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No. 91992-5

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THE SUPREME COURT OF THE STATE OF WASHINGTON

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In re the Detention of:

MICHAEL SEASE,

Petitioner.

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ON DISCRETIONARY REVIEW FROM THE SUPERIOR COURT  
OF THE STATE OF WASHINGTON FOR PIERCE COUNTY

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SUPPLEMENTAL BRIEF OF PETITIONER

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ORIGINAL

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A. INTRODUCTION

Indefinite civil commitment is constitutionally permissible only so long as an individual is both mentally ill and dangerous. Driven by that requirement, RCW 71.09.090 requires a trial court to grant a confined person a trial on the question of continued confinement whenever evidence exists to establish probable cause to believe that as result of treatment they are either no longer mentally ill or no longer likely to commit a new offense.

Michael Sease presented evidence from an expert that as a result of his positive participation in treatment he no longer suffered either a personality disorder or mental abnormality and he is no longer likely to reoffend. Mr. Sease established probable cause to believe that due to treatment his condition had changed and he was not likely to reoffend.

The Court of Appeals believed this Court's opinion in *In re the Detention Meirhofer* required it to examine the symptoms described by the State's experts to determine whether Mr. Sease met his probable cause burden. *In re the Detention of Sease*, 190 Wn. App. 29, 48, 357 P.3d 1088 (2015) (*Sease II*) (citing *In re the Detention of Meirhofer*, 182 Wn.2d 632, 343 P.3d 731 (2015)). As set forth below, *Meirhofer* is not controlling here and Mr. Sease is entitled to a new trial.

B. STATEMENT OF THE CASE

Prior to Mr. Sease's commitment trial in 2007, Dr. Dennis Doren, an expert retained by the State, diagnosed Mr. Sease with three personality disorders: (1) antisocial personality disorder; (2) borderline personality disorder; and (3) narcissistic personality disorder. *In re the Detention of Sease*, 149 Wn. App. 66, 71, 201 P.3d 1078 (2009) (*Sease I*). At the commitment trial, Dr. Doren testified to the jury that Mr. Sease's "antisocial personality disorder and his borderline personality disorder, each make him likely to [engage in predatory acts of sexual violence if he is not confined to a secure facility]." *Id.* at 72-73. Dr. Doren described the narcissistic personality disorder, however, as merely "'other risk considerations' for re-offense." *Id.* at 72.

In support of a new trial under RCW 71.09.090, Mr. Sease presented an evaluation conducted by Dr. Brian Abbott in 2013. Dr. Abbott concluded that through his positive response to treatment

Mr. Sease's present clinical picture is inconsistent with him suffering from the acquired or congenital conditions of . . . Antisocial Personality Disorder and Borderline Personality Disorder. . . . Consequently, Mr. Sease no longer meets the statutory definition of a mental disorder or abnormality under RCW §71.09.

CP 313. Dr. Abbott added that while Mr. Sease exhibited "residual symptoms" of Narcissistic Personality Disorder, those few remaining

traits fall below the threshold for diagnosing him with the disorder. CP 313-14. Dr. Abbott made clear; Mr. Sease's change in condition was a result of his positive response to treatment. CP 314-15.

Dr. Abbott also concluded Mr. Sease is not likely to reoffend and that "change in his risk from time of commitment in July 2007 results from his continuing participation in treatment at SCC . . . ." CP 327.

Based upon the change in his condition and diminution in his risk of re-offense Mr. Sease argued he met his burden of showing probable cause to warrant a new trial on his release.

The State's annual review by Dr. Kirk Newring acknowledges Mr. Sease has made "some progress in his treatment." CP 262. Dr. Newring added "despite . . . setbacks it appears he is continuing to progress." *Id.* The State's evaluators no longer diagnose Mr. Sease with either antisocial personality disorder or borderline personality disorder. Instead, the State's experts now opine that he suffers only from narcissistic personality disorder. CP 256.<sup>1</sup>

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<sup>1</sup> Dr. Newring also diagnosed Mr. Sease as suffering from alcohol dependence, cognitive disorder and borderline intellectual functioning. CP 256. However none of these diagnoses were offered as justification for further commitment.

Missing from Dr. Newring's evaluation is a conclusion that Mr. Sease continues to meet the definition of a sexually violent predator. Specifically he never concludes that Mr. Sease is more likely than not to commit crimes of sexual violence as a result of his disorder. Instead, the evaluation merely concludes Mr. Sease's mental condition "seriously impairs" his ability to control his behavior. CP 263.

