No. 92501-1

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Court of Appeals
Division III
State of Washington

NO. 32118-5-III

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

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IN RE THE DETENTION OF:

JOHN MARCUM

---

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

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# APPELLANT'S OPENING BRIEF

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A. INTRODUCTION.

John Marcum successfully completed the sex offender treatment program offered at the Special Commitment Center. Due to his treatment progress and demonstrated behavioral self-control, experienced psychologists agree he should not be held in total confinement. However, the prosecutor opposed his request for an unconditional discharge trial and the court denied him a trial, even though the annual review reports showed his treatment participation resulted in sustained control over his behavior and they encouraged his release from total confinement.

B. ASSIGNMENTS OF ERROR.

1. The court erroneously denied Mr. Marcum'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 undisputed treatment success.

2. The court's denial of Mr. Marcum's request for an evidentiary trial on his continued confinement violates his right to due process of law under the Fourteenth Amendment and article I, section 3 of the Washington Constitution.

3. The court erroneously denied Mr. Marcum's request for an evidentiary trial on his continued confinement when the State's expert agreed he was not presently dangerous as required for commitment under RCW ch. 71.09.

4. Substantial evidence does not support the court's Finding of Fact 3. CP 77.

5. Substantial evidence does not support the court's Finding of Fact 4. CP 77.

6. Substantial evidence does not support the court's Finding of Fact 5. CP 78.

7. Substantial evidence does not support the court's Finding of Fact 6. CP 78.

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. Marcum and concluded that he consistently showed self-control and no longer presented a more likely than not risk of re-offense. Did the court erroneously deny Mr.

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

2. The governing statute also requires a release trial from on-going involuntary commitment when the State's annual review report does not show the committed person remains more likely than not to commit sexual offense in the future. The State's evaluator believed Mr. Marcum's risk of future offense was far below 50 percent, and his treatment success further reduced his likelihood of reoffense. Did the court erroneously deny Mr. Marcum a trial when the State's evaluator did not present prima facie evidence that he posed a future danger as required for continued civil commitment?

3. The federal and state constitutions bar the State from continuing an involuntary commitment absent proof of current mental illness and present dangerousness due to that psychological disorder. Does Mr. Marcum's continued detention violate these constitutional provisions when there is clear evidence Mr. Marcum does not have a psychological disorder that causes him to be presently dangerous?

D. STATEMENT OF THE CASE.

In 2001, John Marcum stipulated to his commitment under RCW ch. 71.09. CP 30. He started sex offender treatment while still in custody of the Department of Corrections before his commitment. CP 38. His underlying criminal offenses occurred in 1988 and 1993, when he was in his twenties. CP 37. He is presently 49 years old. CP 35.

Mr. Marcum has achieved "maximum benefit from inpatient treatment," according to the annual review report prepared for the State by Dr. Regina Harrington. CP 23. Dr. Paul Spizman, a former SCC psychologist, agreed and described Mr. Marcum's learned behavioral control as well as his ability to practically apply the skills he gained from treatment. CP 35, 45-46, 55. Dr. Spizman explained that Mr. Marcum's "notable gains" in controlling his behavior had been documented by physiological tests that showed he was no longer aroused by children, supporting his conclusion that the originally diagnosed mental abnormality of pedophilia was no longer a valid current diagnosis for Mr. Marcum. CP 38-49, 58. Mr. Marcum was not diagnosed with a personality disorder in his annual reviews and does not currently have one. *Id.* at 40-41, 58.

Dr. Spizman calculated Mr. Marcum's risk of re-offense using the STATIC-99R actuarial risk assessment instrument as 29.6 percent over ten years at the highest. CP 62. Taking into account Mr. Marcum's treatment gains, the STATIC-99R accords him an even lower risk of 18.2% over ten years. *Id.* Based on his age and behavioral improvements, the risk would not increase in the future. *Id.*

The State's expert, Dr. Harrington, believed it was not in Mr. Marcum's best interest to remain in total confinement at the SCC. CP 23. She believed he should focus on adapting to living in the community. *Id.* In 2009, the State placed Mr. Marcum in a secure community transition facility, the SCTF on a less restrictive alternative (LRA). CP 42. But while there, Mr. Marcum was not taking anti-depressant medications and this exacerbated his difficulty adjusting to the environment at the SCTF. CP 54; RP 13, 18. He gained weight, had little to do to occupy his time, and was frustrated by his inability to find a job. RP 13. He returned to the SCC but there was no "concern or deterioration in sexual regulation" during or after his time at the SCTF, according to Dr. Harrington. CP 17. Dr. Harrington noted that despite the adversity and disappointment from the failed experience at the SCTF, Mr. Marcum did not regress in his functioning or show any

problems managing his sexual behavior. CP 23. As Dr. Harrington explained, "based on circumstances not related to concern or deterioration in sexual regulation, he was returned to the total confinement facility in 2011 where he continues to reside." CP 17.

