combating of a disease or disorder; called also therapy." *See* http://medical-dictionary.thefreedictionary.com/treatment. The Merriam-Webster medical dictionary similarly defines treatment as "the action or manner of treating a patient medically or surgically <*treatment* of tuberculosis>" and "an instance of treating <the cure required many *treatments*>." *See* http://www.merriam-webster.com/medical/treatment. Dictionaries show the common understanding of the term treatment broadly means acts relating to caring for a person.

If the definition of treatment in RCW 71.09.040(4)(b) was ambiguous, the doctrine of lenity would control and the court must construe the statute in Mr. Brogi's favor. *In re the Detention of Hawkins*, 169 Wn.2d 796, 801, 238 P.3d 1175 (2010). Under this rule of statutory construction, the court must apply the ordinary meaning of treatment rather than a narrow definition contrived by the State or Court of Appeals.

Rather than accept the plain language of treatment as a course of mental health care monitored by a qualified expert as the plain language of RCW 71.09.090(4)(b) states, the Court of Appeals ruled that the

legislature must have intended treatment to be based on "public accountability." Slip op. at 8. It noted that other statutes direct the State to maintain records of professional care and treatment received by the committed person. *Id.*, citing RCW 71.09.080(3). And it faulted Mr. Brogi for failing to "meaningfully link" Native American healing with "the legislature's goals of public accountability and community safety." *Id.*

The novel construction of treatment in the Court of Appeals opinion is contrary to this Court's consideration of that same language in *McCuistion*. In *McCuistion*, this Court found that the legislature enacted the treatment language in RCW 71.09.090(4)(b) because it wanted an "incentive " for committed people to participate in treatment as opposed to having committed people wait passively for "advancing age" or other demographic factors to change. 174 Wn.2d at 390. The nature of the treatment was not the focus of the legislation, other than that the treatment must have the effect of changing a person's mental condition to the degree necessary to result in a reduction in the person's likelihood of re-offense.

The Court of Appeals overstepped its authority by creating a definition of treatment that does not appear in the statute, is not

supported by the doctrine of lenity, and is not drawn from the plain language and dictionary definition.

Unlike the Court of Appeals, the trial court construed the "treatment" mandated by RCW 71.09.090(4)(b) to mean only the SCC's official and formal inpatient sex offender treatment. RP 34-35. This interpretation is contrary to the plain language of the statute that applied at the time of the show cause hearing. It would be illogical to construe the word "treatment" as meaning only the particular mainstream treatment program designed and implemented by the SCC, absent specific narrowing language in the statute.

In fact, the State pressed the legislature to adopt a more narrow definition of treatment but it did not succeed in this endeavor until 2015, a long time after Mr. Brogi's show cause hearing. *See* SSB 5965 (2014) (proposal for same amendment adding treatment definition to RCW 71.09.020).[2] The 2014 legislature did not pass this proposed statute.[3] However, in 2015, the legislature enacted several changes to

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[2] Available at: http://lawfilesext.leg.wa.gov/biennium/2013-14/Pdf/Bill%20Reports/House/5965-S%20HBA%20PS%2014.pdf (last viewed Aug.).

[3] *See* http://app.leg.wa.gov/billinfo/summary.aspx?bill=5965&year=2013 (last viewed May 26, 2016).

the annual review process, including the definition of treatment proposed by the prosecution. *Laws* of 2015, ch. 278, § 2 (HB 1059).

The recent adoption of a narrow definition of treatment, at the State's urging, demonstrates that the statute did not previously contain this narrow definition. By amending the statute, the legislature necessarily demonstrated that the prior statute did not contain the definition of treatment relied on by the trial court. *See Delgado*, 148 Wn.2d at 729. Narrowing the definition of "treatment" to only a certain class of treatment to the exclusion of an array of other effective treatment processes means the former definition of treatment was not so narrow. *See Vita Food Products, Inc. v. State*, 91 Wn.2d 132, 134, 587 P.2d 535 (1978) ("[E]very amendment is made to effect some material purpose").

