No. 92501-1

FILED
MARCH 3, 2015
Court of Appeals
Division III
State of Washington

NO. 32118-5

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

In re the Detention of John Marcum:

STATE OF WASHINGTON,

Respondent,

v.

JOHN MARCUM,

Appellant.

RESPONDENT'S ANSWERING BRIEF

ROBERT W. FERGUSON
Attorney General

BROOKE BURBANK
ASSISTANT ATTORNEY GENERAL
Office of the Attorney General
Criminal Justice Division
800 Fifth Avenue, Suite 2000
Seattle, WA 98104
(206) 389-3017

TABLE OF CONTENTS

I. IDENTITY OF RESPONDENT 1

II. DECISION BELOW 1

III. RESTATEMENT OF THE ISSUES 2

IV. RESTATEMENT OF THE CASE 3

V. ARGUMENT 7

A. Statutory Framework – Annual Review Show Cause Hearing 7

1. Overview and Standard of Proof 7

2. State's Prima Facie Burden of Proof 9

3. SVP's Prima Facie Burden of Proof 9

B. The State Presented Prima Facie Evidence That Marcum's Mental Disorders Make Him Likely to Reoffend If Unconditionally Released 11

C. The Trial Court Could Not Order an LRA Trial Because Marcum Did Not Petition for Conditional Release and Did Not Comply With RCW 71.09.092 13

D. Marcum Cannot Show That He Has Changed Through "Continuing Participation in Treatment" Because He Hasn't Participated in Treatment Since 2011 16

1. Marcum Could not Show "Continuing Participation in Treatment" Because after Being Terminated in February 2011 He Quit Treatment 17

2. The Plain Language of the Statute Defines "Probable Cause" as Evidence of a Substantial Change in the Person's Condition Since an LRA Revocation 19

VI. CONCLUSION 23

TABLE OF AUTHORITIES

Cases

In re Det. Of Skinner,
122 Wn. App. 620, 94 P.3d 981 (2004) 15, 16

In re Det. of Jones,
149 Wn. App. 16, 201 P.3d 1066 (2009) 14, 15

In re Det. of Moore,
167 Wn.2d 113, 216 P.3d 1015 (2009) 12

In re Detention of Ambers,
160 Wn.2d 543, 158 P.3d 1144 (2007) 18, 19

In re Detention of Boynton,
152 Wn. App. 442, 216 P.3d 1089 (2009) 22

In re Detention of Lewis,
134 Wn. App. 896, 143 P.3d 833 (2006) 12

In re Detention of Thorell,
149 Wn.2d 724, 72 P.3d 708 (2003) 12

In re Detention of Young,
122 Wn.2d 1, 857 P.2d 989 (1993) 13

In re Mierhofer,
2015 WL 596928, 5 (2015) 12

In re Petersen
138 Wn.2d 70, 980 P.2d 1204 (1999)(*Petersen I*) 8

In re the Detention of Jacobson,
120 Wn.App. 770, 86 P.3d 1202 (2004) 21

In re the Detention of Ronald Petersen,
145 Wn.2d 789, 42 P.3d 952 (2002)(*Petersen II*) 7, 9