Based on years of positive participation in sex offense-specific treatment at the SCC, Mr. Marcum made "significant strides in developing ways to manage his 'deviant arousal,' substance abuse, and the cycle that led to his sexual offending, due to what he learned in treatment." CP 51. Yet the trial court denied Mr. Marcum's request for an evidentiary hearing on the legality of his continued confinement. CP 77-78. Mr. Marcum appealed and this Court granted Mr. Marcum's motion for discretionary review.

E. ARGUMENT.

1. **Mr. Marcum presented probable cause that his condition had changed through treatment, entitling him to an evidentiary hearing.**

The superior court must grant a full trial on the legality of a person's continued involuntary commitment if there is probable cause to believe 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) further provides:

> (b) A new trial proceeding under subsection (3) of this section may be ordered, or a trial proceeding may be held, only when there is current evidence from a licensed professional of one of the following and the evidence presents a change in condition since the person's last commitment trial proceeding:
>
> (i) An identified physiological change to the person, such as paralysis, stroke, or dementia, that renders the committed person unable to commit a sexually violent act and this change is permanent; or
>
> (ii) A change in the person's mental condition brought about through positive response to continuing participation in treatment which indicates that the person meets the standard for conditional release to a less restrictive alternative or that the person would be safe to be at large if unconditionally released from commitment.

a. *A qualified expert reported that Mr. Marcum no longer meets the criteria for total confinement under RCW ch. 71.09 due to the beneficial effects of sex-offender specific treatment*

A person makes "the requisite prima facie showing" for a full evidentiary hearing 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 confinement. *Id.* at 558. The Supreme Court held that this expert's opinion 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.

*Ambers* controls the result here. It is undisputed that Dr. Spizman is a qualified expert in the field. RP 7. Dr. Spizman wrote a long and detailed evaluation after interviewing Mr. Marcum and closely parsing his records. CP 35-75.

Dr. Spizman concluded that Mr. Marcum had changed due to his successful participation in sex-offender specific treatment. CP 73-74. From treatment, Mr. Marcum learned how to regulate his behavior as well as his thoughts and urges by a variety of treatment tools and lessons. CP 45-46, 55, 58. In addition to his observable behavioral management, his "notable gains in learning to control his sexual orientation toward children, via his efforts in treatment" have been demonstrated in physiological testing. CP 58.

At the probable cause stage, Mr. Marcum merely needs to present an objectively reasonable claim offered by a qualified professional that he has changed through treatment. *Ambers*, 160 Wn.2d at 558. Dr. Spizman's conclusion was based on his professional discretion and satisfies the prima facie burden set forth under RCW 71.09.090. *See State v. Petersen*, 145 Wn.2d 789, 803-04, 42 P.3d 952 (2002). He presented evidence "which, if believed," showed he was not likely to engage in sexually dangerous acts due to a mental abnormality if released. *Id.* at 803.

At the show cause hearing, the State did not dispute Mr. Marcum's change through treatment. Instead, it claimed that under RCW 71.09.090(4), his treatment gains must occur after he returned from his LRA in order to get a full hearing. RP 8-9. The State's argument is contrary to the statutory scheme and its plain language.

b. *Mr. Marcum's treatment-based change from the time of his commitment entitles him to a trial on the legality of his on-going involuntary commitment.*

RCW 71.09.090(4)(b) unambiguously directs a new trial when a qualified professional opines that the person has changed "from his last commitment trial" due to continued participation in treatment. The State has contended that this portion of RCW 71.09.090(4)(b) is

superfluous. It asserted that RCW 71.09.090(4)(a) supercedes this portion of the statute and under (4)(a), the measurement of whether a person has changed due to treatment must stem solely from progress since the revocation of the less restrictive alternative.[1] RP 7-8.

