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WASHINGTON STATE  
SUPREME COURT

by

NO. 92501-1

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**SUPREME COURT OF THE STATE OF WASHINGTON**

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In re the Detention of:

JOHN MARCUM,

Petitioner,

v.

STATE OF WASHINGTON,

Respondent,

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**SUPPLEMENTAL BRIEF OF RESPONDENT  
STATE OF WASHINGTON**

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ROBERT W. FERGUSON  
Attorney General

KRISTIE BARHAM  
Assistant Attorney General  
WSBA No. 32764 / OID No. 91094  
Office of the Attorney General  
800 Fifth Ave, Suite 2000  
Seattle, WA 98104-3188  
(206) 389-2004

 ORIGINAL

## TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	ISSUES PRESENTED FOR REVIEW.....	2
	A. Where RCW 71.09.090(4)(a) explicitly states that an SVP shows probable cause for a new trial <i>only</i> when evidence exists of a substantial change in condition since his “last commitment trial, <i>or less restrictive alternative revocation proceeding</i> ,” did the Court of Appeals correctly interpret the statute?.....	2
	B. Where Marcum refused to participate in treatment after his LRA revocation, was an unconditional release trial warranted?.....	2
	C. Where the State’s expert opined, based on a broad array of information, that Marcum’s mental condition makes him more likely than not to sexually reoffend if unconditionally released, did the State meet its prima facie burden of showing Marcum continued to meet criteria as a sexually violent predator?.....	2
III.	STATEMENT OF THE CASE.....	2
IV.	ARGUMENT.....	4
	A. Statutory Framework: Annual Review Show Cause Hearing.....	4
	1. Overview and Standard of Proof.....	4
	2. State’s Prima Facie Burden of Proof.....	5
	3. SVP’s Prima Facie Burden of Proof.....	6
	B. The Court of Appeals Correctly Required Proof of Change Since the Last LRA Revocation.....	7

1.	The Plain Language of the Statute Requires Evidence of a Substantial Change Since the Last LRA Revocation.....	7
2.	Statutes Must Be Construed So That All Language is Given Effect With No Language Rendered Meaningless or Superfluous .....	9
3.	<i>Jones</i> Was Decided Before the Phrase “or Less Restrictive Alternative Revocation Proceeding” Was Added to RCW 71.09.090(4)(a) .....	12
4.	The Statutory Scheme Does Not Discourage LRA Placements .....	13
C.	Marcum Was Not Entitled to an Unconditional Release Trial Because He Failed to Show a Change in Condition Since His LRA Was Revoked.....	16
1.	Marcum Refused All Treatment After His LRA Was Revoked.....	16
2.	Dr. Spizman’s Report Was Insufficient to Meet Marcum’s Burden For an Unconditional Release Trial .....	17
D.	The State Presented Prima Facie Evidence That Marcum’s Mental Condition Makes Him Likely to Sexually Reoffend.....	18
V.	CONCLUSION .....	20

## TABLE OF AUTHORITIES

### Cases

<i>Davis v. State ex rel. Dept. of Licensing</i> , 137 Wn.2d 957, 977 P.2d 554 (1999).....	8, 9
<i>Duke v. Boyd</i> , 133 Wn.2d 80, 942 P.2d 351 (1997).....	7, 12
<i>In re Det. of Jacobson</i> , 120 Wn. App. 770, 86 P.3d 1202 (2004).....	17, 20
<i>In re Det. of Jones</i> , 149 Wn. App. 16, 201 P.3d 1066 (2009).....	5, 12, 13
<i>In re Det. of Lewis</i> , 134 Wn. App. 896, 143 P.3d 833 (2006).....	18
<i>In re Det. of Marcum</i> , 190 Wn. App. 599, 360 P.3d 888 (2015).....	passim
<i>In re Det. of Moore</i> , 167 Wn.2d 113, 216 P.3d 1015 (2009).....	18
<i>In re Det. of Petersen</i> , 138 Wn.2d 70, 980 P.2d 1204 (1999) ( <i>Petersen I</i> ).....	5, 11
<i>In re Det. of Petersen</i> , 145 Wn.2d 789, 42 P.3d 952 (2002) ( <i>Petersen II</i> ) .....	6, 18
<i>In re Det. of Stout</i> , 159 Wn.2d 357, 150 P.3d 86 (2007).....	10
<i>In re Det. of Thorell</i> , 149 Wn.2d 724, 72 P.3d 708 (2003).....	18
<i>In re Pers. Restraint of Meirhofer</i> , 182 Wn.2d 632, 343 P.3d 731 (2015).....	19

