

NO. 92501-1

THE SUPREME COURT OF THE STATE OF WASHINGTON

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IN RE THE DETENTION OF

JOHN MARCUM,

Petitioner.

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

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PETITIONER'S SUPPLEMENTAL BRIEF

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A. ISSUES FOR WHICH REVIEW HAS BEEN GRANTED.

John Marcum completed the treatment program at the Special Commitment Center, having achieved “maximum benefit” according to the State’s evaluator.

He then sought a trial on whether he still meets the criteria for total confinement, offering Dr. Paul Spizman’s report detailing the successful change in his mental condition through a positive response to long-term treatment. The court ruled that despite his commendable treatment success, he was not entitled to a trial, construing RCW 71.09.090(4)(a) to require he prove his substantial change through treatment occurred after a less restrictive alternative revocation, even though he substantially changed since the time he was committed.

Does it violate due process and misconstrue the statutory scheme to bar a person from obtaining a full hearing on the legality of his continued confinement based solely on the timing of the change in mental condition gained through treatment participation?

B. STATEMENT OF THE CASE.

John Marcum voluntarily and successfully participated in the state’s sex offender treatment program for many years, both before and after he stipulated to civil commitment in 2001. CP 30, 38. He has been

confined since his last offense occurred in 1993, when he was 28 years old, and started the state's treatment program in 1998. CP 35, 37. As a result, he achieved "maximum benefit from inpatient treatment," according to the State's evaluator Dr. Regina Harrington. CP 23.

In 2009, the State transferred Mr. Marcum from the total confinement setting of the Special Commitment Center (SCC) to the Secure Community Treatment Facility (SCTF). CP 25. Although the SCTF is next to the SCC on McNeil Island and surrounded by a tall barbed wire fence, transfer to SCTF is considered a less restrictive alternative (LRA) and requires compliance with a new set of rules. CP 105-08, RP 13. The SCTF offers far fewer programs than the SCC and affords little freedom of movement even though its goal is to transition a person into the community. CP 104; RP 13, 18.

At the SCTF, Mr. Marcum grew depressed and was not taking antidepressant medications. CP 54; RP 13, 18. He gained a lot of weight and had difficulty motivating himself to leave his bed. CP 122-23. He was disgruntled that the available jobs paying meager wages of one to three dollars and, from that minimal sum, he was required to pay for the cost of care and save money for future release. CP 122, 127. Nevertheless, he continued to participate in treatment. CP 126.

Mr. Marcum realized he was not benefitting from the SCTF and stipulated to the revocation of the LRA and his return to the SCC in 2011. CP 131. The reasons the State revoked his LRA were “not related to concern or deterioration in sexual regulation,” according to the State’s evaluator. CP 17. Once back at the SCC, he exercised, lost weight, acted as “a dependable worker” with a cooperative attitude in his job, took his antidepressant medication, and resumed his good behavior. CP 20. Having achieved maximum benefit from the basic treatment program available at the SCC, he did not resume the SCC’s treatment program. CP 51.

In 2013, he sought an unconditional release trial. Both the State’s evaluator and the evaluator he retained agreed he markedly improved his mental condition since he was committed. CP 23, 35, 45-46, 55. He gained significant control over his behavior as well as his thought process through treatment. CP 35, 45-46, 55. His risk of re-offense was far below the “more likely than not” threshold. CP 17, 62. The only treatment the State’s evaluator suggested was help transitioning into the community, not further participation in the phases of the SCC’s program which he had completed. CP 23-24. He demonstrated the enduring nature of his treatment success by

continuing to manage his behavior well after the LRA. CP 23, 73. But the prosecution insisted, and the court agreed, that in order to obtain an unconditional release trial, Mr. Marcum must prove he changed through treatment that occurred after his LRA revocation based on a narrow reading of RCW 71.09.090(4)(a). CP 77-78; RP 21.

The Court of Appeals affirmed in a divided opinion, with a dissenting judge concluding that the majority misconstrued the statute. *In re Det. of Marcum*, 190 Wn.App. 599, 360 P.3d 888 (2015), *rev. granted*, 185 Wn.2d 1010 (2016).

