NO. 32118-5-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

IN RE: DETENTION OF JOHN MARCUM

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

APPELLANT'S REPLY BRIEF

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A. ARGUMENT.

Throughout its response brief, the State claims to be characterizing Mr. Marcum's arguments. But these characterizations are straw men that fundamentally distort the issues Mr. Marcum raises on appeal. Mr. Marcum asks this Court to disregard the State's assertions when it purports to be repeating Mr. Marcum's analysis. This Court should turn to Mr. Marcum's Opening Brief and this Reply to assess the legal and factual issues on appeal.

1. The State's expert offered no factual basis to explain how Mr. Marcum continued to meet the criteria for confinement even though a bare conclusion is inadequate under the law.

The State's evaluation must be supported by sufficient factual explanation to meet its burden on annual review. *In re the Detention of Jacobson*, 120 Wn.App. 770, 780, 86 P.3d 1202 (2004). The "facts contained in the report" must "support the expert's conclusions." *Id.* It is the court's role to determine whether those facts asserted, if believed, are sufficient to meet the ultimate conclusion that commitment may continue without further evidentiary proof. *Id.*; *see also State v. McCuistion*, 174 Wn.2d 369, 382, 275 P.3d 1092 (2012), *cert. denied*, 133 S.Ct. 1460 (2013) ("court can and must determine whether the

asserted evidence, if believed, is *sufficient* to establish" the essential requirements of continued commitment (emphasis in original)).

The majority of the State's argument defending its expert's opinion is largely irrelevant. Mr. Marcum does not contend that only actuarial scores define a person's future risk, as the State claims. Critically, the actuarial score is all the State's expert offered and this score does not establish the requisite more likely than not standard.

Here, the State evaluator's actuarial assessment concluded that Mr. Marcum poses at most a 30% risk of reoffending in 10 years. CP 17. The evaluator did not offer any other evidentiary basis for concluding that Mr. Marcum presented a heightened risk.

Contrary to the insinuation in the State's brief, its evaluator did not rely on "dynamic" or clinical factors to *increase* Mr. Marcum's likelihood of future predatory attacks if released. Dr. Harrington may well have considered a "broad range" of information about Mr. Marcum, but that information is not described in the report to increase Mr. Marcum's risk of re-offending. The only "dynamic" factor the evaluator's report mentions is the *reduced* likelihood of re-offense due to well-cemented treatment teachings, noting that Mr. Marcum's treatment teachings seemed entrenched and showed his ability to

control his behavior. CP 23. Dr. Harrington firmly stated that Mr. Marcum had not shown any "deterioration in sexual regulation" even after he returned to the Special Commitment Center (SCC) from the less restrictive alternative (LRA). CP 17.

The State's response brief points to no place in its expert's annual review evaluation that explains how Mr. Marcum's risk of re-offense meets the more-likely-than-not standard for predatory reoffending.

The State does not save a factually deficient evaluation by inserting boilerplate language that the person continues to meet the criteria for confinement. Dr. Harrington did not offer factual basis to conclude Mr. Marcum remained sufficiently dangerous to render his on-going confinement permissible absent a further evidentiary hearing. This failure to offer the required factual support means the State did not meet its burden of proof.

2. Mr. Marcum supplied a reasoned, factually supported opinion from a qualified expert that his long-term treatment participation rendered him no longer eligible for continued total confinement.

Unlike the State evaluator's bare conclusion absent factual support, Mr. Marcum offered a detailed evaluation explaining that he

no longer had the requisite mental or personality disorder rendering him dangerous of predatory re-offense as necessary to confine him without further evidentiary review. Moreover, Dr. Paul Spizman's conclusion rested on change directly resulting from Mr. Marcum's long-term treatment participation.

There is no question that both experts consulted in this case concluded Mr. Marcum had achieved "maximum benefit" from the state's treatment program. He had been engaged in the program for a long time and had demonstrated behavioral change as a result, internalizing the teachings and showing control over himself.

a. This Court has already ruled that the relevant change is measured from the original commitment trial.

Similarly to Mr. Marcum's case, *In re Detention of Jones*, 149 Wn.App. 16, 20, 201 P.3d 1066 (2009), involved an annual review appeal from a petitioner who had been given an LRA but that LRA was revoked. The State argued that his request further relief on annual review must be measured by his showing of change occurring after his LRA revocation, and from his original commitment. *Id.* at 30. This Court rejected this argument because "commitment status is not at issue

in an LRA revocation hearing." *Id.* An LRA may be revoked for myriad reasons that do not bear on or alter a person's commitment.