<i>In re Pers. Restraint of Young</i> , 122 Wn.2d 1, 857 P.2d 989 (1993).....	19
<i>State v. Armendariz</i> , 160 Wn.2d 106, 156 P.3d 201 (2007).....	7
<i>State v. Keller</i> , 143 Wn.2d 267, 19 P.3d 1030 (2001).....	7, 9, 12
<i>State v. McCuiston</i> , 174 Wn.2d 369, 275 P.3d 1092 (2012).....	passim
<i>State v. Watson</i> , 146 Wn.2d 947, 51 P.3d 66 (2002).....	7
<i>Whatcom County v. City of Bellingham</i> , 128 Wn.2d 537, 909 P.2d 1303 (1996).....	9, 12

**Statutes**

RCW 71.09.010 .....	5
RCW 71.09.020(18).....	4, 18
RCW 71.09.060(1).....	4
RCW 71.09.070 .....	4
RCW 71.09.090 .....	15, 16
RCW 71.09.090(2).....	5
RCW 71.09.090(2)(c) .....	5, 6, 7, 17
RCW 71.09.090(2)(d) .....	5, 13
RCW 71.09.090(4).....	6
RCW 71.09.090(4)(a) .....	passim
RCW 71.09.090(4)(b) .....	12, 17

RCW 71.09.090(4)(b)(ii)..... 8, 16  
RCW 71.09.092 ..... 4

**Other Authorities**

Black's Law Dictionary 291 (5th ed. 1979)..... 16  
Laws of 2009, ch. 409, § 8..... 8, 13

## I. INTRODUCTION

A Sexually Violent Predator (SVP) who is terminated from treatment and fails on a *conditional* release could not be ready for *unconditional* release. Because John Marcum was unable to manage himself in a highly structured conditional release, the SVP statutes reasonably require that he show his condition has since improved due to treatment before he can claim readiness for another release, especially unconditional release.

Courts must construe the statutory scheme as a whole so that all language is given effect without any provision rendered superfluous. Marcum's proposed statutory interpretation would create an absurd scheme whereby an individual who previously failed on conditional release would be able to make a prima facie case for unconditional release, but would not be able to make a showing for a new conditional release trial. Marcum's interpretation also reduces the incentive of SVPs to continue to participate in treatment, contrary to the intent of the statute.

The Court of Appeals correctly held that the Legislature has directed trial courts to measure change from the last proceeding, whether it was a commitment trial or a Less Restrictive Alternative (LRA) revocation proceeding. In Marcum's case, his last proceeding was the 2011 LRA revocation proceeding, and the Court of Appeals correctly determined that Marcum must show change from this point forward in order to obtain a new

trial. Marcum could not show any such change because he had refused to participate in treatment for nearly three years. This Court should affirm.

## II. ISSUES PRESENTED FOR REVIEW

- A. Where RCW 71.09.090(4)(a) explicitly states that an SVP shows probable cause for a new trial *only* when evidence exists of a substantial change in condition since his “last commitment trial, or less restrictive alternative revocation proceeding,” did the Court of Appeals correctly interpret the statute?
- B. Where Marcum refused to participate in treatment after his LRA revocation, was an unconditional release trial warranted?
- C. Where the State’s expert opined, based on a broad array of information, that Marcum’s mental condition makes him more likely than not to sexually reoffend if unconditionally released, did the State meet its prima facie burden of showing Marcum continued to meet criteria as a sexually violent predator?

## III. STATEMENT OF THE CASE

John Marcum has been convicted of four sexually violent offenses against young boys. CP 3-6. He has admitted to sexually assaulting twenty-one boys between the ages of five and thirteen. CP 16. In 2001, Marcum was civilly committed as an SVP. *Id.* In 2009, based on his treatment progress, Marcum was released to an LRA at a Secure Community Transition Facility (SCTF). CP 17, 84-94.