C. ARGUMENT.

**Based on undisputed evidence that Mr. Marcum has completed the state's treatment program and changed as a result, there is probable cause he no longer meets the criteria for commitment and he is entitled to a new trial for the state to legally justify his continued total confinement.**

*1. The governing statutory provisions permit a new trial if there is probable cause a person no longer meets the requirements for commitment.*

Once committed, the legality of on-going confinement is policed by annual review requirements. RCW 71.09.070; RCW 71.09.090; *In re Det. of Ambers*, 160 Wn.2d 543, 548, 158 P.3d 1144 (2007). 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 spells out annual review requirements.<sup>1</sup> At a show cause hearing, the court must determine whether there is probable cause for a full evidentiary hearing on whether a person's "condition has so changed" to the degree that he either "no longer meets the definition of a sexually violent predator" (for an unconditional release trial), or that "conditional release to a proposed less restrictive alternative would be in the best interest of the person and conditions can be imposed that would adequately protect the community" (for a LRA trial). RCW 71.09.090(2)(a).

The court must order a new trial based on either the State's failure to present prima facie evidence justifying continued

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<sup>1</sup> Full text attached as Appendix A.

commitment, or the detainee's evidence showing probable cause that his condition has changed. RCW 71.09.090(2)(c)(i), (ii); *In re Det. of Petersen*, 145 Wn.2d 789, 798, 42 P.3d 952 (2002).

Two other subsections further explain when a detainee's evidence amounts to probable cause for unconditional release or LRA trials. RCW 71.09.090(4)(a) states:

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.

Next, RCW 71.09.090(4)(b) provides:

A new trial proceeding under subsection (3)<sup>2</sup> 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 . . .*

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<sup>2</sup> Subsection (3) contains the procedural requirements of a new trial, once ordered. *See* App. A.

(emphasis added). The necessary “current evidence” in (4)(b) must involve either (i) permanent physiological incapacity, such as paralysis, or, (ii) “change in the person’s mental condition brought about through positive response to continuing participation in treatment which indicates” the person would be safe in a LRA or in the community unconditionally. *Id.*

Due to the fundamental rights at stake, the doctrine of lenity applies to interpreting commitment statutes. *Hawkins*, 169 Wn.2d at 801. This Court “must narrowly construe” ch. 71.09 RCW and interpret ambiguities in the light most favorable to the detainee. *Id.* If a statute “is susceptible to an interpretation that may render it unconstitutional, courts should adopt, if possible, a construction that will uphold its constitutionality.” *Ambers*, 160 Wn.2d at 553 n.4.

2. *A committed detainee meets his burden for obtaining a new trial on his continued confinement if there is probable cause to believe his condition has changed due to treatment, measured from the time he was committed.*

i. *The governing statutory scheme authorizes a new trial for a person who has sufficiently changed since committed.*

RCW 71.090.090(4)(a) is one provision in a lengthy statute that must be read “as a whole.” *Ambers*, 160 Wn.2d at 557. In one long sentence, this subsection elaborates on what a court must find for

probable cause that a person has “so changed” to order either an unconditional or conditional release trial and reiterates the different type of evidence required for either trial. RCW 71.090.090(4)(a). In the middle of this sentence, (4)(a) says that there must be evidence “since the person’s last commitment trial, or less restrictive alternative revocation proceeding,” of the type of change needed for either a LRA or unconditional release trial, depending on which trial is requested. *Id.*

The Court of Appeals majority construed RCW 71.09.090(4)(a) to mean that once any committed person had a LRA revocation proceeding, he may obtain a trial seeking unconditional release only if he proves his mental condition has substantially changed through treatment *after* the last LRA revocation proceeding. 190 Wn.App. at 603. The dissenting judge found the majority misconstrued the statute by reading it as if it compared “apples and oranges.” 190 Wn.App. at 626-27 (Fearing, J., dissenting). A fair reading of (4)(a) directs the court determine whether a person has sufficiently changed from his last commitment trial if he seeks a new commitment trial, or from the revocation of a LRA if he seeks another LRA, which compares “apples and apples.” *Id.*

RCW 71.09.040(4)(b) expressly addresses the question presented in this case – when a judge may order a full evidentiary trial on a person’s commitment. It specifies that the evidence must show “a change in condition since the person’s *last commitment trial proceeding*,” and it details the type of physiological or mental health evidence required. RCW 71.09.090(4)(b).

