72290-5

NO. 72290-5-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

IN RE DETENTION OF CURTIS BROGI

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

APPELLANT'S OPENING BRIEF

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A. INTRODUCTION

After years of confinement and minimal success in the treatment program operated by the Special Commitment Center (SCC), Curtis Brogi became involved in a Native American healing program at the SCC. This culturally attuned program taught Mr. Brogi, who is Native American, to make positive changes in his attitudes, values, and behavior in a manner that resonated with him unlike the SCC's treatment program. Based on the results of his six years of active participation in the Native Healing program and psychological testing, Dr. Richard Halon concluded Mr. Brogi's mental condition had changed. However, the court refused to credit Mr. Brogi's treatment success because it ruled that treatment progress must derive from the SCC's specific sex offender treatment program. The trial court misapplied the controlling statute and improperly disregarded the psychologically valid opinion presented by a qualified expert.

B. ASSIGNMENTS OF ERROR.

1. The court erroneously denied Mr. Brogi's request for an evidentiary trial on his continued involuntary confinement under RCW 71.09.040(4) even though there was probable cause that he no longer met the criteria for commitment due to his treatment success.

2. To the extent the court's finding of fact 6 is construed to mean Mr. Brogi has not engaged in treatment targeted at reducing his risk of reoffending while at the SCC, it is not supported by substantial evidence. CP 6 (Finding of Fact attached as Appendix A).

3. The court misconstrued the nature of the treatment required by RCW 71.09.090(4)(b). CP 6-7 (Conclusion of Law 3).

4. The recent amendment to RCW 71.09.020 in HB 1059, redefining treatment, does not retroactively apply to a show cause hearing conducted one year before the statute was amended.

5. HB 1059 violates Mr. Brogi's right to due process and equal protection of the law.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. By statute, an individual committed under RCW ch. 71.09 may obtain a trial regarding his release from on-going confinement if he offers evidence indicating there is probable cause to believe that due to his treatment participation, he would be safe to be at large. A qualified expert evaluated Mr. Brogi and concluded that his treatment participation, including dedicated work in a Native American healing program, led to a change in his mental condition so that he no longer presented a more likely than not risk of re-offense. Did the court

erroneously deny Mr. Brogi's request for an unconditional release trial when he presented evidence that his successful treatment participation makes it unlikely that he will commit a sexual offense in the future?

2. An amendment to a statute is presumed to apply prospectively, not retroactively. After Mr. Brogi's show cause hearing, the legislature amended RCW ch. 71.09.020 to define "treatment" to mean only the SCC's conventional sex offender treatment program. The statute does not say it is intended to apply retroactively. Does this change in the law apply prospectively?

3. If HB 1059 retroactively applies to the show cause hearing conducted one year before the statute was changed, does it deny Mr. Brogi his rights to equal protection and due process of law because it denies him the ability to use culturally competent mental health treatment as a basis for changing his mental condition?

D. STATEMENT OF THE CASE.

As the Commissioner's ruling granting discretionary review explained:

> Several years ago, the SCC established a Native American healing program. It is described as a rehabilitation program with psychological, emotional, and spiritual components and involves multiple phases of personal growth which require violent offenders to admit past violent behavior, confront the harm done, and learn positive strategies for emotional healing, personal responsibility, problem solving, and internal control. It is further described as a comprehensive, culturally compatible program that develops and maintains changes that are integrated into a person's life, making it more likely that lessons learned will be thoroughly internalized and permanent.

Comm. Ruling at 3 (entered 4/13/15).

Curtis Brogi has been confined at the 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." Comm. Ruling at 3; CP 152, 63, 66-67. Even the State's treatment providers found this program "appeared to be helping him." CP 251. He was committed to his "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, which he was taking "very seriously." 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.

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 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.

E. ARGUMENT.

Mr. Brogi is entitled to a hearing on the lawfulness of his continued confinement based on an expert's opinion of the significant positive change in his mental condition and reduction in his risk of reoffending from long-term participation in culturally competent and psychologically valid treatment.

1. At the probable cause stage, the court may not disregard a qualified expert's opinion applying the statutory criteria based on established scientific methods.