State v. McCuistion,
174 Wn.2d 369, 275 P.3d 1092 (2012) 8, 9, 10, 12, 21

Statutes

RCW 71.05 16

RCW 71.09 16

RCW 71.09.010 8

RCW 71.09.020(15) 16

RCW 71.09.020(18) 7

RCW 71.09.020(7) 7

RCW 71.09.060(1) 7, 16

RCW 71.09.070 7

RCW 71.09.070(1) 5

RCW 71.09.090(1) 15

RCW 71.09.090(2) 7, 14, 15, 16, 17, 19

RCW 71.09.090(2)(a) 17, 19

RCW 71.09.090(2)(b) 9

RCW 71.09.090(2)(c) 9, 10

RCW 71.09.090(2)(c)(i) 14

RCW 71.09.090(2)(d) 14, 15

RCW 71.09.090(3) 21

RCW 71.09.090(4) 10

RCW 71.09.090(4)(a) 2, 10, 20, 21, 22

RCW 71.09.090(4)(b) 10, 21

RCW 71.09.090(4)(b) 21

RCW 71.09.090(4)(b)(ii) 17, 18, 20

RCW 71.09.092 ..... 2, 6, 14, 15, 16

RCW 71.09.096 16

Rules

RAP 2.3(b)(2) 1

Other Authorities

Black's Law Dictionary 291 (5th ed. 1979) 18

I. IDENTITY OF RESPONDENT

The Respondent is the State of Washington, by and through Robert W. Ferguson, Attorney General, and Brooke Burbank, Assistant Attorney General.

II. DECISION BELOW

Marcum appeals the November 22, 2013, Order on Show Cause Hearing (show cause order), entered by the Spokane County Superior Court. CP at 76-78. The show cause order concluded the State had established prima facie that Marcum continues to meet the definition of a sexually violent predator (SVP), and that Marcum failed to establish a prima facie case that his condition had so changed through a positive response to continuing participation in treatment such that an unconditional release trial should be ordered. Marcum did not petition the court for conditional release to a proposed Less Restrictive Alternative placement (LRA). The trial court therefore continued Marcum's placement at the Special Commitment Center and denied his request for a trial. Marcum moved for review under RAP 2.3(b)(2). The Commissioner denied review. Marcum Moved to Modify the commissioner's Ruling and this Court granted the Motion.

III. RESTATEMENT OF THE ISSUES

A person civilly committed as a Sexually Violent Predator (SVP) is entitled to annual review of his condition. An SVP can obtain an unconditional release trial if the State fails to meet its burden to show he continues to meet criteria at the show cause hearing, or if the SVP presents evidence that his mental condition has changed, since his initial commitment or his last less restrictive alternative (LRA) revocation proceeding, due to continuing participation in sex offender treatment. RCW 71.09.090(4)(a). A court may not order a conditional release trial unless a proposed LRA that meets the requirements of RCW 71.09.092 has been submitted to the court.

A. **Where the State's evaluator opined, based on a broad array of information, that Marcum continued to meet the statutory criteria of a sexually violent predator because his mental condition makes him more likely than not to sexually re-offend if he were to be unconditionally released, did the State meet its prima facie burden?**

B. **Where the State's evaluator opined that Marcum could be managed in a less restrictive alternative, but Marcum did not petition for conditional release, nor did he submit a proposed LRA that satisfied the requirements of RCW 71.09.092, should an LRA trial have been ordered?**

C. **Where, pursuant to RCW 71.09.090(4)(a), Marcum was required to present evidence his condition had changed through continuing participation in treatment since the revocation of a previous LRA on May 12, 2011, and Marcum had not participated in treatment after that date, was he entitled to an unconditional release trial?**

IV. RESTATEMENT OF THE CASE

In 2001, Marcum was civilly committed as an SVP to the custody of the Department of Social and Health Services (DSHS). CP at 16. He entered sex offender treatment and successfully progressed to the point where he was released to an LRA at the Secure Community Transition Facility (SCTF) on McNeil Island in 2009. CP at 17.

Marcum's LRA treatment provider was Vincent Gollogly, Ph.D. CP at 85. On February 13, 2011, Dr. Gollogly terminated Marcum's treatment. CP at 122-123. Dr. Gollogly noted that Marcum was not receptive to treatment feedback. CP at 123. Dr. Gollogly felt that he could no longer help him in treatment. CP at 123. Marcum had been warned the previous October that his lack of motivation was harming his physical condition, job search and sexual offender treatment. CP at 122. Over the next several months Dr. Gollogly and SCTF staff gave Marcum directives designed to address those areas but Marcum did not follow them. CP at 122. He was then specifically directed to "get up at a reasonable hour, exercise and work at the facility." CP at 122. He did not comply and received a violation report on January 12, 2011. CP at 122.