RCW 71.09.090(4)(b) is not even mentioned by the Court of Appeals in its statutory analysis. Subsection (4)(b) plainly uses the “last commitment trial” as the benchmark for whether a person has sufficiently changed to justify a new trial. 190 Wn.App. at 600-06. The Court of Appeals did not read (4)(a) in relation to the other provisions of the same statute. *State v. Keller*, 143 Wn.2d 267, 277, 19 P.3d 1030 (2001).

It makes sense to use the last commitment trial as the yardstick when a person seeks a new trial on the legality of continued confinement, as plainly required by (4)(b) and implied in (4)(a). The defining criteria for continued commitment are having a mental illness which makes the person more likely than not to present a danger of committing a sexually violent act. *Ambers*, 160 Wn.2d at 557. Construing subsection (4) to require evidence that the person has

changed since a judge or jury last found he met the criteria for commitment is the standard used throughout ch. 71.09 RCW and comports with the constitutional threshold for continued confinement.

*ii. LRA revocation bears no direct relationship with whether a person continues to meet the criteria for commitment.*

Using LRA revocation as a benchmark for whether a person is eligible for an unconditional release trial is not narrowly tailored to the commitment criteria, and this narrow tailoring is required for periodic review to pass constitutional muster. *Young*, 122 Wn.2d at 38-39. Revocation of a LRA would be the proper measurement if a person is applying for another LRA. The relevant question is what has changed since the last time a person was in that same circumstance.

A LRA is “an alternative placement” and it “involves a separate inquiry and a different showing” than a person who seeks unconditional release. *In re Det. of Bergen*, 146 Wn.App. 515, 533, 195 P.3d 529 (2008). A LRA may be revoked if a chaperone is in bad health, a treatment provider is no longer available, or the housing is too close to a school or day care. *See, e.g., Bergen*, 146 Wn. App. at 523 (chaperone’s dementia and home’s location near school cited as reasons against LRA placement); *In re Det. of Jones*, 149 Wn.App. 16, 28-29,

201 P.3d 1066 (2009) (proposed LRA denied where supervisor did not satisfy Department of Correction's additional requirements).

LRA revocation need not involve any connection to recidivism risk or mental disorder. *Bergen*, 146 Wn.App. at 533. It may be revoked for any violation of conditions, regardless of willfulness, based on hearsay allegations. RCW 71.09.098(6)(b); *In re Det. of Wrathall*, 156 Wn.App. 1, 8, 232 P.3d 569 (2010). For example, Mr. Marcum's LRA was revoked in part because he did not have money for cigarettes and traded stamps for some, which violated program rules even though it was unrelated to the basis for civil commitment. CP 123.

Ignoring the different legal and factual questions at issue for LRA revocation, the Court of Appeals majority characterized LRA revocation as a "law of the case type of approach to these matters." 190 Wn.App. at 604. But the law of the case doctrine applies only if the identical issue was fully litigated in a prior proceeding where the parties have the same interests at stake. *See Roberson v. Perez*, 156 Wn.2d 33, 41, 123 P.3d 844, 850 (2005). Revocation of a LRA does not litigate a person's eligibility for unconditional release. *See Bergen*, 146 Wn.App. at 533. As Mr. Marcum demonstrates, a person may be unsuccessful in

a LRA placement for reasons unrelated to the specific mental disorder or recidivism risk used to justify his commitment. RP 12-14, 18.

Perhaps recognizing its time frame for measuring a person's change was unreasonably narrow, the Court of Appeals downplayed the impact of its ruling. It agreed that a person's condition may change incrementally and commented that "it might not take much change" after LRA revocation "to push" a person "from one side of the continuum to the other." 190 Wn.App. at 606. But this analysis ignores the text of .090(4)(a), which requires a "substantial change" measured from either the commitment trial or the LRA revocation proceeding. If the last revocation proceeding is the benchmark for ordering any type of trial, then (4)(a) strictly mandates substantial change in a person's condition occur after that proceeding. A court could not consider incremental change prior to the last revocation proceeding. Even the Court of Appeals majority sees that interpretation as unreasonable given the likelihood that a person's positive response to treatment occurred over time, incrementally. 190 Wn.App. at 606.