But subsection (4)(b) explicitly addresses the evidentiary basis of when a court may grant a new trial for unconditional release. It unambiguously states that the pertinent "change in condition" based on treatment success is measured from "the person's last commitment trial proceeding." If the Legislature meant the change must arise from behavior after the revocation of an LRA, it would have said so. *See State v. Delgado*, 148 Wn.2d 723, 727, 63 P.3d 792 (2003). But RCW 71.09.090(4)(b) authorizes a trial on continued confinement when treatment participation causes change since the last commitment trial. Even if the statutory language is considered ambiguous, this Court

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[1] RCW 71.09.090 (4)(a) states:
Probable cause exists to believe that a person's condition has "so changed," under subsection (2) of this section, only when evidence exists, since the person's last commitment trial, or less restrictive alternative revocation proceeding, of a substantial change in the person's physical or mental condition such that the person either no longer meets the definition of a sexually violent predator or that a conditional release to a less restrictive alternative is in the person's best interest and conditions can be imposed to adequately protect the community.

"must narrowly construe" the statute under the doctrine of lenity. *In re Det. of Hawkins*, 169 Wn.2d 796, 801, 238 P.3d 1175 (2010).

Furthermore, the State's interpretation of the statute is unreasonable. A court will not interpret a statute in a manner that yields absurd results. *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003). It is illogical to disregard prior treatment success when it is the building block of a person's ability to control his behavior. A person's change is likely to evolve over time, so that a person able to obtain an LRA may later improve to the further degree that there is probable cause to believe he no longer needs to be totally confined. The State's interpretation of the statute would demand that a confined person draw clear line in the sand proving that all change occurred after an LRA revocation, even though a person's psychological behavior will change over time as he learns from treatment teachings. Someone like Mr. Marcum, who has achieved maximum benefit from sex offender treatment, could never receive relief once he was unable to successfully transition into the community after his first LRA.

A person may lose an LRA placement for reasons that have nothing to do with the likelihood of a person's sexually dangerous future acts. Dr. Harrington said Mr. Marcum's LRA revocation was

"based on circumstances not related to concern and deterioration in sexual regulation." CP 17. A primary problem for Mr. Marcum was that he suffered from depression at the SCTF and was not taking antidepressants. CP 54. Once he resumed his medication at the SCC, his mood improved along with his coping skills. CP 44, 55.

Even the State's expert believed that Mr. Marcum had received "maximum benefit" from available treatment at SCC. CP 23. Dr. Harrington did not see any need for Mr. Marcum to continue inpatient sex-offender treatment. She believed the lessons he needed now were in his "adaptation to community life." *Id.* It would be absurd to find the Legislature would require that trial court ignore Mr. Marcum's years of treatment participation that enabled him to achieve "maximum benefit." The change in Mr. Marcum's behavior due to his long-term dedication to treatment is uncontested. He has been "stable for quite a while." CP 46. He has "maintained" the gains he made through treatment and has "significant control over his thoughts and behaviors." CP 74. Although his less restrictive alternative was revoked, it was not due to any setbacks in his control over his sexual or violent behavior. His treatment success continues, as does the State evalautor's belief that it is not in his best interest to continue Mr. Marcum's SCC confinement.

At the probable cause stage, "[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 McCuistion*, 174 Wn.2d at 382 (at probable cause stage, "a court must assume the truth of the evidence presented; it may not 'weigh and measure asserted facts against potentially competing ones.'"). "A trial court necessarily abuses its discretion if it bases its ruling on an erroneous view of the law." *State v. Harvill*, 169 Wn.2d 254, 259, 234 P.3d 1166 (2010).

The court misapplied the law by failing to credit Dr. Spizman's opinion. *Amber*, 160 Wn.2d at 557-58; *Petersen*, 145 Wn.2d at 803 (court's impression of psychologist's report irrelevant when probable cause asks court only to determine what expert stated, not why). Its findings of fact do not address the probable cause standard or Dr. Spizman's expert opinion on Mr. Marcum's current psychological state. CP 77-78. They reflect the court's failure to apply the legal standard that governs Mr. Marcum's petition for an unconditional release trial. Because Mr. Marcum met his burden of probable cause that he no longer has a psychological condition rendering him unable to control his sexually offending behavior due to his treatment participation, a trial is required. This Court should order a trial on whether Mr. Marcum

continues to meet the requirements for commitment under RCW ch. 71.09.