Approximately nineteen months after transitioning to the LRA, Marcum became unmotivated and stopped any effort to successful transition on the LRA. CP 122. Staff warned Marcum that his lack of motivation was harming not only his physical condition and job search, but also was

impacting his progress in sex offender treatment. *Id.* Over the next several months, SCTF staff and Marcum's treatment provider, Dr. Vincent Gollogly, gave Marcum directives designed to address these issues; however, Marcum did not follow them. *Id.* The Clinical Team then explicitly warned Marcum that if he did not apply himself and improve, it would recommend return to total confinement due to his minimal cooperation with supervision and treatment. *Id.* Several months later, Dr. Gollogly reported that Marcum was still not receptive to feedback. CP 122-23. Marcum refused to work<sup>1</sup> and displayed an overall negative attitude. CP 122-27. He violated treatment rules and ignored directives. *Id.* Rather than accept responsibility, Marcum blamed the SCTF for his poor transition. CP 123. In February 2011, Dr. Gollogly terminated Marcum from treatment. CP 122-23.<sup>2</sup>

The State moved to revoke Marcum's LRA. CP 79-82. Marcum stipulated to revocation. CP 129-32. In May 2011, the trial court agreed and returned him to total confinement at the Special Commitment Center (SCC). CP 133-35. Since that time, Marcum has refused to participate in any sex offender treatment. CP 17, 23.

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<sup>1</sup> Marcum claims that SCTF jobs paid "meager wages of one to three dollars" and he was "required to pay the cost of care from that minimal sum[.]" Pet. for Rev. at 4 (citing CP 122, 127). However, the records cited do not reference wage amounts. *See* CP 122, 127. Rather, the record indicates that Marcum initially refused any SCTF jobs because they paid "under minimum wage" and he would have to pay "15% for cost of care." CP 122. The transition team voiced concern, and Marcum later agreed to work, but claimed he could only do sedentary work. *Id.*

<sup>2</sup> The trial court found that Dr. Gollogly terminated Marcum from treatment due to Marcum's attitude and his violation of a rule prohibiting trading goods. CP 134.

In May 2012, the trial court found that Marcum continued to meet criteria as an SVP based on the Department of Social and Health Services' (DSHS) 2012 annual review. CP 13-15. In April 2013, DSHS submitted another annual review. CP 16-28. The evaluator, Dr. Regina Harrington, considered a broad range of information in evaluating Marcum's mental condition and risk. *See* CP 16-22. Based on this information, Dr. Harrington concluded that Marcum continues to meet SVP criteria. CP 24.

#### IV. ARGUMENT

##### A. Statutory Framework: Annual Review Show Cause Hearing

###### 1. Overview and Standard of Proof

An individual determined to be an SVP<sup>3</sup> is committed to the custody of DSHS for control, care, and treatment in a secure facility until: (1) the person's condition has so changed that he no longer meets the definition of an SVP; or (2) conditional release to an LRA as set forth in RCW 71.09.092 is in the person's best interest and conditions can be imposed to adequately protect the community. RCW 71.09.060(1). DSHS must conduct an annual evaluation of the person's mental condition to assess both these issues. RCW 71.09.070.

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<sup>3</sup> An SVP is defined as "any person who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility." RCW 71.09.020(18).

The standard of proof at a show cause hearing is “probable cause.” *State v. McCuiston*, 174 Wn.2d 369, 382, 275 P.3d 1092 (2012). While the probable cause standard is not a stringent one, it allows the court to perform a critical gate-keeping function, and determine whether “the asserted evidence, if believed, is *sufficient* to establish the proposition its proponent intends to prove.” *Id.* (emphasis in original).

The Legislature has specifically found that SVPs are extremely dangerous and their treatment needs are very long term. RCW 71.09.010; *In re Det. of Petersen*, 138 Wn.2d 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.” *Petersen I*, 138 Wn.2d. at 81 (emphasis in original).

## 2. State’s Prima Facie Burden of Proof

At the annual show cause hearing, the State bears the burden to present prima facie evidence that the person remains an SVP and that conditional release to a proposed LRA would not be appropriate. RCW 71.09.090(2); *McCuiston*, 174 Wn.2d at 380.<sup>4</sup> If the State fails to meet this burden, the matter must be set for trial. RCW 71.09.090(2)(c);

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<sup>4</sup> The court may not find probable cause for an LRA trial unless the SVP presents a specific “proposed” LRA placement meeting the requirements of RCW 71.09.092 at the show cause hearing. See RCW 71.09.090(2)(d); *In re Det. of Jones*, 149 Wn. App. 16, 26, 201 P.3d 1066 (2009).