The Court of Appeals interpretation of the statute was unreasonable. 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. Courts "do not have the power to read into a statute that which we may believe the legislature has omitted, be it an intentional or an inadvertent omission." *State v. Martin*, 94 Wn.2d 1, 8, 614 P.2d 164 (1980). "Appellate courts do not

supply omitted language even when the legislature's omission is clearly inadvertent." *In re Pers. Restraint of Acron*, 122 Wn.App. 886, 891, 95 P.3d 1272 (2004). The trial court was not free to construe the statute based on its speculation about the treatment the legislators might have envisioned when enacting the statute. 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. CP 140-41, 145-46.

2. Evidence of Mr. Brogi's change in mental condition through treatment participation requires a new trial.

A court must order a trial on the legality of a person's on-going confinement if probable cause exists to believe that the person's condition has so changed that he no longer meets the "the definition of a sexually violent predator." RCW 71.09.090(2)(c).

Periodic review of the patient's suitability for release is required to render commitment constitutional. *Jones v. United States*, 463 U.S. 354, 368, 103 S.Ct. 3043, 77 L.Ed.2d 3043 (1984). Indefinite commitment may last only as long as the detainee has a mental disorder that causes him to be substantially dangerous to himself or others.

Foucha v. Louisiana, 504 U.S. 71, 77, 112 S.Ct. 1780, 118 L.Ed.2d 437 (1992); *In re Detention of Young*, 122 Wn.2d 1, 38-39, 857 P.2d 396 (1993); U.S. Const. amend. 14; Const. art. I, § 3; RCW 71.09.060(1).

RCW 71.09.090(4)(b) directs a court to order a trial on the person's continued confinement if there is probable cause based on "current evidence from a licensed professional" of "a change in the person's mental condition brought about through positive response to continuing participation in treatment," indicating that the person would be safe to be at large if unconditionally released from commitment.[4] A person makes "the requisite prima facie showing" for a trial under RCW 71.09.090(4) when a qualified expert indicates that the confined person "no longer meets the definition of an SVP, and because he stated that this change was due to treatment." *In re Det. of Ambers*, 160 Wn.2d 543, 557-59, 158 P.3d 1144 (2007).

Dr. Halon was a qualified expert who evaluated Mr. Brogi's current status. CP 128-59. He interviewed Mr. Brogi, reviewed lengthy records, and conducted tests assessing his mental status and risk of

reoffending. CP 129-31, 139-40. He concluded that Mr. Brogi had changed through sex offender treatment and no longer met the criteria for total confinement. CP 140-41. He explained the Native American healing program was a valid sex offender treatment program capable of causing permanent change in a person's behavior, attitudes, and values, as it had done for Mr. Brogi. CP 145-46, 148. This conclusion was based on his exercise of professional discretion and satisfies the prima facie burden set forth under RCW 71.09.090 (4).

As a person of Native American heritage, Mr. Brogi connected with and benefited from the culturally specific Native American program when the SCC's mainstream program was ineffective for him. The Court of Appeals recognized the validity of this program, even while complaining that more public oversight would ensure community safety. But the adequacy of the treatment program in establishing sufficient change in Mr. Brogi's condition is a question for the jury at trial, once Mr. Brogi meets the statutory threshold of establishing probable cause that he has changed through treatment.

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[4] Effective July 1, 2015, long after the hearing at issue, the legislature amended RCW 71.09.020 to define "treatment" as "the sex offender specific treatment program at the special commitment center. . . ." HB 1059. This statutory amendment does not apply to Mr. Brogi, as addressed in Mr. Brogi's

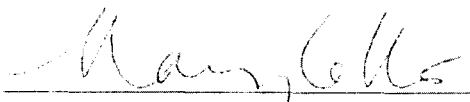
Having met the criteria necessary to obtain a show cause hearing, Mr. Brogi is entitled to receive that hearing. *In re Det. of Elmore*, 162 Wn.2d 27, 36, 168 P.3d 1285 (2007).

F. CONCLUSION

Based on the foregoing, Petitioner Curtis Brogi respectfully requests that review be granted pursuant to RAP 13.4(b).