Dr. Gollogly was particularly concerned that Marcum had stated he would refuse any job at the SCTF because of the low wages and mandatory deduction for treatment costs and would perform only

sedentary work, despite his stated intention to become a truck driver if released. CP at 122. Marcum did not follow through on obtaining a copy of a "physical capacities evaluation" from his physician which would shed light on his ability to work. CP at 123. He also violated treatment rules by trading for cigarettes from another offender in Dr. Gollogly's treatment group. CP at 123. Tasked to complete a "Thinking Exercise Report" about his failings, he blamed the institution for poor support. CP at 123. Dr. Gollogly concluded that he could not help Marcum any further, due to Marcum's "attitude, frustration and irritability regarding his transitional programming at the SCTF." CP at 123.

The State moved to revoke Marcum's LRA. CP at 79-82. Marcum stipulated to revocation. CP at 129-132. Marcum's counsel certified that Marcum's "attitude towards his current placement has deteriorated to the point where nothing will change his mind including changing treatment providers and/or changing current placements." CP at 131. Marcum stated through counsel he wanted his LRA revoked. CP at 131.

The trial court granted the State's motion to revoke the LRA. CP at 133-135. The court found that:

> Due to Respondent's attitude regarding his transitional programming at the SCTF, as well as his violation of a rule prohibiting trading goods with other treatment participants, Dr. Gollogly has terminated the Respondent from sexual offender treatment.

CP at 134. The court returned Marcum to the Special Commitment Center (SCC). CP at 135. Thereafter he declined sex offender treatment. CP at 23. ("[S]ince his return to total confinement [he] has not participated in SCC sexual offender treatment.").

On April 15, 2013, the SCC submitted its annual review to the trial court, pursuant to RCW 71.09.070(1). CP at 16-28. The reviewer, Regina Harrington, Ph.D., diagnosed Marcum with: (1) Pedophilia, attracted to males, nonexclusive; (2) Alcohol Dependence, in sustained remission in a controlled environment; (3) Dysthymic Disorder; and (4) Personality Disorder Not Otherwise Specified (NOS) with narcissistic and passive aggressive traits.[1] CP at 18-20. Dr. Harrington noted that Marcum had continued to decline both formal and adjunct sex offender treatment activities. CP at 20.

Dr. Harrington considered a broad range of information. CP at 16. ("Clinical information from multiple data sources is reviewed to assess the quality of treatment progress, treatment gains are discussed with relevant staff and Mr. Marcum is given opportunity to discuss sexual offender

[1] Marcum argues that the state's evaluator did not assess a personality disorder. Opening Brief at 4. To the contrary, the record shows that Dr. Harrington diagnosed him with both a mental disorder and a personality disorder, as discussed above. See CP at 18-20.

treatment knowledge, perceptions and progress.") Her information included historical data about Marcum's offending and treatment history. CP at 16-17. She considered the nature of Marcum's mental disorders and their impact on his ability to control his behavior. CP at 17, 19-20. She considered research-supported static (unchanging) and dynamic (changeable) risk factors. CP at 17. She considered his treatment progress and her clinical interview of Marcum. CP at 20-22. Dr. Harrington concluded that Marcum

> continues to meet the definition of a sexually violent predator because his present mental condition still includes the predisposition for sexually violent behavior which renders him more likely than not to sexually re-offend if he were unconditionally released to the community without continued treatment and supervision.

CP at 24.

Dr. Harrington noted that Marcum "has not presented a viable community release plan[.]" CP at 17. His plan included release to a property on which children ages 10 and 12 reside. CP at 22. She opined that he could be managed in an environment less restrictive than the SCC. CP at 24. Marcum, however, did not petition the court for release to a proposed LRA nor did he provide any of the required criteria set forth in RCW 71.09.092.

V. ARGUMENT

A trial court's legal conclusion of whether evidence meets the probable cause standard is reviewed de novo. *In re the Detention of Ronald Petersen*, 145 Wn.2d 789, 799, 42 P.3d 952, 958 (2002).

A. Statutory Framework – Annual Review Show Cause Hearing

1. Overview and Standard of Proof

An individual determined to be an SVP[2] is committed to the custody of DSHS for placement in a secure facility:

> for control, care, and treatment until such time as: (a) The person's condition has so changed that the person no longer meets the definition of a sexually violent predator; or (b) conditional release to a less restrictive alternative as set forth in RCW 71.09.092 is in the best interest of the person and conditions can be imposed that would adequately protect the community.