*In re Det. of Petersen*, 145 Wn.2d 789, 798, 42 P.3d 952 (2002)  
(*Petersen II*).

### 3. SVP's Prima Facie Burden of Proof

Probable cause for a new trial may also be established through the SVP's proof. *Petersen II*, 145 Wn.2d at 798. An SVP must show "substantial change":

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.

RCW 71.09.090(4)(a) (emphasis added); RCW 71.09.090(2)(c).

RCW 71.09.090(4) requires the SVP to meet very specific criteria in order to satisfy the "so changed" requirement. The SVP must show that, since his last commitment trial or LRA revocation proceeding, there has been a "substantial change" in his condition due to either: (1) a permanent physiological change that renders him unable to sexually reoffend; or (2) a change in mental condition brought about through "positive response to continuing participation in treatment[.]" RCW 71.09.090(4). If the SVP

makes either required showing, there is probable cause to order a new trial. RCW 71.09.090(2)(c).<sup>5</sup>

**B. The Court of Appeals Correctly Required Proof of Change Since the Last LRA Revocation**

**1. The Plain Language of the Statute Requires Evidence of a Substantial Change Since the Last LRA Revocation**

Statutory interpretation is a question of law, which is reviewed de novo. *State v. Keller*, 143 Wn.2d 267, 276, 19 P.3d 1030 (2001). The goal of statutory interpretation is to discern and implement the Legislature's intent. *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007). The legislative intent should be derived primarily from the statutory language. *Duke v. Boyd*, 133 Wn.2d 80, 87, 942 P.2d 351 (1997). Courts do not engage in statutory interpretation of a statute that is not ambiguous. *Keller*, 143 Wn.2d at 276. If the plain language of the statute is unambiguous, the court's inquiry ends. *Armendariz*, 160 Wn.2d at 110.

This Court does not insert words into a statute where the language, taken as a whole, is clear and unambiguous, even if the Court believes the Legislature intended something else but did not adequately express it. *State v. Watson*, 146 Wn.2d 947, 955, 51 P.3d 66 (2002); *see also Duke*, 133 Wn.2d at 87 (courts must assume the Legislature meant exactly what

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<sup>5</sup> This Court has upheld the amendment requiring either a permanent physiological change or a treatment-based change. *McCustion*, 174 Wn.2d 369.

it said and apply the statute as written). In determining the plain meaning of a statute, courts must consider the statute as a whole. *See Davis v. State ex rel. Dept. of Licensing*, 137 Wn.2d 957, 963, 977 P.2d 554 (1999).

Here, the Court of Appeals correctly determined that the statute requires courts to measure “change” from the last time the court assessed the person’s condition at a hearing – whether at a commitment trial or an LRA revocation hearing. *See In re Det. of Marcum*, 190 Wn. App. 599, 603-05, 360 P.3d 888 (2015). RCW 71.09.090(4)(a) explicitly provides that probable cause exists to believe a person’s condition has “so changed” *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 condition. *Id.* (emphasis in original).<sup>6</sup> Marcum’s LRA was revoked in May 2011. CP 133-35. Thus, under the plain language of the statute, in order to show probable cause that a new trial is warranted, Marcum was required to present evidence of a “substantial change” in his condition since the court revoked his LRA in May 2011.

Furthermore, Marcum was required to show that this change was due to a positive response to *continuing* participation in treatment. RCW 71.09.090(4)(b)(ii). Marcum could not produce such evidence because he refused to participate in *any* treatment since his LRA was revoked.

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<sup>6</sup> The italicized language was added by the Laws of 2009, ch. 409, § 8. *Id.*

See CP 17, 23. Under the statute's plain language, evidence of any prior treatment gains before the LRA revocation does not satisfy probable cause.

"Courts should assume the Legislature means exactly what it says." *Keller*, 143 Wn.2d at 276. Here, the phrase "only when evidence exists, since the person's last commitment trial, or *less restrictive alternative proceeding*" is plain and unambiguous. See RCW 71.09.090(4)(a) (emphasis added). The Court of Appeals was correct that the 2009 amendment "simply recognized that an LRA revocation might be the most recent occasion at which a court was assessing the detainee and allowed judges to work from that point." *Marcum*, 190 Wn. App. at 605.

