COA NO. 82912-2-I
(cons. w/ 82126-1-I)

IN THE COURT OF APPEALS OF WASHINGTON
DIVISION ONE

IN RE DETENTION OF ROBERT LOUGH:

STATE OF WASHINGTON,

Respondent,

v.

ROBERT LOUGH,

Appellant.

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

The Honorable Catherine Shaffer, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. THE COURT VIOLATED THE STATUTE IN DENYING AN UNCONDITIONAL RELEASE TRIAL AS PART OF THE 2019 ANNUAL REVIEW PROCEEDING BECAUSE LOUGH ESTABLISHED PROBABLE CAUSE TO BELIEVE HE NO LONGER MEETS THE COMMITMENT CRITERIA BASED ON A TREATMENT-BASED CHANGE IN HIS CONDITION.

a. Lough showed a treatment-based change in his mental condition, as shown by comparing his current condition with his condition at the time of his commitment trial.

The State claims participation in substance abuse treatment is insufficient to obtain a release trial under RCW 71.09.090.

How so? Lough's substance use disorder was a diagnosed mental abnormality that caused him to commit sexually violent acts. The State's own expert at the commitment trial testified it was so. RP (1/15/15) 79-80; RP (1/27/15 a.m.) 41, 64-65, 86-90; RP (1/27/15 p.m.) 3-6. According to Dr. Phenix, Lough's treatment for that

disorder, in combination with advanced age, lowered the risk of reoffense and resulted in Lough no longer meeting the SVP definition. 1CP[1] 325, 329, 449-50. Lough's treatment for that disorder is sex offender specific treatment because it treats a mental condition that qualified Lough as an SVP in the first place.

The State nonetheless contends Lough cannot show change through treatment because the jury at the commitment trial did not return a special verdict specifying the mental abnormality or abnormalities it relied upon to find Lough was an SVP. Brief of Respondent (BR) at 61-62.

There is no way to meaningfully measure a relevant change in the person's mental condition since the last commitment trial if we cannot look to the evidentiary basis for commitment presented at that trial. An inability to

[1] "1CP" refers to the clerk's papers index for 82126-1-I. "2CP" refers to the clerk's papers index for 82912-2-I.

compare the detainee's current condition with the past condition presented at the commitment trial would deprive detainees of the means to obtain a release trial at the show cause stage.

The State's argument runs contrary to common sense and a basic sense of fairness, turning the "so changed" standard into the legal equivalent of a shell game.[2] The detainee is duped into thinking he could show change by looking at what got him committed in the first place, only to be told that whatever he points to as the basis for commitment is not in fact the basis for commitment. He can never show the basis of

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[2] Shell Game, Black's Law Dictionary (8th ed. 2004) ("This is a game of chance in which one player bets that he or she can remember under which cup the object is. The cups are moved around so quickly that the player finds it difficult to remember where the object is. When played casually on public streets, the shell game is usu. a swindle because the operator palms the object rather than leaving it under a cup, so the player has no chance of winning.").

commitment, so he cannot show any relevant change in his condition.

Unvarnished, the State's logic is that we don't know which abnormality was found by the jury and therefore Lough cannot show the requisite change by pointing to his treatment for his substance use disorder. "A periodic and timely evaluation of the sexually violent person's mental health condition is critical to the constitutionality of the civil commitment scheme." In re Detention of Rushton, 190 Wn. App. 358, 371, 359 P.3d 935 (2015). The State, by its argument, would reduce the annual review scheme to a kind of confidence game, in which detainees like Lough are always losers.

A return to basics is in order. The person's condition as of the commitment trial forms the baseline by which to assess future change. Lough's argument is grounded in this principle.

"[O]nce a fact-finder has determined that an individual meets the criteria for commitment as an SVP, the court accepts this initial conclusion as a verity in determining whether an individual is mentally ill and dangerous at a later date." State v. McCuistion, 174 Wn.2d 369, 385, 275 P.3d 1092 (2012). "Accordingly, where an individual was found beyond reasonable doubt to be mentally ill and dangerous at the time of his commitment trial, a showing that he no longer satisfies the constitutional criteria for confinement necessarily requires a showing of change." Id.