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). RCW 71.09.090(4)(b) directs a court to order a trial on the person's continued

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

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.[2] 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).

In *Ambers*, a psychological expert evaluated Mr. Ambers after he had been committed under RCW ch. 71.09. 160 Wn.2d at 546, 558. Based on the benefits Mr. Ambers received from his participation in treatment while in prison as well as reduced scores on actuarial tests and other dynamic factors, the expert believed that Mr. Ambers's condition had changed and he no longer met the criteria for

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[2] 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 *infra*, § 3. Statutory citations refer to the version in effect at the time of the show cause hearing.

confinement. *Id.* at 558. The Supreme Court held that this expert's opinion sufficiently met the criteria of RCW 71.09.090(4), including its "treatment-based change" element, to entitle Mr. Ambers to an evidentiary hearing. 160 Wn.2d at 558. The court did not inquire into the nature of the treatment or consider what modalities it involved. *Id.* Instead, it relied on the qualified expert's opinion that treatment participation led to positive change. *Id.*

To meet the threshold showing of probable cause, the court must take the evidence in the light most favored to the detained person. *Id.* at 557 (citing *State v. Petersen*, 145 Wn.2d 789, 799, 42 P.3d 952 (2002)). "A court may not weigh the evidence in determining whether probable cause exists." *In re Det. of Elmore*, 162 Wn.2d 27, 37, 168 P.3d 1285 (2007); *see In re Det. of McCuistion*, 174 Wn.2d 369, 382, 275 P.3d 1092 (2012) (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. 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).

The trial court denied Mr. Brogi an evidentiary hearing, notwithstanding Dr. Halon's opinion that Mr. Brogi's mental condition and risk of re-offense had changed through treatment, because it refused to credit the type of treatment he engaged in its reading under RCW 71.09.090(4). RP 34-35. It opined that "treatment" success must be the result of the formal and specific conventional sex offender treatment program operated by the SCC. *Id.* Mr. Brogi was engaged in a culturally competent sex offender treatment program as Dr. Halon described in detail, operated in collaboration with the SCC. CP 146-49, 180-83. The trial court was required to credit to Dr. Halon's professional, detailed opinion.

Ambers demonstrates that a prison treatment program satisfies the treatment requirement of the statute, without inquiring into the

treatment method used, because the statute only mandates that a qualified expert asserts the beneficial change is due to treatment and that opinion is sufficient under the prima facie evidentiary standard for RCW 71.09.040(4). 160 Wn.2d at 558. *Ambers* also demonstrates the deference due to a qualified expert's opinion at the probable cause stage. *Id.* at 557-58. Moreover, the plain language of the statute in effect at the time of the hearing does not authorize the court to base its decision on its opinion that a certain type of treatment must occur.

2. The controlling statute requiring probable cause based on treatment success that leads to positive change included 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. The legislation was focused on prohibiting "advancing age or changes in other demographic factors" as the sole reason for showing a person has changed since commitment. Laws of 2005, ch. 334, § 1.

"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.

This common understanding does not mean a preordained and uniform course of therapy that need not be individualized to a given patient. 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.

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.

As further evidence of legislative intent, the legislature did not enact the State's request to adopt this narrow the definition of treatment in 2014. *See* SSB 5965 (2014) (proposing same amendment to RCW

71.09.020 as in 2015).[3] The 2014 legislature did not pass this proposed statute.[4] However, in 2015, the legislature enacted several changes to the annual review process, including the definition of treatment proposed by the prosecution. HB 1059 (2015).

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 lower court's interpretation of the statute was unreasonable. The only qualifying characteristic of treatment in RCW

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[3] Available at: http://lawfilesext.leg.wa.gov/biennium/2013-14/Pdf/Bill%20Reports/House/5965-S%20HBA%20PS%2014.pdf (last viewed Aug. 25, 2015).

[4] *See* http://app.leg.wa.gov/billinfo/summary.aspx?bill=5965&year=

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.

3. The recent changes to the statutory definition of treatment do not retroactively apply to Mr. Brogi.

It is a "well-settled and fundamental rule of statutory construction" that "all statutes are to be construed as having only a prospective operation, and not as operating retrospectively." *In re*

2013 (last viewed Aug. 25, 2015).