RCW 71.09.060(1). DSHS is required to conduct a yearly evaluation of the SVP's mental condition in order to determine whether he continues to meet the statutory criteria for commitment. RCW 71.09.070. Unless the SVP affirmatively waives the right to a hearing, the trial court must schedule a show cause hearing. RCW 71.09.090(2). An SVP may also submit his own expert evaluation to the court at any time. *Id.*

---

[2] An SVP is defined 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 that makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility. RCW 71.09.020(18). "Likely to engage…" means that the person more probably than not will engage in such acts if unconditionally released. RCW 71.09.020(7).

The standard of proof at a show cause hearing is "probable cause." *State v. McCuistion,* 174 Wn.2d 369, 382, 275 P.3d 1092 (2012) *cert. denied,* 133 S. Ct. 1460, 185 L. Ed. 2d 185 (2013). While the probable cause standard is not a stringent one, it allows the court to perform a critical gate-keeping function:

> Under this standard, a court must assume the truth of the evidence presented; it may not 'weigh and measure asserted facts against potentially competing ones.' At the same time, the court can and must determine whether the asserted evidence, if believed, is *sufficient* to establish the proposition its proponent intends to prove.

Id. (emphasis in original; internal citations omitted).

The Legislature specifically found that the SVP population is extremely dangerous and their treatment needs are very long term, implying the statute contemplates a prolonged period of treatment. RCW 71.09.010; *In re Petersen,* 138 Wn.2d 70, 78, 980 P.2d 1204 (1999) (*Petersen I*). The statute involves indefinite commitment, "not a series of fixed one-year terms with continued commitment having to be justified beyond a reasonable doubt *annually* at evidentiary hearings where the State bears the burden of proof." *Id.* at 81 (emphasis in original). Consequently, the show cause hearing is "in the nature of a summary proceeding" consistent with the "Legislature's wish that judicial resources not be burdened annually with full evidentiary hearings for sexually

violent predators absent at least some showing of probable cause to believe such a hearing is necessary." *Id.* at 86.

2. State's Prima Facie Burden of Proof

At a show cause hearing, the State bears the burden to present prima facie evidence that the person continues to meet the definition of an SVP and that conditional release to a proposed less restrictive alternative would not be appropriate. RCW 71.09.090(2)(c); *McCuistion,* 174 Wn.2d at 380. The State may rely on the DSHS annual review to satisfy this burden. RCW 71.09.090(2)(b).

If the State cannot or does not prove this prima facie case, there is probable cause to believe continued confinement is not warranted and the matter must be set for a trial. RCW 71.09.090(2)(c); *In re: the Detention of Petersen,* 145 Wn.2d 789, 798, 42 P.3d 952 (2002) (*Petersen II*).

3. SVP's Prima Facie Burden of Proof

The second way probable cause for a new trial may be established is through the SVP's proof. *See, e.g., Petersen II,* 145 Wn.2d at 798. "Probable cause" as it pertains to the SVP's proof is defined in

RCW 71.09.090(4)(a).[3] A new trial will be granted only if an SVP presents evidence that he has "so changed" such that he either no longer meets the definition of an SVP, or release to a less restrictive alternative is appropriate. *See* RCW 71.09.090(2)(c). However, RCW 71.09.090(4) requires that very specific criteria be met in order for the SVP to satisfy the "so changed" requirement. The SVP must show that since his last commitment trial or LRA revocation proceeding, there has been a "substantial change" in condition due to either (1) a permanent physiological change that renders him unable to reoffend; or (2) a change in mental condition brought about through "positive response to continuing participation in treatment[.]" RCW 71.09.090(4)(a), (b). If the SVP makes the required showing, there is probable cause to order a new trial. RCW 71.09.090(2)(c).[4]

---

[3] RCW 71.09.090(4)(a) provides:

> 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. (Emphasis added.)