The evaluation reports actuarial risk assessments indicating Mr. Sease is only 19.6% and 27.7% likely to reoffend in five and ten years respectively. CP 258. The evaluation addresses other factors which may increase the risk of re-offense, but states it is difficult to say which apply to Mr. Sease. CP 258-62. But after doing so, the evaluation never opines or concludes Mr. Sease is more likely than not to reoffend.

The trial court concluded Mr. Sease was not entitled to a new trial. CP 359-61; RP 37-38. The trial court, and the Court of Appeals after it, focused almost exclusively on the quantum and quality of the State's evidence, impermissibly weighing it against Mr. Sease's evidence. The Court of Appeals reasoned Mr. Sease did not meet his burden because the State's experts continue to identify symptoms which they opine establish a personality disorder. *Sease II*, 190 Wn. App. at 48-50. Against this, the court faulted Dr. Abbott for

“erroneously equat[ing] a mental condition with a diagnosis” *Id.* at 50.

Based upon this weighing, the Court of Appeals, affirmed the trial court’s order denying a new trial.

C. ARGUMENT

**Where a person presents evidence that he no longer suffers either a mental abnormality or a personality disorder and/or that he is no longer likely to reoffend, due process and RCW 71.09.090 entitle him to a trial on whether he should be released.**

The Fourteenth Amendment’s Due Process Clause “requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed.” *Jackson v.*

*Indiana*, 406 U.S. 715, 738, 92 S. Ct. 1845, 32 L.Ed.2d 435 (1972).

The “outside limits” on civil commitment are that the individual is both mentally ill and dangerous due to that mental illness. *Foucha v.*

*Louisiana*, 504 U.S. 71, 78 & n.5, 112 S. Ct. 1780, 118 L. Ed. 2d 437

(1992). If the committed person is either no longer mentally ill or no

longer dangerous, due process demands his release. *Jones v. United States*, 463 U.S. 354, 368, 103 S. Ct. 3043, 77 L. Ed. 2d 694 (1983);

*O’Connor v. Donaldson*, 422 U.S. 563, 575-76, 95 S. Ct. 2486, 45 L.

Ed. 2d 396 (1975). Moreover, due process requires periodic review of

the person's commitment so that a court can determine if the predicates to confinement still exist. *Jones*, 463 U.S. at 368.

RCW 71.09.090 purports to provide that mechanism. Consistent with the constitutional mandate, RCW 71.09.090 requires a trial court grant a new trial where a committed person establishes probable cause that as result of treatment he no longer meets the definition of SVP.

Probable cause exists where "the facts, if believed, establish that the person is no longer an SVP or may otherwise be conditionally released." *In re Detention of Elmore*, 162 Wn.2d 27, 37, 168 P.3d 1285 (2007). A court may not weigh the evidence in determining whether probable cause exists. *In re the Detention of Petersen*, 145 Wn.2d 789, 797, 42 P.3d 952 (2002). RCW 71.09.020(18) defines a "sexually violent predator" as a "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."

Probable cause that a detainee's condition has 'so changed' such that he or she no longer meets the definition of a sexually violent predator, is established when *a detainee shows that*, since his or her last commitment proceeding, there has been a substantial change in his or her physical or mental condition that

indicates either: (a) that the person *no longer meets the commitment standard*; or (b) that conditional release to a less restrictive alternative is in the person's best interest and conditions can be imposed that adequately protect the community.

*In re the Detention of Ambers*, 160 Wn.2d 543, 555, 158 P.3d 1144 (2007) (Italics in original) (citing SB 5582 (2005), House Bill Report).

Thus, where the confined person submits an expert opinion that concludes that because of his positive response to treatment the confined person no longer meets the definition of an SVP, RCW 71.09.090 entitles that person to a trial on his release. *Ambers*, 160 Wn.2d at 559.

The evidence before the trial court met this standard. Dr. Abbott plainly stated his conclusion that as a result of treatment Mr. Sease is not likely to reoffend. Dr. Abbott also stated his conclusion that as a result of treatment Mr. Sease does not suffer either a mental abnormality or personality disorder. If that evidence is insufficient to warrant a new trial, the periodic review provisions of RCW 71.09.090 are rendered useless. In that event, the constitutional safeguard is removed raising the specter that the commitment itself is unconstitutional.