Cascade Fixture Co., 8 Wn.2d 263, 271-72, 111 P.2d 991 (1941), quoting 59 C.J. 1159 § 692. The presumption that an amendment is prospective is "an essential thread in the mantle of protection that the law affords the individual citizen," and is "deeply rooted." *State v. Smith*, 144 Wn.2d 665, 672, 30 P.3d 1245 (2001) (superceded by statute) (internal citations omitted).

To deviate from the presumptive prospective application of a statutory change, "the purpose and intention of the legislature to give [the statute] a retrospective effect [must] clearly, expressly, plainly, obviously, unequviocably, and unmistakably appear" in the statute. *Cascade Fixture.*, 8 Wn.2d at 271-72. Doubt must be resolved in favor of prospective construction. *Id.* "[C]ourts disfavor retroactivity." *Smith*, 144 Wn.2d at 673. The legislature "is presumed to know the law," which includes this long-standing rule of statutory construction disfavoring retroactivity. *See State v. Torres*, 151 Wn.App. 378, 384-85, 212 P.3d 573 (2009).

The legislature's realization that it inadvertently omitted a provision from a statute does not make a later amendment retroactive unless the amendment itself addresses its retroactive application. *In re F.D. Processing, Inc.*, 119 Wn.2d 452, 460, 832 P.2d 1303 (1992). In

F.D. Processing, the legislature had enacted a law governing the delivery of "any agricultural product" to a processor. *Id.* at 456. The law's definition of "agricultural product" did not specifically include dairy products. *Id.* at 461. This omission was a mistake and the legislature later amended the definition of agricultural product to include dairy. *Id.* But the amendment did not "directly indicate any intent as to retroactivity." *Id.* Correcting an error is not the equivalent of specifically intending retroactive application of a statutory amendment. *Id.* Legislative intent to apply a statute retroactively "must be in the form of an explicit legislative command," and it does not suffice that the legislature expresses discontent with how others have construed the provisions. *Smith*, 144 Wn.2d at 672.

A change in a statute may also be retroactive if it is a "clearly curative" clarification or technical correction to an ambiguous statute. *F.D. Processing,* 119 Wn.2d at 461. The word "treatment" in RCW 71.09.090(4)(b) is not ambiguous just because it is capable of being defined more narrowly. The context of the statute explained the nature of the treatment necessary, because it was required to be treatment that caused positive change in a person's mental condition. RCW 71.09.090(4)(b)(ii).

Moreover, a substantive change in a statute is not merely curative or technical. *Smith*, 144 Wn.2d at 674. The new definition of treatment is a substantive change that narrowly limits the scope of any treatment-based change. It eliminates a person's ability to seek release based on treatment organized or provided by an entity outside the SCC or by a modality other than the "specific" treatment program controlled by the SCC. HB 1059. This substantive change does not constitute a technical clarification that overcomes the principles disfavoring retroactive application of a new statute.

For similar reasons, the Supreme Court held changes to RCW 71.09.090 were not retroactive when addressing the 2005 amendments to RCW 71.09.090, which narrowed the factual basis on which a committed person may obtain a new trial in an annual review proceeding and inserted this "treatment" participation requirement. *Elmore*, 162 Wn.2d at 36. The *Elmore* Court held that adding restrictions on the type of information required for a person to meet his burden of proving his entitlement to a new trial was not merely a clarification of the law, even though the legislature insisted its intent was to clarify the law. *Id.*

Elmore also explained that the use of an emergency clause indicates the statute was not intended to have a retroactive effect. *Id.* HB 1059 has an emergency clause, providing further support for the notion that it is not intended to retroactively apply. Similarly to *Elmore*, Mr. Brogi had his hearing prior to HB 1059's enactment and the changes wrought by the statute do not apply to him. 162 Wn.2d at 36.