[4] The constitutionality of the amendment requiring either a permanent physiological change or a treatment-based change was upheld by this Court in *McCuistion,* 174 Wn.2d at 369.

B. The State Presented Prima Facie Evidence That Marcum's Mental Disorders Make Him Likely to Reoffend If Unconditionally Released

Marcum argues that the State failed to present prima facie evidence that his mental condition makes him likely to reoffend if released unconditionally. He rests his argument on his proposition that actuarial assessment must show that more than 50% of others with Marcum's actuarial score recidivated after release, or the State's proof fails. Opening Brief at 16-17. Marcum's argument is without merit. Dr. Harrington's opinion was supported by a broad range of information. Actuarial assessment is but one component of an evaluator's comprehensive risk assessment. Marcum's singling out of actuarial data does not establish that the trial court committed probable error because the court does not weigh the evidence.

Marcum asserts that the State's expert "agreed Mr. Marcum was not presently dangerous as required for total, indefinite confinement. Opening Brief at 16. That is incorrect. Dr. Harrington opined that Marcum

> continues to meet the definition of a sexually violent predator because his present mental condition still includes the predisposition for sexually violent behavior which renders him more likely than not to sexually re-offend if he were unconditionally released to the community without continued treatment and supervision.

CP 24. Marcum disregards this opinion because results of one actuarial test showed his score was associated with group recidivism rates under 50 percent. His argument does not establish probable error. Under the probable cause standard the trial court assumes the truth of the evidence presented and does not weigh it, but does determine whether ultimate conclusions are supported. *McCuistion,* 174 Wn.2d at 382.

As Dr. Harrington noted, actuarial instruments are "generally considered underestimates of actual sexual offense risk over a lifetime" because of a variety of factors. They have limited applicability in SVP cases because of their small sample sizes and a variety of predictive shortcomings. *In re Detention of Thorell,* 149 Wn.2d 724, 753, 72 P.3d 708 (2003). For example, because they cannot include all offenses actually committed, they underestimate risk. *In re Detention of Lewis,* 134 Wn. App. 896, 906, 143 P.3d 833 (2006). The common practice in Dr. Harrington's field, therefore, is to also consider non-actuarial information. *Thorell,* 149 Wn.2d at 753. The SVP act does not limit experts to the results of actuarial tests and there is no requirement that "the SVP will reoffend in the foreseeable future." *In re Det. of Moore*, 167 Wn.2d 113, 125, 216 P.3d 1015 (2009)(*In re Meirhofer*, 2015 WL 596928, 5 (2015)).

Dr. Harrington therefore relied on a broad range of information. CP at 16. "Clinical information from multiple data sources is reviewed to

assess the quality of treatment progress, treatment gains are discussed with relevant staff and Mr. Marcum is given opportunity to discuss sexual offender treatment knowledge, perceptions and progress."). Her information included historical data about Marcum's offending and treatment history. CP at 16-17. A person's sexual history is admissible in SVP proceedings because it is highly probative of that person's recidivism risk. *In re Detention of Young,* 122 Wn.2d 1, 53, 857 P.2d 989 (1993) ("In assessing whether an individual is a sexually violent predator, prior sexual history is highly probative of his or her propensity for future violence.") Dr. Harrington considered the nature of Marcum's mental disorders and their impact on his ability to control his behavior. CP at 19-20. She considered research-supported dynamic risk factors. CP at 17. And she considered Marcum's treatment progress and her clinical interview of him. CP at 20-22.

Because Dr. Harrington sufficiently supported her ultimate conclusion under the probable cause standard, the trial court's order should be affirmed.

C. The Trial Court Could Not Order an LRA Trial Because Marcum Did Not Petition for Conditional Release and Did Not Comply With RCW 71.09.092

It is undisputed that Marcum did not propose an LRA at the show cause hearing. The Court may not order a conditional release trial "unless

a proposed less restrictive alternative placement meeting the conditions of RCW 71.09.092 is presented to the court at the show cause hearing." RCW 71.09.090(2)(d).