This analysis is particularly apt in Mr. Marcum's situation, because he did not lose his LRA placement due to a hint of sexual misbehavior. CP 126 (treatment provider Dr. Gollogy explaining, "his decision to terminate treatment with Mr. Marcum had 'nothing to do with his participation and compliance with treatment requirements.'"). Mr. Marcum agreed to give up his LRA placement after Dr. Gollogy terminated treatment – but the report explaining this termination shows Mr. Marcum's dole drums were the root cause. His failings were that he was not getting out of bed early in the morning, exercising and working. CP 122. He did not like the employment options available to him as a closely monitored sex offender and sought "sedentary work." *Id.* He postponed getting a doctor to evaluate his physical limitations and then did not remind the doctor to give him the report after he was evaluated. CP 123. He ran out of money and borrowed cigarettes from other inmates, and traded stamps for cigarettes, which violated facility rules. *Id.* Despite this lack of motivation for exercising or getting out of bed, he remained "active in treatment group." *Id.*

As explained at the annual review hearing, Mr. Marcum was depressed and not taking his anti-depression medication while at the LRA. CP 54; RP 13, 18. This led to listlessness, which in turn led his treatment provider to find that this placement was not sufficiently inspiring him to obtain the community-based skills he needed. CP 126. Mr. Marcum agreed to the revocation of the LRA because he understood it was not helping him improve and transition. CP 131. But this revocation does not undercut the progress he had made in treatment and it should not be viewed as the equivalent of a new commitment trial in terms of measuring Mr. Marcum's change since that original commitment. Treatment progress occurs over time and Mr. Marcum should not be categorically denied the ability to use his long-term treatment gains to show he has changed from the time of commitment when seeking an unconditional release trial. It is consistent with the statutory scheme, logical, and reasonable to predicate Mr. Marcum's access to an evidentiary hearing on whether he continues to meet the criteria for total confinement on whether he has changed since his original commitment, not as the trial court ruled, the date of the LRA revocation.

b. The expert's opinion of Mr. Marcum's continued benefit from treatment to reduce his potential dangerousness and demonstrate his lack of mental abnormality or personality disorder meets the statutory threshold for an evidentiary hearing.

There is no question that a qualified expert evaluated Mr. Marcum and reached the conclusion that he had learned behavioral control from long-term treatment participation, the originally diagnosed mental abnormality of pedophilia was no longer a valid current diagnosis; and the original belief that he had a personality disorder no longer applies to him. CP 35, 40-41, 45-46, 49, 55, 58. These opinions, supported by the expert's detailed explanation, constitute probable cause that Mr. Marcum no longer meets the criteria required for continued confinement without an evidentiary hearing. *See McCuistion*, 174 Wn.2d at 382.

The State misreads RCW 71.09.090(4)(b)(ii), which provides that the basis for an evidentiary hearing must be a change in mental condition "brought about through positive response to continuing participation in treatment." Mr. Marcum had this positive response to continuing treatment participation. "Continuing" is used to convey the long-term nature of the treatment, which was the intended purpose of this statutory change. *See McCuistion*, 174 Wn.2d at 390. The statutory

provision does not mean that there cannot be any pause in treatment as a mandatory eligibility criteria for an evidentiary hearing, as the State insists. It was Mr. Marcum's continuing participation the led to the changes at the root of the evaluation he presented. His treatment gains are secure. He met his burden of probable cause at the show cause hearing and is entitled to further review of the propriety of his total confinement.

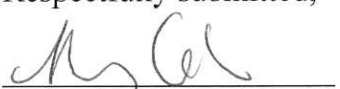
The evaluation Mr. Marcum submitted by Dr. Spizman msut be taken as true, without weighing the supported conclusions of the qualified expert. Under this standard of review, Mr. Marcum is entitled to an evidentiary hearing on his on-going confinement under RCW 71.09.090(3), (4).

B. CONCLUSION.

Mr. Marcum respectfully requests this Court grant him an evidentiary hearing on his continued confinement under RCW 71.09.

DATED this 24th day of April 2015..

Respectfully submitted,



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JOHN MARCUM,	)	NO. 32118-5-III
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APPELLANT.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, DECLARE THAT ON THE 24TH DAY OF APRIL, 2015, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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