DATED this 27th day of May 2016.

Respectfully submitted,



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Opening Brief. The Court of Appeals opinion did not address the new statutory definition, presuming the prior definition controlled.

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

In the Matter of the Detention of CURTIS BROGI	)	No. 72290-5-I
STATE OF WASHINGTON, Petitioner/Respondent, v. CURTIS BROGI, Respondent/Appellant,	)	UNPUBLISHED OPINION FILED: March 21, 2016

VERELLEN, A.C.J. — Curtis Brogi appeals the trial court's denial of an unconditional release trial after his 2014 annual review as a sexually violent predator. A sexually violent predator committed at the Special Commitment Center (SCC) is entitled to an unconditional release trial if he shows probable cause to believe that his mental condition has so changed "through positive response to continuing participation in treatment" that he would be safe to be at large if unconditionally released from commitment.[1] For the last six years, Brogi has actively participated in the SCC's Native American healing program (NAHP), but he has not recently participated in the SCC's sex offender treatment program. At the time of his show cause hearing, the controlling

[1] RCW 71.09.090(4)(b)(ii).

statutes did not define "treatment." The trial court concluded Brogi's participation in the NAHP was not "treatment" under RCW 71.09.090(4)(b)(ii).

Brogi contends the legislature did not intend to limit treatment to sex offender-specific treatment for purposes of triggering an unconditional release trial. Brogi's expert concluded Native American healing strategies are cognitive based and are as efficacious as sex offender-specific treatment. But as described here, the NAHP lacks the oversight, recordkeeping, and accountability appropriate to satisfy the legislature's community safety goals.

We affirm.

FACTS

From 1986 to 1996, Brogi was alleged to have committed several violent sexual acts against women. Brogi was also convicted of several sex-related offenses. The State filed a sexually violent predator petition shortly before Brogi's release from prison. After a jury trial in 2000, Brogi was civilly committed as a sexually violent predator.

Ten years ago, the SCC began the NAHP. This program has cultural, psychological, emotional, and spiritual components and involves multiple phases of personal growth. The program addresses Native American values and uses traditional ceremonial practices to help individuals. The program uses positive strategies for emotional healing, personal responsibility, problem solving, and internal control.

The SCC invited Brad Mix to lead the NAHP. Mix, a graphic designer, volunteers as the program's "spiritual advisor." Mix has no experience treating sexually violent predators. Mix has not received any training specific to sexually violent predators and has limited knowledge of "sex offender treatment modalities."

The NAHP's activities include sweat lodges, healing circles, talking circles, the medicine wheel, and a 12-step program. Those activities are not psychotherapy; they are private. Although Mix collaborates with SCC staff, the NAHP is not supervised by any SCC treatment team member. The NAHP does not keep official records of its activities. Mix never discloses "details about what goes on in ceremony" to SCC staff.[2] He is not required to and does not report disclosures made by participants. The SCC considers the NAHP as a spiritual and cultural program that may benefit sexually violent predators, but the SCC does not recognize the NAHP as a valid sex offender treatment program.

At the time of his 2014 annual review, Brogi had been actively participating in the NAHP for six years. Brogi had "not recently" participated in the SCC's sex offender treatment program.[3]

For his 2014 annual review, Brogi was evaluated and interviewed by the State's expert, Dr. Robert Saari, and Brogi's expert, Dr. Robert Halon. Dr. Saari concluded Brogi continues to meet the sexually violent predator definition. Dr. Halon concluded Brogi had so changed through his participation in the NAHP that he no longer suffers from a mental abnormality or personality disorder.

At the show cause hearing, the State conceded Brogi presented sufficient evidence for a least restrictive alternative trial but opposed an unconditional release trial.[4] The trial court agreed and denied Brogi an unconditional release trial, concluding he "has not shown probable cause to believe his mental condition has substantially

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[2] Clerk's Papers (CP) at 71.

[3] CP at 6, 50, 251.

[4] The trial court stayed the least restrictive alternative trial pending this appeal.

changed through a positive response to continuing participation in sex offender treatment."[5]

This court granted discretionary review.