If the new statute is retroactive, then all provisions would seemingly apply. Under HB 1059, a committed person is barred from presenting an evaluation from a psychologist not employed by the SCC if he does not submit to an interview with the State's evaluator. Mr. Brogi did not submit to an interview with SCC's evaluator, but he had no notice that his failure to do so could to preclude him from offering an expert's evaluation at the show cause hearing. The substantive rights affected by this statutory change demonstrate it is not the type of merely clarifying statute that may be given retroactive effect.

Even if a rule of statutory interpretation calls for retroactive application, retroactivity will not be granted if it violates the right to due process. *F.D. Processing*, 119 Wn.2d at 462. Retroactivity would deny Mr. Brogi his due process right to notice of the evidentiary burden

he is required to meet to obtain a new trial. For these numerous reasons, the statutory changes in HB 1059 may not be applied retroactively.

4. Mr. Brogi's successful participation in a therapeutic, culturally competent program satisfies his burden at the show cause hearing.

a. Sex offender treatment predicated on Native American-based healing is an established methodology.

National experts agree that "treatment is apt to be the most effective when it is tailored to the risks, needs, and offense dynamics of individual sex offenders." Roger Przybylski, Sex Offender Management Assessment and Planning Initiative, "Effectiveness of Treatment for Adult Sex Offenders, Ch. 7 at 139 (Oct. 2014).[5] "[T]ailored rather than uniform approaches" are needed for effective treatment. *Id.*

"Culture obviously plays a critical role in the proper evaluation of a clinical subject in a mental health evaluation." *State v. Sisouvanh*, 175 Wn.2d 607, 624, 290 P.3d 942 (2012). When evaluating the adequacy of a mental health evaluation, "the basic need for cultural competency on the part of an expert or professional person conducting a competency evaluation is important and indisputable." *Id.* A trial court acts unreasonably if it relies on an expert's opinion "who refused

to acknowledge the importance of cultural competency and who failed to reasonably account for the need for cultural competency in his or her evaluation." *Id.* at 624-25.

For Native Americans, treatment providers need more than general training and expertise, according to the federal government's Comprehensive Approach to Sex Offender Management.[6] "[P]roviders delivering treatment for AI/AN [American Indian/Alaskan Native] sex offenders must also be equipped with information, knowledge, and skills that facilitate the delivery of culturally-responsive treatment." *Id.* Treatment engagement, responsiveness, and outcomes may be influenced by cultural communication styles and values. *Id.*

The Correctional Services of Canada (CSC) is "widely regarded in Canada and beyond as one of the leading authorities on sex offender treatment." Dr. John Hylton, Aboriginal Sex Offending in Canada, ch. 5 (2002) (attached to Motion for Discretionary Review, App. D at 16). CSC uses Native or Aboriginal focused treatment programs as a valid

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[5] Available at: http://smart.gov/SOMAPI/index.html (last viewed Aug. 27, 2015).

[6] U.S Dept. of Justice, Center for Sex Offender Management, Building a Comprehensive Approach to Sex Offender Management in Tribal Jurisdictions: an Action Guide, Treatment, ch. 3, §6, available at : http://csom.org/tribal-action-guide/treatment.htm (last viewed Aug. 27, 2015) (hereinafter "Center for Sex Offender Management Guide").

and effective method of helping change the behavior and mental condition of sex offenders. CSC, "Aboriginal Sex Offenders: Melding Spiritual Healing with Cognitive-Behavioural Treatment," copy attached to MDR, App. F.[7] (listing and explaining institutional aboriginal-specific programs for sex offenders developed by CSC). CSC recognizes that "aboriginal sex offenders require culturally and spiritually appropriate assessment and treatment" predicated on native traditions, values, and beliefs. *Id.* at 1.