**2. When the State's evaluator believes the detained person does not need total confinement, it has not met its prima facie burden that commitment remains justified due to a psychological disorder causing current dangerousness.**

a. *The State may not confine a person without showing he poses the degree of dangerousness required for continued commitment.*

The State violates due process when it continues to confine a person who is no longer either mentally ill or dangerous. *Foucha v. Louisiana*, 504 U.S. 71, 77, 112 S.Ct. 1780, 118 L.Ed.2d 437 (1992). "Periodic review of the patient's suitability for release" is required to render commitment constitutional. *Jones v. United States*, 463 U.S. 354, 368, 103 S.Ct. 3043, 77 L.Ed.2d 3043 (1984). Due process mandates that the State release a committed person "when the basis for holding him or her in the psychiatric facility disappears." *State v. Sommerville*, 86 Wn.App. 700, 710, 937 P.2d 1317 (1997).

"Because SVP commitment is indefinite, the due process requirement that a detainee be mentally ill and dangerous is ongoing." *In re Det. of Cherry*, 166 Wn.App. 70, 75, 271 P.3d 259 (2011). To comply with this due process requirement, involuntarily committed

individuals have a right to an annual examination to determine whether they still have the mental abnormality that they cannot control and which renders them unsafe to be free from total confinement. *In re Detention of Young*, 122 Wn.2d 1, 38-39, 857 P.2d 396 (1993); RCW 71.09.070.

At the show cause hearing, the State bears the burden of proving there is no basis for a full trial on whether the individual continues to meet the criteria for commitment. RCW 71.09.090; *State v. Petersen*, 145 Wn.2d 789, 796, 42 P.3d 952 (2002). If the State's own designee finds that "the individual no longer meets the criteria for confinement, he is entitled to an evidentiary hearing." *McCuistion*, 174 Wn.2d at 393.

When evaluating the State's report, the court must "look at the *facts* contained in the [annual review] report to decide whether they support the expert's conclusions." *In re the Detention of Jacobson*, 120 Wn.App. 770, 780, 86 P.3d 1202 (2004) (emphasis added). Mere conclusory statements by an expert do not establish probable cause. *Id.*; *see also McCuistion*, 174 Wn.2d at 382 ("court can and must determine whether the asserted evidence, if believed, is *sufficient* to establish" the essential requirements of continued commitment (emphasis in original)).

A full trial must be granted if (1) the State fails to present prima facie evidence that the committed person continues to meet the definition of an SVP; or (2) probable cause exists to believe the person's condition has so changed that he no longer meets the criteria for commitment. *Petersen*, 145 Wn.2d at 798; RCW 71.09.090(2)(c).

This Court reviews a trial court's decision following a show cause hearing *de novo*. *Petersen*, 145 Wn.2d at 799. The question on review is "whether the evidence, or lack thereof, suffices to establish probable cause for an evidentiary hearing." *In re Detention of Elmore*, 162 Wn.2d 27, 37, 168 P.3d 1285 (2007).

b. *The State's expert agreed Mr. Marcum was not presently dangerous as required for total, indefinite confinement.*

A person does not meet the criteria for commitment under RCW 71.09 unless he has a mental abnormality or personality disorder that makes him *more likely than not* to commit predatory acts of sexual violence if not confined. RCW 71.09.020(7), (18). If the State determines that a detainee is no longer sufficiently dangerous, continued detention is not authorized. *Cherry*, 166 Wn.App. at 76.

The State must show a greater than 50% likelihood of reoffense to meet the "more likely than not" threshold showing a person will

reoffend if not confined. *In re Det. of Brooks*, 145 Wn.2d 275, 295-96, 36 P.3d 1034 (2001), *overruled on other grounds*, *In re Det. of Thorell*, 149 Wn.2d 724, 72 P.3d 708 (2003). "The fact to be proved with respect to the SVP statute is expressed in terms of a statistical probability." *Brooks*, 145 Wn.2d at 296. The question "is not whether the defendant will reoffend, but whether the probability of the defendant's reoffending exceeds 50 percent." *Id.*

In making this determination, actuarial models are more reliable than clinical judgment. *Thorell*, 149 Wn.2d at 753, 757. The probative value of actuarial assessments is "high" and "directly relevant" to whether an individual meets the definition of "sexually violent predator." *Id.* at 758; *see also In re Det. of Fox v. State, Dep't of Soc. & Health Servs.*, 138 Wn.App. 374, 395 n.14, 158 P.3d 69 (2007) ("research suggests that actuarial risk assessments are more reliable than clinical analyses" (internal citation omitted)).

Under both the State evaluator's actuarial assessment and that presented by Mr. Marcum's expert, he poses at most a 30% risk of reoffending in 10 years. CP 17, 62. This prediction falls below the more likely than not threshold for confinement and constitutes probable cause to believe Mr. Marcum no longer meets all criteria of commitment.