What kind of change? "A showing that a person has 'so changed' requires a showing that . . . the person no longer meets the commitment standard[.]" In re Detention of Ambers, 160 Wn.2d 543, 555, 158 P.3d 1144 (2007) (quoting Senate Bill 5582, Final Bill Report). To assess change, the person's condition at the time of the commitment trial must be compared to the person's

current condition at the time of any subsequent annual review.

The statute reflects this. Probable cause under the "so changed" standard is established "when evidence exists, *since the person's last commitment trial proceeding*, of a substantial change in the person's physical or mental condition such that the person . . . no longer meets the definition of a sexually violent predator[.]" RCW 71.09.090(4)(a) (emphasis added); see also Laws of 2005 ch. 344, § 1 ("These provisions are intended only to provide a method of revisiting the indefinite commitment due to *a relevant change in the person's condition*, not an alternate method of collaterally attacking a person's indefinite commitment for reasons unrelated to a change in condition.").

There is no way to measure a relevant change in the person's condition "since the last commitment trial" if we cannot look to the evidentiary basis for commitment

presented at the last commitment trial. What the State's expert testified to at the commitment trial is the backstop from which change is measured. See In re Detention of Reimer, 146 Wn. App. 179, 198-99, 190 P.3d 74 (2008) (release trial unwarranted because disagreement with initial diagnoses that formed the basis for commitment did not show a treatment-based change; those diagnoses could not be collaterally attacked at the show cause stage).

The State takes Lough to task for considering Dr. Packard's diagnoses at the commitment trial, insisting that a diagnosis and a statutory mental abnormality are not the same thing. This is linguistic obfuscation. The State is, in effect, collaterally attacking the original basis for commitment by stealth in seeking to separate Dr. Packard's expert diagnosis from the mental abnormality component of the State's burden of proof at the commitment trial.

A mental abnormality has no substantive meaning in any given case apart from the medical diagnoses provided by the expert. The diagnosis provides the content for the mental abnormality determination. In re Detention of Thorell, 149 Wn.2d 724, 761-62, 72 P.3d 708 (2003) (testimony of state's experts, by providing a diagnosis of mental abnormality and linking that abnormality to serious lack of control, gave the jury sufficient evidence to commit the person as an SVP).

Indeed, "the commitment is tailored to the nature and duration of the mental illness." In re Personal Restraint of Young, 122 Wn.2d 1, 39, 857 P.2d 989 (1993). At the commitment trial, Dr. Packard diagnosed Lough with substance use disorders and identified those disorders as a mental abnormality under the statute. RP (1/27/15 a.m.) 64-65. It is impossible to imagine what form of evidence would prove the existence of a mental

abnormality except in the form of a mental illness diagnosis by a qualified expert.

A diagnosis is simply the act of identifying a disease from its signs and symptoms. Webster's Third New Int'l Dictionary, 622 (1993). The disease at issue in SVP cases is the mental abnormality that makes the person likely to reoffend. RCW 71.09.020(9), (19). The diagnoses are significant because they comprise the mental abnormality that formed the basis for commitment.

One way to meet the "so changed" requirement of RCW 71.09.090(4) is to show the detainee no longer suffers from a mental abnormality that makes him likely to reoffend. Whether such change has occurred is necessarily measured by comparison with the State's expert opinion presented at the commitment trial that formed the basis for commitment.

Contrary to the State's assertion, Lough's argument is not at all premised on a diagnosis being in the DSM.

His argument is premised on the underlying mental conditions diagnosed by Dr. Packard, which the doctor identified as mental abnormalities under the statute and which he tied to risk of sexual offense at the original commitment trial. That is the yardstick by which to measure change.

Dr. Phenix's evaluation is prima facie evidence that Lough has changed through treatment such that he no longer meets the SVP definition. Dr. Packard diagnosed Lough with substance use disorders. Dr. Phenix did the same. 1CP 314, 315-16, 449.