**2. Statutes Must Be Construed So That All Language is Given Effect With No Language Rendered Meaningless or Superfluous**

Courts construe a statute in its entirety with each provision viewed in relation to the other provisions and harmonized, if possible. *Keller*, 143 Wn.2d at 277; see also *Davis*, 137 Wn.2d at 963. "Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous." *Whatcom County v. City of Bellingham*, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996); see also *Keller*, 143 Wn.2d at 277. The court must also avoid constructions that yield absurd consequences. See *id.*

Marcum argues that change should be measured from the last commitment trial, rather than from the last LRA revocation proceeding. The Court of Appeals correctly explained that Marcum's interpretation reads the words "or less restrictive alternative proceeding" in RCW 71.09.090(4)(a) right out of the statute in derogation of the court's duty to give effect to all language in a statute. *See Marcum*, 190 Wn. App. at 604 (citing *In re Det. of Stout*, 159 Wn.2d 357, 367 FN6, 150 P.3d 86 (2007)). Marcum's reading would render the Legislature's 2009 amendment to RCW 71.09.090(4)(a) meaningless because it would require the court to measure change from the last commitment trial in every case.

The Court of Appeals majority correctly explained that the Legislature "easily could have tied the LRA and commitment trial language to subsequent proceedings of the same variety" as the dissent suggests, but it did not. *See Marcum*, 190 Wn. App. at 604-05. Instead, it tied that language to the "so changed" probable cause definition applicable to both proceedings, which is entirely consistent with the 2005 legislative intent requiring change to be measured from the most recent hearing, as opposed to over the entire history of the commitment. *Id.* at 605. The Court of Appeals correctly followed the plain language of the statute by requiring Marcum to show a change in condition since his LRA was revoked in order to obtain a new trial.

Once an SVP makes the required showing of change, he then has a statutory right, not a constitutional right, to a new trial. *McCustion*, 174 Wn.2d at 386. Accordingly, the Legislature can define what is required to obtain this additional benefit, including a requirement that he must show a change in his mental condition due to treatment after any LRA revocation in order to obtain a new trial. *See Marcum*, 190 Wn. App. at 604; *see also McCustion*, 174 Wn.2d at 388-89 (The Legislature had every right to alter a scheme that provides protections beyond what is required by substantive due process). This ensures that the statutory focus remains on successful treatment participation. *See McCustion*, 174 Wn.2d at 389-90; *see also Petersen I*, 138 Wn.2d at 81.

Marcum refused to participate in any treatment after his LRA was revoked and he failed to make any progress. CP 17, 23; *see Marcum*, 190 Wn. App. at 606. Marcum's unsuccessful *conditional* release does not demonstrate that he is ready for *unconditional* release absent some evidence of change:

**Having failed at the LRA, he does not now obtain a “do over” by using the same initial evidence of change to obtain a new commitment trial.** He made his choice then and wisely sought the halfway step toward release. The unsuccessful LRA does not demonstrate that Mr. Marcum now is ready for release.

*Marcum*, 190 Wn. App. at 605 (emphasis added).

Contrary to Marcum's claim, the Court of Appeals did not add requirements into the plain language of RCW 71.09.090(4)(b). RCW 71.09.090(4)(a) is a *mandatory* definition of "probable cause" that applies to evidence Marcum must show in order to obtain a new trial. It unequivocally includes a requirement of change since the "less restrictive alternative revocation proceeding." RCW 71.09.090(4)(a). RCW 71.09.090(4)(b), on the other hand, pertains more generally to the ordering of trials *after* probable cause has been established. RCW 71.09.090(4)(b). The mere fact that (4)(a) and (4)(b) are not identical does not mean that the phrase should be ignored as Marcum suggests. Courts must construe the statute as a whole with each provision viewed in relation to the other provisions. *Keller*, 143 Wn.2d at 277. All language should be given effect, with no portion rendered superfluous. *Whatcom County*, 128 Wn.2d at 546. Finally, courts should not second guess or "question the wisdom" of the Legislature's judgment. *Duke*, 133 Wn.2d at 87.

**3. Jones Was Decided Before the Phrase "or Less Restrictive Alternative Revocation Proceeding" Was Added to RCW 71.09.090(4)(a)**

Marcum argues that the Court of Appeals decision is contrary to *Jones*, 149 Wn. App. 16. *See* Pet. for Rev. at 9, 12. Marcum fails to recognize that the Legislature added the statutory language at issue in this case **after** *Jones* was decided.