1. *Because Mr. Sease presented evidence that as a positive response to treatment he is no longer likely to reoffend he is entitled to a trial on his release.*

Where evidence establishes probable cause to believe a person is no longer likely to reoffend, RCW 71.09.090 entitles him to a trial on his release. Mr. Sease presented such evidence.

Dr. Abbott's evaluation provides:

. . . Mr. Sease does not pose a risk level that is more likely than not to engage in sexually violent, predatory if not confined in a secure setting. The change in his risk from time of commitment in July 2007 results from his continuing participation in treatment at SCC . . . .

CP 327. To be sure, Dr. Abbott did more than just offer a conclusory opinion. Dr. Abbott's report explains in great detail the manner in which he performed his risk assessment. CP 321-27.

Again, when assessing whether probable cause exists, a court is not permitted to weigh the evidence. *Petersen*, 145 Wn.2d at 798. If believed, Dr. Abbott's opinion would permit a reasonable juror to conclude Mr. Sease is not likely to reoffend and thus no longer meets the criteria for commitment. At the probable cause stage it does not matter if the State has competing evidence. At this threshold stage, it would not even matter if a court found an opponent's evidence to be of better quality and more convincing. *Elmore*, 162 Wn.2d at 37. *Elmore*

specifically held the show cause hearing is not the appropriate venue to weigh these opinions and resolve disputes. *Id.* So long as the evidence if believed permits a reasonable juror to find the contested fact, probable cause is established. *Id.* No greater showing is required.

Indeed, Dr. Newring's report does not offer much to the contrary. While he believed Mr. Sease continued to suffer a mental illness, he never expressed an opinion that that illness made Mr. Sease likely to reoffend. That failing was one of the bases on which the Court of Appeals granted discretionary review. *See, Ruling Granting Review at 16.* Having granted review in part on that question, in assessing whether Mr. Sease met his burden, the Court of Appeals does not address his diminution in risk. The court failed to recognize this lowering of risk provides an independent bases for a new trial regardless of any mental illness.

“A finding of ‘mental illness’ alone cannot justify a State’s locking a person up against his will and keeping him indefinitely in simple custodial confinement.” *O'Connor*, 422 U.S. at 575. Instead, both mental illness *and* dangerousness are required to justify indefinite commitment. *Foucha*, 504 U.S. at 77-78. As in *Ambers*, Dr. Abbott’s conclusion that as a result of treatment Mr. Sease is no longer likely to

commit new offenses entitles Mr. Sease to a trial on his release.

*Ambers*, 160 Wn.2d at 559.

*2. Because Mr. Sease presented evidence that as a result of participation in treatment his condition has changed he was entitled to a trial on his release.*

Where a committed persons offers expert opinion that as a result of treatment his condition has changed, RCW 71.09.090 entitles him to a trial on his release. *Ambers*, 160 Wn.2d at 559. Beyond the evidence that he was no longer a risk t reoffend, Mr. Sease offered sufficient evidence of his change in condition. This constitutes an independent basis for reversal.

Dr. Abbott made clear “[Mr. Sease] does not suffer from a mental abnormality or personality disorder . . . .” CP 320. Dr. Abbott explained his conclusion in detail. Acknowledging Mr. Sease had previously been diagnosed with both antisocial personality disorder (APD) and borderline personality disorder (BPD), Dr. Abbott offered:

Mr. Sease has demonstrated a positive response to continued participation in treatment sessions with Dr. Sziebert and that has contributed to ameliorating the Respondent’s APD and BPD (his condition has so changed).

CP 315. He explained further:

[Mr. Sease’s] continuous participation in the [Sex Offender treatment Program] has contributed to his

positive response in treatment that has been instrumental in the conditions of APD and BPD having so changed since he was committed in 2007.

CP 316. Dr. Abbott continued:

Mr. Sease has demonstrated a positive response to continued participation in treatment sessions with Dr. Sziebert and that has contributed to ameliorating the Respondent's APD and BPD (his condition has so changed).

CP 315. Finally he concluded:

It is apparent that the stable support Mr. Sease has received in treatment at SCC since his commitment date and decline in interpersonal stresses seem to best explain the reasons why his former APD has remitted.

CP 317. Thus, there can be no question that Mr. Sease established probable cause to believe his condition had changed as a result of treatment.