"[T]he State may not demand that the change occur only during a limited measure of time." 190 Wn.App. at 629 (Fearing, J. dissenting). Such a rule would place a more stringent standard for a

person to be released than to be committed, and that would rest on “precarious constitutional footing.” *Id.* (citing *Ambers*, 160 Wn.2d at 533 n.4). It would also discourage LRA participation, because the consequences of having a LRA revoked would risk setting an impossible threshold of evidence for a person to later obtain an unconditional release trial, and it is unreasonable to believe that was the legislature’s intent.

*iii. One subsection of the annual review statute was not intended to alter the fundamental standard for justifying on-going commitment.*

The statutory scheme consistently provides that a person’s on-going commitment hinges on whether he meets the criteria for commitment. *See, e.g.*, RCW 71.09.060(1); RCW 71.09.090(2)(a), (c). This benchmark is constitutionally required because civil commitment is impermissibly punitive unless its duration is limited “until [the person’s] mental abnormality no longer causes him to be a threat to others.” *Kansas v. Hendricks*, 521 U.S. 346, 363-64, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997).

This Court has consistently construed the commitment scheme to direct a new trial when a person is “no longer mentally ill and dangerous,” with the caveat the detainee may be required to show

“change of that nature” through participation in treatment. *State v. McCuiston*, 174 Wn.2d 369, 394, 275 P.3d 1092 (2012); *McCuiston*, 174 Wn.2d at 394; see *In re Meirhofer*, 182 Wn.2d 632, 650, 343 P.3d 731 (2015) (“a showing of change” in condition required for release trial).

In *McCuiston*, this Court deferred to the legislature’s finding that a detainee must show his condition changed through treatment, as opposed to “passive aging,” because it is reasonable to find change instilled through treatment leads to enduring behavioral change. 174 Wn.2d at 391. But the Court will not construe legislation to create a more stringent standard for a new trial absent clear proof the legislature intended a significant substantive change, and no intent exists here. *Ambers*, 160 Wn.2d at 554-55.

The legislature inserted the words “less restrictive alternative revocation proceeding” into 4(a) in Laws of 2009, ch. 409. The same bill made other LRA changes, clarifying requirements for obtaining a LRA and procedures for its modification or revocation. Laws of 2009, ch. 409, §§ 8, §§ 9, 10, 11, 13, 14. The otherwise detailed final bill report does not mention the LRA revocation language added to .090(4)(a), indicating the legislature was not intending this language to

substantively alter the proof needed for commitment trials. S.S.B. No. 5718, Final Bill Report, at 4 (2009).<sup>3</sup> The legislative history confirms the insertion of LRA language in subsection (4)(a) was intended for people seeking another LRA placement, and not to create a new substantive standard for a person seeking a new commitment trial.

RCW 71.09.090(4)(a) directs the court to assess whether a person seeking unconditional release has changed from the last commitment trial, thus comparing “apples and apples.” 190 Wn.App. at 626 (Fearing, J., dissenting). This interpretation of the statute comports with due process, the doctrine of lenity, and the fair and reasonable construction of the statute as a whole.

*3. Mr. Marcum’s commendable efforts engaging in long-term treatment and markedly reducing his risk of re-offense entitle him to a trial on his continued confinement.*

Mr. Marcum presented probable cause he no longer meets the criteria for continued confinement due to the change in his mental condition brought about through positive response to treatment, entitling him to an evidentiary hearing. *See McCuiston*, 174 Wn.2d at

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<sup>3</sup> Available at: <http://lawfilesexternal.wa.gov/biennium/2009-10/Pdf/Bill%20Reports/Senate/5718-S%20SBR%20FBR%2009.pdf> (last viewed May 25, 2016).

382; RCW 71.09.090(4)(b)(ii). Dr. Spizman was a qualified expert, whose report must be read in the light most favorable to Mr. Marcum. *State v. Petersen*, 145 Wn.2d 789, 803-04, 42 P.3d 952 (2002); *see McCuiston*, 174 Wn.2d at 382 (at probable cause stage, “a court must assume the truth of the evidence presented; it may not ‘weigh and measure asserted facts against potentially competing ones’”).