At the time, RCW 71.09.090(4)(a) did not include the phrase “or less restrictive alternative revocation proceeding”. *See Jones*, 149 Wn. App. at 30. The State broadly construed “commitment trial proceeding” to include an LRA revocation hearing. *Id.* The *Jones* Court rejected this broad interpretation, noting that they are two different hearings. *See id.* Shortly after, and perhaps in reaction to *Jones*, the Legislature amended RCW 71.09.090(4)(a) to require a change “since the person’s last commitment trial, *or less restrictive alternative revocation proceeding*”. RCW 71.09.090(4)(a) (emphasis added).<sup>7</sup> Thus, *Jones* has been legislatively overturned and is no longer good law.

#### **4. The Statutory Scheme Does Not Discourage LRA Placements**

SVPs are not required to show *any* change in condition in order to transition to an LRA for the first time. RCW 71.09.090(2)(d).<sup>8</sup> Thus, SVPs are not discouraged from transitioning to an LRA in lieu of seeking unconditional release.

“[T]he State has a substantial interest in encouraging treatment, preventing the premature release of SVPs, and avoiding the significant

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<sup>7</sup> *Jones* was published on February 23, 2009. The Legislature added the LRA revocation language effective May 7, 2009. Laws of 2009, ch. 409, § 8.

<sup>8</sup> If the court has not previously considered the issue of release to an LRA, the court shall consider whether an LRA would be in the person’s best interest and conditions could be imposed to adequately protect the community, “*without considering whether the person’s condition has changed.*” RCW 71.09.090(2)(d) (emphasis added).

administrative and fiscal burdens associated with evidentiary hearings.” *McCouston*, 174 Wn.2d at 394. Rather than discouraging SVPs from seeking conditional release, the statutory scheme properly places the incentive on successful treatment participation. By making treatment the only viable avenue to a release trial (absent a permanent physiological change), the State creates an incentive for participation in treatment. *Id.*

Marcum claims that he did not participate in treatment at the SCC after his LRA was revoked because “he had already achieved maximum benefit” from the SCC program. Pet. for Rev. at 4. However, Dr. Harrington did not opine that Marcum had reached the maximum benefit of the SCC program such that he was ready for unconditional release. *See* CP 23-24. Rather, she opined that he was ready for *conditional* release to an LRA. *Id.* However, Marcum chose not to pursue this recommendation and instead sought unconditional release, despite the fact that he had refused to participate in treatment for nearly three years. *See* CP 17, 23, 29-33. The State has an interest in protecting the community by restricting trials to those participating in treatment. *See McCouston*, 174 Wn.2d at 395.<sup>9</sup>

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<sup>9</sup> Marcum also claims that Dr. Harrington agreed he “had significant control over his behavior as well as his thought process.” Pet. for Rev. at 5. Marcum fails to cite to any records for this assertion. In fact, Dr. Harrington never makes such a statement. *See* CP 16-24. Rather, she indicated that *prior to transitioning to the LRA in 2009*,

Marcum also argues that the showing of change “makes sense only if the change required for an unconditional release trial is change from the last commitment trial, and change is measured from the LRA revocation if a new LRA is sought.” Pet. for Rev. at 11. But this argument requires adding words to the statute that do not exist. It is true that many other provisions in RCW 71.09.090 distinguish between unconditional release and an LRA. *See id.* However, these other provisions simply show that the Legislature clearly knew how to articulate a different process or standard for LRA proceedings. The Legislature chose not to under RCW 71.09.090(4)(a).

Moreover, if an SVP must show change from the last LRA revocation hearing in order to obtain a subsequent *conditional* release to an LRA, it makes sense for the statute to require him to show at least that same level of change in order to obtain an *unconditional* release trial. Otherwise an SVP could face an easier hurdle to achieving an unconditional release trial—where the end result could be unsupervised release into the community—than he would face in obtaining a second LRA placement. This defies common sense and is not likely what the Legislature intended.

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Marcum “made significant strides in developing ways to control his deviant arousal, substance abuse, and the emotional/behavioral cycle” that led to his offending. CP 17.

**C. Marcum Was Not Entitled to an Unconditional Release Trial Because He Failed to Show a Change in Condition Since His LRA Was Revoked**

**1. Marcum Refused All Treatment After His LRA Was Revoked**

The Court of Appeals correctly determined that “probable cause” under RCW 71.09.090 required Marcum to show that he had changed due to *continuing* participation in treatment as is unequivocally required in RCW 71.09.090(4)(b)(ii). “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 at 291 (5th ed. 1979).