As further example of the benefits of cultural healing for Native American sex offenders, the 2015 annual conference of the Association for the Treatment of Sexual Abusers (ATSA) includes the "Role and Use of Cultural Healing" for treating Native American sex offenders. ATSA Conference 2015, Registration Brochure at 31 (available at: http://www.atsa.com/pdfs/Conf2015/2015_ATSA_Registration_Brochure.pdf). Likewise, the federal agency focused on effective treatment for Native American sex offenders recommends adapting mainstream programs "to ensure" treatment is provided "in a culturally competent and appropriate manner." Center for Sex Offender Management Guide,

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[7] Available at: http://www.csc-scc.gc.ca/publications/so/aboriginal/aboriginale-04-eng.shtml (last viewed Aug. 29, 2015),

ch. 3 at ¶ Quality Assurance, Outcome Evaluations. A "strong therapeutic alliance" with tribal or cultural elements increasing treatment effectiveness. *Id.*

Native-based programs teach Native American traditions as a mechanism for changing behavior. CP 147. It has a rigorous structure that includes cultural and spiritual ceremonies as part of a holistic program focused on individual growth. *Id.* It is a "powerful therapeutic and learning base" for Native people. *Id.* The "integrative nature" and its emphasis on harmoniously contributing to the culture makes it "more likely lessons-learned will be more thoroughly internalized, permanent, and structure one's overall attitudes, values and behavior." CP 147-48. It is also a type of "cognitive-behavioral strategy" just as the SCC uses in its conventional mainstream treatment." CP 140.

The SCC's Treatment Plan denigrated Mr. Brogi for believing his Native American healing program participation was helping him. CP 204. It contended that Mr. Brogi's "belief that the therapists at the SCC do not have an understanding of the Native American Culture is a barrier to establishing truth in the treatment process." *Id.* By dismissing Mr. Brogi's interest in culturally attuned treatment as a "barrier" to his

treatment success, the SCC showed the lack of cultural competence the Supreme Court denounced in *Sisouvanh*, 175 Wn.2d at 624-25.

b. Mr. Brogi used an accepted model of culturally based treatment to make the necessary positive change in his mental condition that entitles him to a hearing on the lawfulness of his continued confinement.

In Dr. Halon's opinion, premised on his expertise, Mr. Brogi positively changed his mental condition and gained behavioral control at the SCC through his participation in the recognized Native American healing program, his rigorous educational program, and his daily experiences as a long term resident of a mental health facility. CP 140-41. He interviewed Mr. Brogi, tested his mental status, and examined his records. CP 128-30. He explained the benefits of sex offender treatment delivered in a multicultural manner, as opposed to the conventional program that left Mr. Brogi feeling degraded. Under the probable cause provisions of RCW 71.09.090, the court is required to credit this opinion that Mr. Brogi benefitted from the sex offender treatment he received and no longer presented a danger of committing sexually violent offenses and it erred by failed to do so. *Petersen*, 145 Wn.2d at 799; CP 6 (Finding of Fact 3).

The court abused its discretion and misapplied the law when ti denied Mr. Brogi a trial on the legality of his continued confinement based on evidence showing there is probable cause to find he had changed due to treatment. The court was not permitted to weigh the credibility of Dr. Halon's opinion instead of accepting it as true. When crediting Dr. Halon's evaluation, as the court must, Mr. Brogi is entitled to a hearing on his continued confinement.

5. If HB 1059 applies to Mr. Brogi, its operation denies him his rights to due process and equal protection of the law.

As the Supreme Court has recognized, "cultural competency in forensic evaluations is important in part because the State's provision of mental health services must meet constitutional equal protection and due process requirements." *Sisouvanh*, 175 Wn.2d at 625 n.7. The *Sisouvanh* Court expressed "serious concern" that the mental health field's focus on "male adults from society's major ethnic group" may result in unfair and disparate treatment for people of racial or ethnic minorities. *Id.*

A statute violates the constitutional guarantee of equal protection if it fails to afford like treatment to persons who are similarly situated. U.S. Const. amend. 14; Const. art. I, § 12; *see Baxstrom v.*

Herold, 383 U.S. 107, 114-15, 86 S.Ct. 760, 15 L.Ed.2d 620 (1966) (prohibiting disparate treatment of prisoners and other civilly committed people under the equal protection clause). The right to due process of law includes to right to fundamentally fair procedures and requires strict scrutiny of statutes that unfairly disadvantages people based on race or ethnicity. U.S. Const. amend. 14; Const. art. I, § 3; *see Foucha v. Louisiana,* 504 U.S. 71, 80, 112 S.Ct. 1780, 118 L.Ed.2d 437 (1992) (freedom from physical restraint "has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action"); *see also Forbes v. City of Seattle*, 113 Wn.2d 929, 941, 785 P.2d 431 (1990) (statutes burdening fundamental rights or affecting protected classes subject to strict scrutiny).