Despite failing to petition for a conditional release trial or offering a proposed plan, Marcum argues that because the annual review indicated, in the abstract, that he could be managed in an LRA, the trial court erred by not ordering a trial. He is incorrect because a trial cannot be ordered where there is no proposed LRA at issue. RCW 71.09.090(2)(d). Furthermore, the statute provides that the court shall set a trial only if the State fails to establish that *no proposed* LRA would be appropriate. RCW 71.09.090(2)(c)(i).

Division I has examined the legislative intent communicated by inclusion of the word "proposed" in RCW 71.09.090(2). *In re Det. of Jones*, 149 Wn. App. 16, 201 P.3d 1066, 1070 (2009). *Jones* concluded that the Legislature's "precise reference to a 'proposed LRA'" indicated there must be evidence of a "specific LRA" before a court can find probable cause to order a trial. 149 Wn. App. at 26. *Jones* further concluded that that if "the legislature intended this showing to be made in the abstract without reference to a specific 'proposed LRA,' it would not have modified the term 'LRA' with the word 'proposed.'" *Id.*

The elements of the specific proposal required by

RCW 71.09.090(2) are set out in RCW 71.09.092.[5] They require signed agreements for treatment and housing, among other things. *Id.* A trial cannot be ordered unless these requirements are met. RCW 71.09.090(2)(d); *See Jones*, 149 Wn. App. at 26. Marcum did not provide a proposed LRA to the trial court and did not comply with RCW 71.09.092.

The determination of whether an LRA with sufficient conditions is in a person's best interest lies with the DSHS Secretary. RCW 71.09.090(1). While Dr. Harrington opined that a theoretical LRA would be in Marcum's best interest, DSHS made the ultimate determination not to authorize Marcum to file a petition. There is no obligation for the State to propose an LRA. *In re Det. Of Skinner*, 122 Wn. App. 620, 626-8, 94 P.3d 981 (2004), *rev. denied*, 153 Wn.2d 1026

---

[5] There are five specific conditions set forth in RCW 71.09.092:

(1) The person will be treated by a treatment provider who is qualified to provide such treatment in the state of Washington under chapter 18.155 RCW;

(2) the treatment provider has presented a specific course of treatment and has agreed to assume responsibility for such treatment . . . ;

(3) housing exists in Washington that is sufficiently secure to protect the community, and the person or agency providing housing to the conditionally released person has agreed in writing to accept the person, to provide the level of security required by the court . . . ;

(4) the person is willing to comply with the treatment provider and all requirements imposed by the treatment provider and by the court; and

(5) the person will be under the supervision of the department of corrections and is willing to comply with supervision requirements imposed by the department of corrections.

(2005). In *Skinner*, the appellant challenged RCW 71.09.092 on equal protection grounds. 122 Wn. App. at 630-31. He argued that RCW 71.09 requires the State to produce a currently available treatment and residence plan, analogizing to RCW 71.05, the involuntary treatment act, where the State is required to create an appropriate LRA even if none exists. *Id.* The court disagreed, finding no equal protection violation. *Id.* at 630.

Marcum's confinement is based on his continued status as an SVP. The SVP statute provides that a person determined to be an SVP is to be confined in a secure facility. RCW 71.09.060(1). The definition of "secure facility" includes total confinement and LRAs.[6] RCW 71.09.020(15). Because Marcum still meets the criteria for confinement in a secure facility, and did not propose an LRA at the show cause hearing, this court should affirm the trial court.

D. Marcum Cannot Show That He Has Changed Through "Continuing Participation in Treatment" Because He Hasn't Participated in Treatment Since 2011

Marcum argues that his evidence was sufficient to show probable cause, as that standard applies to RCW 71.09.090(2), that his condition has substantially changed due to his continuing participation in treatment.

---

[6] "Secure facility" means a residential facility for persons civilly confined under the provisions of this chapter that includes security measures sufficient to protect the community. Such facilities include total confinement facilities, secure community transition facilities, and any residence used as a court-ordered placement under RCW 71.09.096. RCW 71.09.020(15).