Dr. Spizman concluded that Mr. Marcum had changed due to his successful participation in sex-offender specific treatment. CP 73-74. Mr. Marcum learned how to regulate his behavior, thoughts, and urges by a variety of treatment tools and lessons. CP 45-46, 55, 58. His observable, “notable gains in learning to control his sexual orientation toward children, via his efforts in treatment,” were confirmed by physiological testing. CP 58. Mr. Marcum’s originally diagnosed mental abnormality of pedophilia was no longer a valid current diagnosis and the historical belief that he had a personality disorder no longer applied. CP 35, 40-41, 45-46, 49, 55, 58. Dr. Spizman calculated Mr. Marcum’s risk of re-offense using the STATIC-99R actuarial risk assessment instrument as 29.6 percent over ten years at most. CP 62. And when accounting for his treatment success, the STATIC-99R accords him a lower risk of 18.2 percent over ten years.

*Id.* This risk would only decrease in the future due to his advancing age and the ingrained benefits of long-term treatment participation. *Id.*

Dr. Spizman's conclusions were based on detailed evidence and his professional discretion, satisfying the prima facie burden set forth under RCW 71.09.090(2), (4). His opinion constitutes probable cause that Mr. Marcum no longer meets the criteria required for continued confinement and entitles him to an evidentiary hearing. *See McCuiston*, 174 Wn.2d at 382; *Ambers*, 160 Wn.2d at 558.

4. *When the State's evaluator agrees Mr. Marcum no longer satisfies the criteria for total confinement, his continued confinement violates due process.*

The State violates due process when it continues to confine a person who is no longer either mentally ill or dangerous. *Foucha*, 504 U.S. at 77; U.S. Const. amend. 14. "Because SVP commitment is indefinite, the due process requirement that a detainee be mentally ill and dangerous is ongoing." *In re Det. of Cherry*, 166 Wn.App. 70, 75, 271 P.3d 259 (2011). If the State's own designee finds that "the individual no longer meets the criteria for confinement, he is entitled to an evidentiary hearing." *McCuiston* 174 Wn.2d at 393.

When evaluating the State's report, the court must "look at the facts contained in the [annual review] report to decide whether they

support the expert's conclusions." *In re the Detention of Jacobson*, 120 Wn.App. 770, 780, 86 P.3d 1202 (2004) (emphasis added). Conclusory statements by an expert do not establish probable cause. *Id.*; *see also McCuiston*, 174 Wn.2d at 382 ("court can and must determine whether the asserted evidence, if believed, is *sufficient* to establish" the essential requirements of continued commitment (emphasis in original)).

Commitment under RCW 71.09 requires a mental abnormality or personality disorder that makes a person *more likely than not* to commit predatory acts of sexual violence if not confined. RCW 71.09.020(7), (18). If the State determines that a detainee is no longer sufficiently dangerous, continued detention is not authorized. *Cherry*, 166 Wn.App. at 76; *see Foucha*, 504 U.S. at 77.

The "more likely than not" threshold means the State must show a greater than 50 percent likelihood of reoffense if not confined. *In re Det. of Brooks*, 145 Wn.2d 275, 295-96, 36 P.3d 1034 (2001), *overruled on other grounds*, *In re Det. of Thorell*, 149 Wn.2d 724, 72 P.3d 708 (2003). The question "is not whether the defendant will reoffend, but whether the probability of the defendant's reoffending exceeds 50 percent." *Id.* at 296.

State evaluator Harrington agreed with Dr. Spizman that actuarial assessments show Mr. Marcum poses at most a 30% risk of reoffending in 10 years and this risk unlikely to increase due to his treatment benefits and advancing age. CP 17, 62. This prediction falls below the more likely than not threshold for confinement.