Marcum could not possibly meet this burden because he had refused to participate in any treatment since his LRA was revoked in May 2011. *See* CP 17, 23, 122-23, 133-35; Dr. Gollogly undisputedly “terminated” Marcum’s treatment in February 2011. CP 122-23. Thereafter, Marcum refused to participate in any treatment for nearly three years. *See* CP 17, 23. Thus, his treatment cannot be “continuing” or “enduring” and the Court of Appeals correctly determined that Marcum failed to meet the statutory requirement for an unconditional release trial.

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**2. Dr. Spizman's Report Was Insufficient to Meet Marcum's Burden For an Unconditional Release Trial**

Marcum argues that his expert, Dr. Spizman, opined that Marcum had changed "due to his successful participation in sex-offender-specific treatment." Pet. for Rev. at 12 (citing CP 73-74). However, at the cited pages, Dr. Spizman merely states that "*while at the SCTF*" Marcum was able to "maintain the solid gains he has made via treatment." CP 74 (emphasis added). Dr. Spizman then concludes that "Marcum has so changed, via his efforts in treatment, in conjunction with various other factors," that he no longer meets SVP criteria. CP 74. This is a far cry from the standard required by the statute. Reading together RCW 71.09.090(2)(c), RCW 71.09.090(4)(a), and RCW 71.09.090(4)(b), Marcum was required to show a "substantial change" in condition due to a "positive response to continuing participation in treatment" since his 2011 LRA revocation.

When reviewing the sufficiency of the evidence, the court must "look at the *facts* contained in the report to decide whether they support the expert's conclusions." *See In re Det. of Jacobson*, 120 Wn. App. 770, 780, 86 P.3d 1202 (2004) (emphasis added). Mere conclusory statements by an expert do not establish probable cause. *Id.*; *see also McCuiston*, 174 Wn.2d at 382. Dr. Spizman fails to include *any* facts to support an opinion that Marcum's mental condition changed due to treatment since

the LRA revocation. Thus, the Court of Appeals correctly determined that Marcum was not entitled to a new trial.

**D. The State Presented Prima Facie Evidence That Marcum's Mental Condition Makes Him Likely to Sexually Reoffend<sup>10</sup>**

The State presented prima facie evidence that Marcum's mental condition makes him likely to reoffend if unconditionally released. Actuarial assessment is but one component of an evaluator's overall risk assessment. Dr. Harrington considered a broad range of information and conducted a comprehensive risk assessment before ultimately opining that Marcum continues to meet the definition of an SVP because "his present mental condition still includes the predisposition for sexually violent behavior" that makes him likely to sexually reoffend. CP 24.

Actuarial instruments have limited applicability in SVP cases. *In re Det. of Thorell*, 149 Wn.2d 724, 753, 72 P.3d 708 (2003); *see also In re Det. of Lewis*, 134 Wn. App. 896, 906, 143 P.3d 833 (2006) (actuarial instruments underestimate risk because they only measure convictions).<sup>11</sup> Dr. Harrington explained that actuarial instruments generally underestimate actual sexual offense risk for a variety of reasons,

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<sup>10</sup> The Court of Appeals did not address this issue. *See Marcum*, 190 Wn. App. 599. But this Court can affirm the trial court's decision on this issue based on its own review of the record and the law. *See Petersen II*, 145 Wn.2d at 799.

<sup>11</sup> Actuarial testing measures recidivism rates within a finite, limited time, such as five or ten years. *See* CP 17. The question for an evaluator is whether the person is likely to reoffend in his lifetime. *See* RCW 71.09.020(18); *see also In re Det. of Moore*, 167 Wn.2d 113, 125-26, 216 P.3d 1015 (2009).

including: failure to measure unreported or uncharged sex offenses, failure to assess all primary risk factors, and failure to assess lifetime risk. CP 17.<sup>12</sup> Experts are not limited to the results of actuarial tests; they may rely on static and dynamic risk factors and clinical judgment. *See In re Pers. Restraint of Meirhofer*, 182 Wn.2d 632, 645-46, 343 P.3d 731 (2015).