ANALYSIS

A "sexually violent predator" is any person who has been convicted of or charged with a crime of sexual violence and who suffers from a mental condition that makes the person "likely to engage in predatory acts of sexual violence if not confined in a secure facility."[6] An individual committed as a sexually violent predator is entitled to an unconditional release trial if he shows probable cause to believe that he no longer meets the sexually violent predator definition.[7] Probable cause exists when evidence from a licensed professional reflects a "change in the person's mental condition brought about through positive response to continuing participation in treatment" such that "the person would be safe to be at large if unconditionally released from commitment."[8] The change must be "substantial" and must have occurred since the individual's last commitment trial.[9]

We review a trial court's probable cause determination de novo.[10] We also review issues of statutory interpretation de novo.[11] We view the evidence in the light

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[5] CP at 6-7.

[6] RCW 71.09.020(18); WAC 388-880-010.

[7] RCW 71.09.090(2)(a).

[8] RCW 71.09.090(4)(b)(ii), (c).

[9] RCW 71.09.090(4)(a), (b).

[10] In re Pers. Restraint of Meirhofer, 182 Wn.2d 632, 643, 343 P.3d 731 (2015).

[11] In re Det. of Anderson, No. 91385-4, 2016 WL 454049, at *2 (Wash. Feb. 4, 2016).

most favorable to the individual.[12] We must assume the truth of the evidence presented and do not weigh the credibility of an expert's opinion.[13] But "conclusory statements" do not establish probable cause.[14] We may "look beyond an expert's stated conclusion to determine whether sufficient facts support it."[15]

At the time of Brogi's show cause hearing in 2014, the controlling statutes did not define "treatment."[16] Brogi acknowledges that the meaning of "treatment" must be considered in the context of the statute and that "treatment" must be intended to address the sexually violent predator's mental condition.[17] But Brogi contends the legislature did not intend to limit treatment to the single treatment modality adopted by the SCC. The narrow issue is whether the NAHP is "treatment" as intended by the legislature to allow Brogi an unconditional release trial. Because the NAHP, as described here, is not consistent with the legislature's community safety goals, we conclude the NAHP is not "treatment" that may trigger an unconditional release trial.

Brogi relies upon Dr. Halon's report and Mix's declaration to establish probable cause that he benefited from a treatment-based change through his continuing participation in the NAHP.

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[12] See Meirhofer, 182 Wn.2d at 638.

[13] Id.

[14] In re Det. of McGary, 155 Wn. App. 771, 780, 231 P.3d 205 (2010); see also In re Det. of Ward, 125 Wn. App. 381, 387, 104 P.3d 747 (2005), superseded by statute on other grounds as recognized by State v. McCuistion, 174 Wn.2d 369, 397-98, 275 P.3d 1092 (2012).

[15] McGary, 155 Wn. App. at 780.

[16] In 2015, the legislature defined "treatment" as "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).

[17] Appellant's Reply Br. at 1.

Dr. Halon generally describes Native American healing activities as a "cognitive-behavioral strategy."[18] He views such activities as efficacious as the SCC's mainstream sex offender treatment. Because the NAHP encompasses a "global cultural approach to treatment, recovery, and re-socialization," Dr. Halon concludes the resulting changes through the NAHP are "much more likely to be meaningfully internalized" and permanent than other treatment approaches.[19] Dr. Halon principally relies upon Mix's description of the NAHP. The NAHP's volunteer-run activities include various traditional rituals and ceremonies. The program is "organized around the 'red road' of the broad Native American culture" and "is more community- and spiritually-concerned."[20]

Mix identifies the specific changes in Brogi that he has observed: he "takes responsibility for his prior criminal conduct and has developed problem-solving and internal control to stop committing offenses";[21] he understands and accepts "his own violent offense history";[22] and he "has developed positive strategies for expressing his anger."[23] Mix has "witnessed significant change and positive growth in [Brogi] since he began the Native programs."[24] Although Mix has extensive experience as a "spiritual advisor" at the NAHP, he is not a certified sex offender treatment provider.[25] Mix has no prior experience in treating sexually violent predators. Mix's education on sex offender

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[18] CP at 140.