At times, experts adjust the result of an actuarial assessment by examining individual, dynamic factors. *Thorell*, 149 Wn.2d at 753. But in the annual review report, Dr. Harrington did not claim that individual risk factors required an upward adjustment of Mr. Marcum's risk of reoffending. While she noted generally an actuarial assessment may not account for all important information such as incidents that were not prosecuted, she also explained that an actuarial assessment may overstate a person's future dangerousness. CP 17. A person's risk may be lower than predicted by the actuarial tool due to the "observed statistical decline" in risk as people age and because treatment reduces a person's risk. *Id.* Mr. Marcum is nearly 50 years old and his sustained treatment participation has resulted in demonstrable regulation of sexual impulses and behavior. *Id.*

Dr. Harrington's report undermines the court's findings of fact 3, 4, 5, and 6. CP 77-78. She believed Mr. Marcum's behavior demonstrated he no longer lacked behavioral control over his "sexual regulation." CP 17. The court's cursory written findings ignore the undisputed evidence of the change in Mr. Marcum's condition since his commitment.

The State's annual review did not set forth facts showing how Mr. Marcum was more likely than not to commit a predatory crime of sexual violence, which is a required element of his continued confinement. *See Jacobson*, 120 Wn.App. at 780. The trial court misapplied the law by denying Mr. Marcum's request for an evidentiary hearing based on his undisputed lack of present risk.

Furthermore, given the evidence that Mr. Marcum is no longer more than 50% likely to reoffend, his continued confinement is unconstitutional absent a full trial on the merits. *See Foucha*, 504 U.S. at 77; *Jones*, 463 U.S. at 368; *O'Connor v. Donaldson*, 422 U.S. 563, 575, 95 S.Ct. 2486, 45 L.Ed.2d 396 (1975) ("even if [a detainee's] involuntary confinement was initially permissible, it could not constitutionally continue after *that basis* no longer existed"); U.S. Const. amends. 5, 14; Const. art. I, § 3. His reduced risk of harm means it is no longer statutorily or constitutionally permissible to confine him. He is entitled to a trial regarding his continued confinement.

### 3. Because the State agreed Mr. Marcum should be released to a less secure facility, the court lacked authority to deny an evidentiary hearing on his continued confinement.

An annual report must include "whether conditional release to a less restrictive alternative is in the best interest of the person and conditions can be imposed that would adequately protect the community." RCW 71.09.070(1). Dr. Harrington assessed the best interest of both Mr. Marcum and the community would be his release, recommending a transfer to a less secure facility so he learns the skills necessary to live independently. CP 23-24.

The State's authority to detain someone rests largely on the need to keep the public safe from the danger posed by a person who cannot control his violent behavior due to mental illness. *In re Young*, 122 Wn.2d 1, 22, 857 P.2d 989 (1993). But after evaluating Mr. Marcum, Dr. Harrington found,

> Mr. Marcum has reached maximum benefit from inpatient treatment and a higher management setting is not in his best interest as it does not further his adaption to community life and does not appear necessary for community safety based on what is observed of his current functioning while at the SCTF on conditional release.

CP 23. Dr. Harrington concluded,

> it is my professional opinion he continues to [be] suitable for a less restrictive alternative community placement and a higher management total confinement setting is not in his best interest and is not needed for community safety.

CP 24.

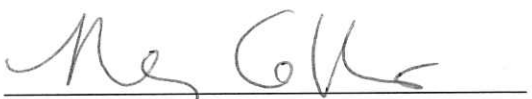
When the interests of community safety and an individual's needs are not best served by continuing total confinement, the State lacks sufficient grounds to continue the total confinement absent an evidentiary hearing. *Foucha*, 504 U.S. at 80; RCW 71.09.090(1). Continued confinement must be closely tailored to "pressing public safety concerns." *Young*, 122 Wn.2d at 38. The State's expert concluded that it is not in the best interest of Mr. Marcum or the community to maintain his total confinement. CP 23-24. The State did not present prima facie evidence justifying Mr. Marcum's continued involuntary total confinement. *Foucha*, 504 U.S. at 80-81. Based on universal agreement of Mr. Marcum's exceptional changes in his behavior gained through treatment since he was committed, he is entitled to an evidentiary hearing at which the State must prove he continues to currently meet the criteria for total confinement.

F. CONCLUSION.

This Court should order that Mr. Marcum is entitled to an evidentiary hearing on whether he meets the criteria for continued total confinement under RCW ch. 71.09.

DATED this 12th day of December 2014.

Respectfully submitted,



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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**
**DIVISION THREE**

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

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