With respect to the diagnosis which the State's expert now relies upon, Narcissistic Personality Disorder (NPD), Dr. Abbott explained

Aside from the two symptoms of NPD . . . the Respondent's clinical presentation is inconsistent with the threshold of NPD. His current clinical presentation reflects that Mr. Sease suffers from Narcissistic Personality Traits ("NPT").

CP 313-14. Importantly, that condition was never the basis upon which the jury committed Mr. Sease, as the State's expert at trial stated that condition did not make Mr. Sease likely to commit new offenses.

*Sease I*, 149 Wn. App. at 72. In any, event, Dr. Abbott's evaluation makes clear his opinion that Mr. Sease does not currently suffer that condition.

Dr. Abbott also clarified that the "rule out" paraphilia diagnosis mentioned in intervening evaluations by the State's various evaluators is by definition not a diagnosis of a mental condition. "[T]he rule out diagnosis implies substantial uncertainty as to whether the Respondent suffers" from the condition. "[T]he rule out diagnosis actually means that the evaluators believe he is unlikely to have the condition but do not have sufficient clinical data to definitive[ly] arrive at this conclusion." CP 317.

Dr. Abbott concluded Mr. Sease's "condition has changed and he no longer suffers from the acquired or congenital conditions that in part constituted the legally defined mental disorder or abnormality that supported his civil commitment." CP 314. Again, in assessing whether probable cause exists the question is only whether if believed Dr. Abbott's opinion would permit a neutral decision maker to conclude Mr. Sease does not suffer a mental abnormality or personality disorder. *Elmore*, 162 Wn.2d at 37. Dr. Abbott's opinion in all respects mirrors the expert opinion offered in *Ambers. Compare*, 160 Wn.2d at 559.

Consistent with this Court's decision in *Ambers* Mr. Sease met his burden under RCW 71.09.090 and was entitled to a new trial. *Ambers*, 160 Wn.2d at 559.

*3. Evidence that a committed person can no longer be diagnosed with the condition that led to his commitment can establish probable cause to believe his condition has changed as a result of treatment.*

Because Dr. Abbott's report fully establishes probable cause that Mr. Sease's condition has changed as a result of treatment and that as result of treatment he is not likely to reoffend Mr. Sease is entitled to a trial on his release. RCW 71.09.090. The trial court and Court of Appeals focused instead on the State's evidence as if it established a benchmark which Mr. Sease must rebut.

The Court of Appeals believed this Court's opinion in *Meirhofer* required it to examine the symptoms described by the State's experts to determine whether Mr. Sease met his probable cause burden. *Sease II*, 190 Wn. App. at 48. The Court of Appeals reasoned Mr. Sease did not meet his burden because the State's experts continue to identify symptoms which they opine establish a personality disorder. *Id.* at 48-50. Against this, the court faulted Dr. Abbott for "erroneously equat[ing] a mental condition with a diagnosis." *Id.* at 50.

First, because Dr. Abbott specifically stated his medical opinion that as a result of treatment Mr. Sease is no longer likely to reoffend, that alone entitles Mr. Sease to a new trial. RCW 71.09.090. Therefore, it is wholly unnecessary to even address the competing opinions of experts regarding his condition. As discussed in more detail below, *Meirhofer* does not require anything different.

Second, *Elmore* makes clear the show cause hearing is not the venue to resolve disputes within the evidence. 162 Wn.2d at 37. Thus, the opinion of the State's experts does not factor in any way into the determination of whether Mr. Sease met his burden. Again, *Meirhofer* says nothing to the contrary.

Third, the reasoning of the Court of Appeals that a change in a person's diagnosis cannot establish probable cause to believe their mental condition has changed leaves no means by which a committed person can establish probable cause. As stated above, weighing the evidence or resolving disputes among expert opinion is not appropriate at this stage and is instead a matter for trial. *Elmore*, 162 Wn.2d at 37. Instead the court's only task to determine whether the evidence would permit a fair minded juror to conclude Mr. Sease no longer meets the definition of an SVP. *Id.* The State's expert contended a change in

diagnosis does not evidence a change in condition, Dr. Abbott disagreed. While *Meirhofer* permits the view of the State's expert to satisfy the State's *prima facie* burden, concluding, as a matter of law, that the competing view regarding a change in diagnosis cannot be probable cause of a change in condition weighs the opinion of one group of experts against the other.