[19] CP at 147-48.

[20] CP at 147-48.

[21] CP at 180, ¶ 12.

[22] CP at 180, ¶ 12.

[23] CP at 180, ¶ 11.

[24] CP at 181, ¶ 15.

[25] CP at 176, ¶ 2.

treatment modalities is limited to discussions with SCC therapists and other therapists in the community.[26] His training has been mostly "traditional," based upon Native American healing practices.[27] Mix acknowledges that the Native American healing practices are not "psychotherapy."[28] Information shared within the NAHP remains confidential. Mix is not required to and does not report disclosures made by participants. Mix "collaborates" with SCC personnel, but the SCC does not supervise the NAHP.[29] And the NAHP does not keep official records of its activities.

Viewed in a light most favorable to Brogi, Dr. Halon's opinion may support that Native American healing strategies could be a component of sex offender treatment, or even that the SCC should recognize such strategies as sex offender treatment for individuals whose cultural backgrounds are not amenable to the SCC's mainstream sex offender treatment. But the question here is whether the legislature intended to include the NAHP as a form of "treatment" that may trigger an unconditional release trial.

The provision requiring a positive response to treatment was added to RCW 71.09.090 in 2005:

> (4) (a) Probable cause exists to believe that a person's condition has 'so changed' . . . only when evidence exists, since the person's last commitment trial 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 . . . .
>
> (b) A new trial proceeding . . . may be ordered . . . 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:

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[26] CP at 92-93.

[27] CP at 92-93.

[28] CP at 70.

[29] CP at 67, 70-71.

. . . .

> (ii) A change in the person's mental condition brought about through *positive response to continuing participation in treatment* which indicates that . . . the person would be safe to be at large if unconditionally released from commitment.[30]

The legislature emphasized the importance of community safety. The 2005 amendments focused upon "the 'very long-term needs' of the sexually violent predator population for treatment and the equally long-term needs of the community for protection from these offenders."[31] The legislature noted its concern with "distracting committed persons from fully engaging in sex offender treatment."[32]

The statute also stresses public accountability. The Department of Social and Health Services must keep official records detailing all "professional care and treatment received by the committed person," and such records must "be made available upon request."[33] Once an individual is conditionally released, he must be examined by a "certified sex offender treatment provider," who must regularly report the individual's progress.[34]

Conclusory statements that the NAHP is treatment are not compelling. Mix's declaration and Dr. Halon's report fail to meaningfully link the NAHP with the legislature's goals of public accountability and community safety. Brogi's long-term participation in the NAHP may have benefited him in ways that the SCC's mainstream

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[30] Laws of 2005, ch. 344, § 2 (codified at RCW 71.09.090(4)(b)(ii)) (emphasis added).

[31] Laws of 2005, ch. 344, § 1; see also RCW 71.09.020(16), .070(2)(c).

[32] Laws of 2005, ch. 344, § 1.

[33] RCW 71.09.080(3).

[34] RCW 71.09.092, .350(1).

sex offender treatment program could not, but the NAHP's activities are largely confidential and are not supervised or conducted by members of a SCC treatment team. No official records are generated from each treatment session. Such a cultural and spiritual program run by a volunteer without oversight by a SCC treatment provider and documentation of participation and progress lacks a level of public accountability consistent with the legislature's community safety goals.

CONCLUSION

We conclude that, as described here, the NAHP does not constitute treatment as intended by the legislature in 2014. Therefore, we affirm the trial court's denial of Brogi's petition for an unconditional release trial.[35]

WE CONCUR:

[35] We need not reach the alternative theory that we should retroactively apply the 2015 amendment defining "treatment" as limited to sex offender specific treatment. Nor must we address whether retroactively applying the 2015 amendment would violate Brogi's due process and equal protection rights. We are not aware of any pending cases that challenge the meaning of treatment before the 2015 amendment's effective date.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 72290-5-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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