His argument fails for two reasons: (1) Marcum could not show that his condition has changed due to "continuing participation in treatment" because he had not engaged in any treatment since being terminated by his treatment provider in February, 2011; and (2) "probable cause" as used in RCW 71.09.090(2) required Marcum to show he had changed through continuing participation in treatment since the Court revoked his LRA. Marcum's failure in a highly structured *conditional* release setting required him to show his condition had since improved due to treatment, before he could claim readiness for *unconditional* release to the community. There was no error.

1. Marcum Could not Show "Continuing Participation in Treatment" Because after Being Terminated in February 2011 He Quit Treatment

RCW 71.09.090(2)(a) permitted Marcum to present evidence to the Court to establish "probable cause" that he had changed such that he was no longer an SVP. The statute requires that Marcum's evidence show:

> 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....

RCW 71.09.090(4)(b)(ii). But Marcum could not possibly show his mental condition had changed due to "continuing participation in treatment"

because after he was terminated in February 2011, he quit treatment. *See* CP at 23. As a result, his "elaboration of treatment concepts was less sophisticated than previously when he was active in treatment." CP at 21.

RCW 71.09.090(4)(b)(ii) unequivocally required Marcum to show his mental disorders had changed through "continuing participation in treatment." "Continuing" is defined as:

> Enduring; not terminated by a single act or fact; subsisting for a definite period or intended to cover or apply to successive similar obligations or occurrences.

Black's Law Dictionary 291 (5th ed. 1979). Marcum's treatment was undisputedly "terminated" in 2011, and thus had "subsisted for a definite period." Thereafter he refused all treatment. It therefore cannot be considered to have been "continuing" and the trial court correctly concluded he did not meet the statutory requirement for obtaining an unconditional release trial.

Marcum cites to WSSC case *Ambers* for the proposition that a committed SVP is able to show treatment based change that satisfies the 71.09 show cause requirements based on prior prison treatment. Opening brief at 7-8. This is a misrepresentation of the *Ambers* opinion, where the expert opined:

> *It is my opinion, to a reasonable degree of scientific certainty that Mr. Ambers' condition has changed since his commitment in 1998* such that he no longer meets the definition of a sexually violent

> predator. *The change in Mr. Ambers' condition has been brought about through positive responses to continuing participation in treatment* that indicates that he no longer meets the criteria of a sexually violent predator. ...CP at 215. Because Dr. Abracen indicated Ambers no longer meets the definition of an SVP, and because he stated that this change was due to treatment, we hold that Ambers made the requisite prima facie showing.

In re Detention of Ambers, 160 Wash.2d 543, 559, 158 P.3d 1144, 1151 (2007) (emphasis added).

Furthermore, the Court's holding in *Ambers* was not that prison-based treatment is sufficient to show the requisite change in mental condition, it was that the standard for unconditional release is the same as the commitment standard:

> We find that the 2005 amendments to the Act do not impose a more stringent standard for a detainee, seeking unconditional release, to meet at an SVP hearing. The standard continues to be that the detainee must show that he or she no longer meets the definition of an SVP and that this change has come about through continuing participation in treatment.

160 Wash.2d, 559-560.

2. The Plain Language of the Statute Defines "Probable Cause" as Evidence of a Substantial Change in the Person's Condition Since an LRA Revocation

As noted above, under RCW 71.09.090(2)(a) Marcum could attempt to establish "probable cause" by presenting evidence he had changed such that he was no longer an SVP. "Probable cause" as used in RCW 71.09.090(2), however, has a very specific definition:

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

RCW 71.09.090(4)(a) (emphasis added). Marcum's LRA had been revoked. The trial court correctly concluded that the statute required him to show that evidence existed since revocation of a change in his condition. And that evidence had to show a positive response to continuing participation in treatment. RCW 71.09.090(4)(b)(ii). But Marcum could not produce such evidence because he had quit treatment. His evidence of previous treatment gains was therefore irrelevant.