Culturally competent treatment is an established principle in delivering meaningful mental health profession and is a necessary aspect of fair and consistent application of the law. *Sisouvanh*, 175 Wn.2d at 624. If cultural differences affect the use of mental health services, forensic practitioners must either make an appropriate referral or gain the necessary training, experience, consultation, or supervision. *Id.*, citing Am. Psychological Ass'n, Specialty Guidelines for Forensic Psychology § 2.08 (2012).

The State's evaluator Dr. Saari conceded he was unable to "evaluate change" from Mr. Brogi's participation in Native American treatment because he lacked the cultural competence necessary to conduct such an evaluation. CP 254. He "encouraged" Mr. Brogi to "find a mental health professional to evaluate him for change. *Id.* Dr. Halon offered this evaluation but the court refused to credit it and HB 1059 would not permit an outside professional's opinion to be credited. CP 6-7.

The SCC's Treatment Plan disregarded culturally competent treatment. It characterized Mr. Brogi's faith in his Native American "treatment work" as a barrier that "imped[es] his ability to progress" in the SCC's treatment program. CP 204. It refused to acknowledge his participation could serve as a valid means of addressing the underlying mental condition. *Id.*

Under HB 1059, Mr. Brogi is precluded from using an evaluation by a qualified mental health professional outside the SCC's specific treatment program even when the SCC evaluator acknowledges his inadequate expertise in assessing this type of mental health progress. In addition to the SCC evaluator's concession that he lacked the cultural competence to assess Mr. Brogi's gains from participation in

Native American healing, the SCC's treatment plan denigrated his desire to have his positive changes from Native American healing recognized. CP 204, 254. It treated as null the change in Mr. Brogi resulting from participation in a culturally based treatment program.

HB 1059 impermissibly denies individualized treatment predicated on individual needs. It insists that the mainstream program, based on the responsiveness of the major ethnic group, is the only treatment that qualifies a person to seek release. *Sisouvanh*, 175 Wn.2d at 625 n.7. Native American healing is a valid mechanism for initiating long-term change in a person's mental condition. IHB 1059 unfairly deprives Mr. Brogi of an otherwise available avenue for relief from total confinement because his learning needs and treatment responses are intertwined with his ethnic and cultural heritage. It denies him a fundamentally fair opportunity to receive a new trial based on successful participation in culturally appropriate treatment. If HB 1059 is retrospectively enforced, it is unconstitutional as applied to Mr. Brogi.

F. CONCLUSION.

Mr. Brogi is entitled to a trial to determine whether he continues to meet the criteria for total confinement based on the probable cause showing he has made positive change through treatment that reduces his risk of reoffense. The trial court's order misapplying the statutory criteria and failing to defer to a qualified expert's opinion should be reversed.

DATED this 31st day of August 2015.

Respectfully submitted,

s/ Nancy P. Collins
NANCY P. COLLINS (28806)
Washington Appellate Project (91052)
Attorneys for Appellant

APPENDIX A

STATE OF WASHINGTON
ISLAND COUNTY SUPERIOR COURT

In re the Detention of CURTIS BROGI, Respondent.	NO. 97 2 00476 9 ORDER ON RESPONDENT'S PETITION FOR UNCONDITIONAL RELEASE AND LESS RESTRICTIVE ALTERNATIVE TRIAL

562
DV

THIS MATTER came before the Court on June 27, 2014, to determine whether the Respondent, Curtis Brogi, presented evidence sufficient to satisfy probable cause that: (1) He has so changed that he no longer meets the criteria for commitment as a sexually violent predator, and that, (2) A conditional release to a less restrictive alternative (LRA) would be in his best interest and could adequately protect the community. The court was further asked to determine whether a new trial on the above-stated questions should be ordered. At the hearing, Petitioner, State of Washington, was represented by Assistant Attorney General Joshua Studor. Respondent was not present and had waived his presence, but was represented by his counsel, Lin-Marie Nacht and Bruce Shamulka. In reaching a decision in this matter, the court considered the pleadings and attachments filed in relation to this question, the evidence presented at the show cause hearing, and the argument of counsel. Based upon all of this, the court enters the following Findings of Fact, Conclusions of Law, and Order:

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Criminal Justice Division
900 Fourth Avenue, Suite 2000
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(206) 464-6430

FINDINGS OF FACT

1. Respondent was committed to the care and custody of the Department of Social and Health Services (DSHS) as a sexually violent predator on January 12, 2000.
2. On June 27, 2014, this Court found that the Petitioner met its prima facie burden that Respondent continues meet the statutory definition of a sexually violent predator and ordered that he remained civilly committed to the custody of DSHS.
3. On June 19, 2014, Respondent chose to exercise his rights under RCW 71.09.090(2)(a) and petitioned the court for an unconditional release or, in the alternative, an LRA trial.
4. Also on June 19, 2014, Respondent petitioned the court for an LRA trial under RCW 71.09.090(2)(d).
5. The parties stipulated Respondent presented sufficient evidence to meet the minimum requirements outlined in RCW 71.09.092.
6. Respondent has not recently participated in sex offender treatment at the Special Commitment Center.
7. Respondent has participated in the Native American Healing Program (NAHP), the Counselor Assisted Self Help (CASH) program, and has been permitted to begin the SCC's Awareness and Preparation program.
8. The court has not previously considered the issue of release to a less restrictive alternative pursuant to RCW 71.09.090(2)(d).

CONCLUSIONS OF LAW

1. This court has jurisdiction over the parties and the subject matter herein.
2. Respondent has provided evidence sufficient to meet the minimum conditions set forth in RCW 71.09.092.
3. Respondent has not shown probable cause to believe his mental condition has substantially changed through a positive response to continuing participation in sex

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offender treatment as intended by the legislature such that he either no longer meets the definition of a sexually violent predator or that conditional release to a less restrictive alternative is in his best interest and conditions can be imposed that would adequately protect the community.

4. Respondent is entitled to a trial on the issue of a less restrictive alternative under RCW 71.09.090(2)(d).

Based on the foregoing Findings of Fact and Conclusions of Law, the court enters the following:

ORDER

IT IS HEREBY ORDERED:

1. That Respondent's petition for an unconditional release trial is denied;

2. That Respondent's petition for an LRA trial based on a change in his mental or physical condition is denied;

3. That, pursuant to RCW 71.09.090(2)(d), Respondent's petition for a trial on the issue of an LRA is granted. The trial shall be scheduled by the parties after consultation with the Court Administrator for available dates.

DATED this 31 day of July, 2014.

THE HONORABLE VICKIE CHURCHILL

Presented by:

ROBERT M. FERGUSON
Attorney General

JOSHUA STUDOR, WSBA #47183
Assistant Attorney General
Attorneys for the State of Washington

Copy Received; Approved as to form:

LIN-MARIE NACHT, WSBA #16149
BRUCE SHAMULKA, WSBA #19748
Attorney for Respondent

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

IN RE THE DETENTION OF	)	
	)	
	)	
CURTIS BROGI,	)	NO. 72290-5-I
	)	
	)	
APPELLANT.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, DECLARE THAT ON THE 31ST DAY OF AUGUST, 2015, I CAUSED THE ORIGINAL **OPENING 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:

[X] BROOKE BURBANK, AAG [brookeb@atg.wa.gov] JOSHUA STUDOR, AAG [Joshuas@atg.wa.gov] [crjsvpef@atg.wa.gov] OFFICE OF THE ATTORNEY GENERAL 800 FIFTH AVENUE, SUITE 2000 SEATTLE, WA 98104-3188	( ) U.S. MAIL ( ) HAND DELIVERY (X) AGREED E-SERVICE VIA COA PORTAL
[X] CURTIS BROGI SPECIAL COMMITMENT CENTER PO BOX 88600 STEILACOOM, WA 98388	(X) U.S. MAIL ( ) HAND DELIVERY ( ) _____

SIGNED IN SEATTLE, WASHINGTON THIS 31ST DAY OF AUGUST, 2015.

X_____

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