Actuarial tools “anchor” the scientific reliability of expert predictions of dangerousness. *Thorell*, 149 Wn.2d at 754. On occasion, clinicians adjust an actuarial assessment due to an individual’s dynamic factors. *Id.* at 753. Dr. Harrington noted that actuarial results may be incomplete, but did not cite any individual risk factors that would increase Mr. Marcum’s risk. CP 17. Dynamic factors are manageable through treatment and Mr. Marcum received treatment designed to reduce these risks. *Id.* Actuarial calculations also overstate a person’s risk due to the “statistical decline” in a person’s risk as he ages, and Mr. Marcum is approaching the age where there is a large statistical reduction in risk. *Id.* Mr. Marcum had “internalized essential treatment principles” and his sustained treatment participation resulted in demonstrable regulation of sexual impulses and behavior, which minimizes his individual risk of reoffending, according to the State’s evaluation. CP 17, 21.

By failing to show that actuarial calculations understate Mr. Marcum's risk of reoffense, and instead supplying reasons those results are overinflated, the State's evaluation lacks the predicate evidence of dangerousness due to mental illness needed for continued confinement.

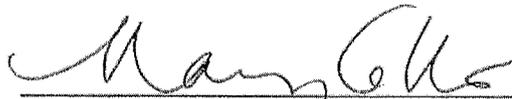
The State's annual review evaluation provides prima facie evidence that Mr. Marcum no longer meets all criteria necessary for his commitment. This factual evidence "vitiates the basis to confine" him under RCW 71.09.060 and 090. *State v. Reid*, 144 Wn.2d 621, 630-31, 30 P.3d 465 (2001). His continued confinement is unconstitutional absent a full trial. *See Foucha*, 504 U.S. at 77.

D. CONCLUSION.

Mr. Marcum respectfully requests this Court order that the evidence presented satisfies the statutory and constitutionally mandated threshold for a trial on the legality of his continued confinement.

DATED this 31st day of May 2016.

Respectfully submitted,



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**APPENDIX A**  
(RCW 71.09.090)

RCW 71.09.090

(1) If the secretary determines that the person's condition has so changed that either: (a) The person no longer meets the definition of a sexually violent predator; or (b) conditional release to a less restrictive alternative is in the best interest of the person and conditions can be imposed that adequately protect the community, the secretary shall authorize the person to petition the court for conditional release to a less restrictive alternative or unconditional discharge. The petition shall be filed with the court and served upon the prosecuting agency responsible for the initial commitment. The court, upon receipt of the petition for conditional release to a less restrictive alternative or unconditional discharge, shall within forty-five days order a hearing.

(2)(a) Nothing contained in this chapter shall prohibit the person from otherwise petitioning the court for conditional release to a less restrictive alternative or unconditional discharge without the secretary's approval. The secretary shall provide the committed person with an annual written notice of the person's right to petition the court for conditional release to a less restrictive alternative or unconditional discharge over the secretary's objection. The notice shall contain a waiver of rights. The secretary shall file the notice and waiver form and the annual report with the court. If the person does not affirmatively waive the right to petition, the court shall set a show cause hearing to determine whether probable cause exists to warrant a hearing on whether the person's condition has so changed that: (i) He or she no longer meets the definition of a sexually violent predator; or (ii) conditional release to a proposed less restrictive alternative would be in the best interest of the person and conditions can be imposed that would adequately protect the community.

(b) The committed person shall have a right to have an attorney represent him or her at the show cause hearing, which may be conducted solely on the basis of affidavits or declarations, but the person is not entitled to be present at the show cause hearing. At the show cause hearing, the prosecuting agency shall 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 in the best interest of the person and conditions cannot be imposed that adequately protect the community. In making this showing, the state may rely exclusively upon the annual report prepared

pursuant to RCW 71.09.070. The committed person may present responsive affidavits or declarations to which the state may reply.

(c) If the court at the show cause hearing determines that either:

(i) The state has failed to present prima facie evidence that the committed person continues to meet the definition of a sexually violent predator and that no proposed less restrictive alternative is in the best interest of the person and conditions cannot be imposed that would adequately protect the community; or

(ii) probable cause exists to believe that the person's condition has so changed that: (A) The person no longer meets the definition of a sexually violent predator; or (B) release to a proposed less restrictive alternative would be in the best interest of the person and conditions can be imposed that would adequately protect the community, then the court shall set a hearing on either or both issues.