RCW 71.09.020(18) defines "sexually violent predator" to mean a person with a predicate conviction 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. It is impossible to imagine what form of evidence that a person does or does not suffer from a mental abnormality or personality disorder would take except in the form of a diagnosis. "Diagnoses" are how medical professional describe the disorders or illnesses which their patients suffer. <http://www.merriam-webster.com/dictionary/diagnosis>. Thus one way to meet the requirement of RCW 71.09.090(4) of establishing one no longer meets the definition of sexually violent predator is to show he no longer suffers the mental abnormality or personality disorder that led the jury to commit him. In that regard, a

diagnosis or change in diagnosis must be relevant. Particularly where a medical expert says it is.

This issue did not arise in *Meirhofer* because Mr. Meirhofer, unlike Mr. Sease, had never participated in treatment and was therefore precluded by RCW 71.09.090 from filing his own petition for a trial on that basis. Instead, *Meirhofer* stands only for the unremarkable proposition that the State can meet its *prima facie* burden despite evidence that a person's diagnosis has changed - that is, a reasonable person viewing those facts could conclude that despite Mr. Meirhofer's change in diagnosis he continued to meet the definition of personality disorder or mental abnormality. But that does not preclude the possibility that a reasonable person viewing evidence of a change in diagnosis could conclude the person's condition had changed.

RCW 71.09.090 permits dueling probable cause showings, one by the State and one by the committed person, and does not make those showings mutually exclusive. The statute does not limit the evidence which can support a respondent's position; it does not require the respondent's probable cause showing be premised only on evidence the respondent submits. Instead, the statute says probable cause exists

“when evidence exists” without limitation on the source of that evidence.

Consistent with *Meirhofer*, a court could rely on Dr. Newring’s evaluation, with its change in diagnoses, to find the State has presented *prima facie* evidence that Mr. Sease’s condition has not changed. But a reasonable juror could rely on the change in diagnosis to conclude Mr. Sease’s condition has changed. To conclude otherwise would be to say that as a matter of law a diagnosis is irrelevant to the factual question of whether a person’s condition has so changed.

*Meirhofer* cannot be read as precluding a committed person from establishing probable cause where he presents evidence of a change in diagnosis as a result of treatment. To say that would be akin to saying the condition of a person’s lungs has not changed even when as a result of treatment she no longer has tuberculosis but does have bronchitis.

Moreover, this Court’s decision in *State v. Klein* does not require a different conclusion. 156 Wn.2d 102, 120–21, 124 P.3d 644 (2005). First, the petitioner in *Klein* received the very sort of release trial which Mr. Sease requests and to which the State adamantly insists he is not entitled. Second, *Klein* found it significant that the statute at

issue specifically permitted continued confinement so long as any mental disease existed. 156 Wn.2d at 119. By contrast, 71.09 RCW permits confinement only so long as “the mental illness” of confinement persists. *In re the Detention of Young*, 122 Wn.2d 1, 39, 857 P.2d 989 (1993). Finally, and based upon that different standard, *Klien* found a court could find Ms. Klein continued to suffer “a” mental illness. Certainly, *Klein* did not say that as a matter of law the trial court was required to make that finding nor did this Court preclude a different trier of fact from concluding otherwise. Here too, whether the change in diagnosis satisfied the probable cause standard is a question of fact. Indeed, since a probable cause determination is a threshold burden requiring far less than the preponderance standard in play in *Klien*, all that is required is evidence which if believed could permit a reasonable juror to agree with Mr. Sease’s position. Neither *Klein* nor *Meirhofer* preclude a change in diagnosis from establishing that point.

To receive a trial on his release, RCW 71.09.090 requires only that evidence exist to establish probable cause that a committed person’s condition has changed through treatment. That burden must be met where, as here, the person offers the opinion of an expert who states the person’s diagnosis has changed as a result of treatment.

D. CONCLUSION

For the reasons above, this Court should reverse the trial court's ruling and remand to allow Mr. Sease the hearing to which RCW 71.09.090 entitles him.

Respectfully submitted this 22<sup>nd</sup> day of January, 2016.

*s/ Gregory C. Link*  
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**IN THE SUPREME COURT OF THE STATE OF WASHINGTON**

IN RE THE DETENTION OF )

MICHAEL SEASE, )

PETITIONER. )

NO. 91992-5

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**Supplemental Brief of Petitioner**

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