Dr. Harrington relied on a broad range of information to support her conclusion that Marcum continued to meet SVP criteria. *See* CP 16. She considered clinical information from multiple data sources, she assessed Marcum's treatment knowledge and progress, and she considered information about his sexual offending, which revealed longstanding dynamic risk factors. *See* CP 16-17, 20-22. An SVP's sexual history is highly probative of his recidivism risk. *In re Pers. Restraint of Young*, 122 Wn.2d 1, 53, 857 P.2d 989 (1993), *superseded by statute on other grounds*. Dr. Harrington also considered the nature of Marcum's mental disorders and their impact on his ability to control his behavior, noting that symptoms associated with his mental disorders correspond with known risk factors. CP 17-20. Consequently, she also considered research-supported dynamic risk factors. CP 17. She noted that Marcum was not

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<sup>12</sup> Contrary to Marcum's assertions, Dr. Harrington did not opine that he "poses at most a 30% risk of reoffending in 10 years" or that actuarial assessment "may overstate a person's future dangerousness." *See* Pet. for Rev. at 16. In fact, her opinion was the opposite-that actuarial assessments are generally *underestimates* of actual risk. CP 17.

acknowledging his faults or making appropriate changes due to his refusal to participate in treatment after his LRA was revoked. *See* CP 17, 23.

Based upon all this information, Dr. Harrington concluded that Marcum continues to meet SVP criteria. *See* CP 24.<sup>13</sup> The trial court was not permitted to weigh the evidence, but must assume the truth of the evidence presented. *See McCuiston*, 174 Wn.2d at 382. Dr. Harrington presented sufficient facts supporting her ultimate conclusion that Marcum continues to meet criteria as an SVP.

#### V. CONCLUSION

The Court of Appeals correctly affirmed the trial court's denial of Marcum's request for a new commitment trial. This Court should affirm.

RESPECTFULLY SUBMITTED this 31<sup>st</sup> day of May, 2016.

ROBERT W. FERGUSON  
Attorney General

  
\_\_\_\_\_  
KRISTIE BARHAM  
WSBA No. 32764  
Assistant Attorney General

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<sup>13</sup> Marcum incorrectly asserts that there was an "undisputed lack of present risk." *See* Pet. for Rev. at 17. Dr. Harrington explicitly opined that Marcum was more likely than not to sexually reoffend, CP 24. Further, Marcum's claim that it is "a required element" for the State to set forth facts showing *how* Marcum was likely to commit predatory acts of sexual violence is simply wrong. *See* Pet. for Rev. at 17. There is no such element or requirement. The *Jacobson* case cited by Marcum only requires sufficient facts to support the expert's ultimate conclusion. *See Jacobson*, 120 Wn. App. at 780-81.

NO. 92501-1

**SUPREME COURT OF THE STATE OF WASHINGTON**

In re the Detention of:

John Marcum,

Petitioner.

DECLARATION OF  
SERVICE

I, Lucy Pippin, declare as follows:

On May 31, 2016, I sent via electronic mail a true and correct copy of Supplemental Brief of Respondent and Declaration of Service, addressed as follows:

Nancy Collins  
Washington Appellate Project  
[nancy@washapp.org](mailto:nancy@washapp.org)  
[wapofficemail@washapp.org](mailto:wapofficemail@washapp.org)

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

DATED this 31<sup>st</sup> day of May, 2016, at Seattle, Washington.



LUCY PIPPIN  
Legal Assistant

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**From:** OFFICE RECEPTIONIST, CLERK  
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**Subject:** RE: In re the Detention of John Marcum, WSSC No. 92501-1

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**Subject:** In re the Detention of John Marcum, WSSC No. 92501-1

Good Afternoon,

Please find attached for filing and service the Supplemental Brief of Respondent and Declaration of Service in the above-entitled case.

Thank you,

**Lucy Pippin**

**Legal Assistant to Kristie Barham, Brooke Burbank, and Shelley Williams**

Washington State Attorney General's Office | Criminal Justice Division

800 Fifth Ave | Suite 2000 | Seattle, WA 98104

206-389-2765 | Fax: 206-587-5088 | [LucyP1@atg.wa.gov](mailto:LucyP1@atg.wa.gov)

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Thank you,  
**Lucy Pippin**  
**Legal Assistant to Kristie Barham, Brooke Burbank, and Shelley Williams**  
Washington State Attorney General's Office | Criminal Justice Division  
800 Fifth Ave | Suite 2000 | Seattle, WA 98104  
206-389-2765 | Fax: 206-587-5088 | [LucyP1@atg.wa.gov](mailto:LucyP1@atg.wa.gov)