(d) If the court has not previously considered the issue of release to a less restrictive alternative, either through a trial on the merits or through the procedures set forth in RCW 71.09.094(1), the court shall consider whether release to a less restrictive alternative would be in the best interests of the person and conditions can be imposed that would adequately protect the community, without considering whether the person's condition has changed. The court may not find probable cause for a trial addressing less restrictive alternatives unless a proposed less restrictive alternative placement meeting the conditions of RCW 71.09.092 is presented to the court at the show cause hearing.

(3)(a) At the hearing resulting from subsection (1) or (2) of this section, the committed person shall be entitled to be present and to the benefit of all constitutional protections that were afforded to the person at the initial commitment proceeding. The prosecuting agency shall represent the state and shall have a right to a jury trial and to have the committed person evaluated by experts chosen by the state. The prosecuting agency shall have a right to a current evaluation of the person by experts chosen by the state. The judge may require the person to complete any or all of the following procedures or tests if requested by the evaluator: (i) A clinical interview; (ii) psychological testing; (iii) plethysmograph testing; and (iv) polygraph testing. The judge may order the person to complete any other procedures and tests relevant to the evaluation. The state is responsible for the costs of the evaluation. The committed person shall also have the right to a jury trial and the right to have experts evaluate him or her on his or her

behalf and the court shall appoint an expert if the person is indigent and requests an appointment.

(b) Whenever any indigent person is subjected to an evaluation under (a) of this subsection, the office of public defense is responsible for the cost of one expert or professional person conducting an evaluation on the person's behalf. When the person wishes to be evaluated by a qualified expert or professional person of his or her own choice, such expert or professional person must be permitted to have reasonable access to the person for the purpose of such evaluation, as well as to all relevant medical and psychological records and reports. In the case of a person who is indigent, the court shall, upon the person's request, assist the person in obtaining an expert or professional person to perform an evaluation or participate in the hearing on the person's behalf. Nothing in this chapter precludes the person from paying for additional expert services at his or her own expense.

(c) If the issue at the hearing is whether the person should be unconditionally discharged, the burden of proof shall be upon the state to prove beyond a reasonable doubt that the committed person's condition remains such that the person continues to meet the definition of a sexually violent predator. Evidence of the prior commitment trial and disposition is admissible. The recommitment proceeding shall otherwise proceed as set forth in RCW 71.09.050 and 71.09.060.

(d) If the issue at the hearing is whether the person should be conditionally released to a less restrictive alternative, the burden of proof at the hearing shall be upon the state to prove beyond a reasonable doubt that conditional release to any proposed less restrictive alternative either: (i) Is not in the best interest of the committed person; or (ii) does not include conditions that would adequately protect the community. Evidence of the prior commitment trial and disposition is admissible.

(4)(a) 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.

(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:

(i) An identified physiological change to the person, such as paralysis, stroke, or dementia, that renders the committed person unable to commit a sexually violent act and this change is permanent; or

(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.

(c) For purposes of this section, a change in a single demographic factor, without more, does not establish probable cause for a new trial proceeding under subsection (3) of this section. As used in this section, a single demographic factor includes, but is not limited to, a change in the chronological age, marital status, or gender of the committed person.

(5) The jurisdiction of the court over a person civilly committed pursuant to this chapter continues until such time as the person is unconditionally discharged.

(6) During any period of confinement pursuant to a criminal conviction, or for any period of detention awaiting trial on criminal charges, this section is suspended.

**IN THE SUPREME COURT OF THE STATE OF WASHINGTON**

IN RE THE DETENTION OF )  
 )  
 )  
JOHN MARCUM, ) NO. 92501-1  
 )  
 )  
 )  
PETITIONER. )

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, DECLARE THAT ON THE 31<sup>ST</sup> DAY OF MAY, 2016, I CAUSED THE ORIGINAL **SUPPLEMENTAL BRIEF OF PETITIONER** TO BE FILED IN THE **WASHINGTON STATE SUPREME COURT** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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**SIGNED** IN SEATTLE, WASHINGTON THIS 31<sup>ST</sup> DAY OF MAY, 2016.

x \_\_\_\_\_  


**Washington Appellate Project**  
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