Marcum argues that his expert opined that he had "changed due to his successful participation in sex-offender specific treatment." CP 73-74. Opening Brief at 8. However, at the cited pages, Marcum's expert, Dr. Paul Spizman, merely states that despite having his LRA revoked, Marcum was able to "maintain the solid gains he has made via treatment." CP 74. Dr. Spizman ultimately concludes that "Marcum has so changed, via his efforts in treatment, in conjunction with various other factors, that he no longer meets the definition of a Sexually Violent Predator." CP 74.

This is a far cry from the standard required by the statute, and the trial court did not err in denying new trial.

When evaluating the evidence, the court must "look at the *facts* contained in the [annual review] 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).

Marcum argues that RCW 71.09.090(4)(b) does not mention LRA revocation and the Legislature therefore did not intend the language of RCW 71.09.090(4)(a) to apply to .090(4)(b). Opening Brief at 10. But .090(4)(a) is a mandatory definition of "probable cause" that applies to an SVP's evidence. RCW 71.09.090(4)(a) ("only when evidence exists"). It therefore must apply to Marcum's evidence. RCW 71.09.090(4)(b), on the other hand, pertains more generally to the ordering of trials under RCW 71.09.090(3) and permissively provides that a trial "may" be ordered if there is evidence since the last commitment trial proceeding. That general permissive provision, however, is clearly modified by the preceding specific definition of "probable cause" in RCW 71.09.090(4)(a). Thus,

while a trial court "may" order a trial based on evidence arising since the last commitment trial proceeding, in a case where an LRA has been revoked, that evidence establishes *probable cause* "only" where it arises since the revocation.

Marcum argues that this interpretation would render RCW 71.09.090(4)(b) superfluous. It is Marcum's interpretation, however, that would render RCW 71.09.090(4)(a) superfluous. If treatment evidence arising prior to LRA revocation is sufficient, then the revocation language would be superfluous. Any SVP who had been revoked from an LRA could argue that, under RCW 71.09.090(4)(b), he need only show he had changed since his commitment trial, in order to obtain either a conditional or unconditional release trial. That interpretation reads the LRA revocation language of RCW 71.09.090(4)(a) right out of the statute. Under rules of statutory interpretation, all language is given effect and plain language cannot be rendered superfluous. *In re Detention of Boynton*, 152 Wn. App. 442, 452, 216 P.3d 1089 (2009).

Marcum did not satisfy the statutory criteria necessary to show probable cause for a new trial because it did not address a change since his LRA revocation two years prior. This Court should affirm.

VI. CONCLUSION

The trial court found that Mr. Marcum's 2013 annual review concluded that he continued to meet the definition of an SVP and the State met its prima facie burden at the show cause hearing. Because Mr. Marcum had not been in treatment for at least two years, he could not show that his condition had changed through continued participation in treatment. Furthermore, Mr. Marcum did not propose an LRA and did not petition for conditional release.

An SVP who fails at conditional release and is terminated from treatment is obviously unsuitable for unconditional release. The Legislature therefore required that such a person demonstrate a change in his condition, caused by his continuing participation in treatment, since the time he failed in a highly structured conditional release. The trial court correctly interpreted the statute and concluded that Marcum's evidence, which did not address any change in condition in the years since his LRA revocation, failed to meet the statutory standard. The trial court did not err in declining to order a trial.

RESPECTFULLY SUBMITTED this 3rd day of March, 2015.

ROBERT W. FERGUSON
Attorney General

BROOKE BURBANK, WSBA #26680
Assistant Attorney General

NO. 32118-5-III

WASHINGTON STATE COURT OF APPEALS, DIVISION III

In re the Detention of John Marcum, JOHN MARCUM, Appellant.	DECLARATION OF SERVICE

I, Lissa Treadway, hereby declare as follows:

On the 3rd day of March, 2015, I sent a true and correct copy of the Respondent's answering Brief and Declaration of Service via electronic transmission and United States mail, first class delivery, postage fully prepaid, addressed as follows:

Nancy P. Collins
Washington Appellate Project
1511 Third Avenue, Suite 701
Seattle, WA 98101
nancy@washapp.org
wapofficemail@washapp.org

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

DATED this 3rd day of March, 2015, at Seattle, Washington.

LISSA TREADWAY