Dr. Phenix, however, opined that his diagnosed mental conditions "no longer rise to the level of constituting a mental abnormality in his case." 1CP 449. Phenix identified the sustained remission of Lough's substance use disorders as "a change since Lough's commitment." 1RP 449. Dr. Phenix believed Lough's substance use disorders "played a central role in his

sexual offending behavior and his serious difficulty controlling his behavior." 1RP 449-50. According to Phenix, "this sustained remission has resulted from his abstinence and his engagement and successful completion of substance abuse treatment at the SCC." 1CP 450. Dr. Packard, at the commitment trial, had opined Lough's substance use disorders were not in full remission. RP (1/29/15) 15-16.

Phenix linked the change to risk of reoffense: "I believe the sustained remission of the substance abuse disorders enhances the probability that he will not reoffend sexually." 1CP 450. Lough's greatest area of improvement was in the area of substance abuse. 1CP 329. Lough effectively worked in the CASH group and individual counseling to address his substance abuse issues. 1CP 329. Lough's progress in dealing with his substance use disorders "will greatly enhance the probability of not sexually reoffending in the future." 1CP

329. Phenix opined Lough was not likely to reoffend. 1CP 325, 450.

The change in condition identified by Dr. Phenix is that treatment of Lough's substance use disorder, in combination with advanced age, made it so that Lough was no longer likely to reoffend. 1CP 325, 329, 449-50. A new trial is warranted when the detainee establishes through expert evaluation that he has changed through treatment such that he is no longer likely to reoffend, even where he continues to suffer from a qualifying mental abnormality. Ambers, 160 Wn.2d at 551, 558-59; In re Detention of Fox, 138 Wn. App. 374, 385-86, 403-05, 158 P.3d 69 (2007).

b. The substance abuse treatment provided by the SCC is sex offender specific treatment, where Lough's substance use disorder was a mental abnormality used to originally commit him and this treatment resulted in a change to his mental condition such that he no longer meets the commitment criteria.

As a gateway to obtain a release trial under the "so changed" standard at the show cause stage, the legislature intended for people to participate in treatment that addresses what got them there in the first place. Nothing in the statute requires a detainee to successfully participate in *all* available treatment before a release trial is warranted.

The State predictably claims the SCC's substance abuse treatment does not qualify as sex offender treatment. The State says sex offender specific treatment is that which "specifically addresses sexual offending behaviors," which does not include substance abuse treatment. BR at 55, 56.

Like much of the State's argument on this issue, the claim floats in abstraction rather than rooting itself in specific facts. In figuring out whether Lough has changed through treatment, how are Lough's sexual offending behaviors to be identified? Dr. Packard identified Lough's substance abuse as a sexually offending behavior, to the point where Packard elevated the condition to a mental abnormality that contributed to Lough's risk of reoffense. In this context, treatment that addresses substance abuse necessarily addresses a sexually offending behavior.

According to the State, sex offender treatment is limited to that which addresses a range of behaviors and risk factors that cause a person to offend sexually, and which help mitigate the risk of sexual reoffense. BR at 50, 52.

Yet the State grudgingly acknowledges that "Lough's use of substances may have been a contributing factor to his sexual offending in that it lowered his

inhibitions[.]" BR at 58 n. 23. Despite the guarded use of "may," the State essentially admits, and nowhere actually disputes, that substance use was a contributing factor to Lough's sexual offending that lowered his risk of reoffense. It cannot dispute this because Dr. Packard testified to it at the original commitment trial, describing Lough's substance use disorder as a mental abnormality under the statute that contributed to Lough's risk of reoffense. RP (1/15/15) 79-80; RP (1/27/15 a.m.) 41, 64-65, 86-90; RP (1/27/15 p.m.) 3-6.

Now, after Lough is treated by the SCC for that disorder, such that it no longer rises to the level of a mental abnormality and lowers his risk of reoffense (per Dr. Phenix), the State says substance abuse treatment is not sex offender treatment. That approach untethers the meaning of sex offender treatment from the reason why treatment is needed: to facilitate a change in the person's condition such that he no longer meets the SVP definition.

The SCC provided treatment that addressed Lough's mental abnormality and which lowered his risk of reoffense as a result. According to Dr. Phenix, Lough has changed through that treatment and no longer meets the SVP definition. That is enough to obtain a release trial.

The State says "it is not clear that his risk of using substances has substantially changed since the time of his commitment as a result of his participation in CASH" and his sexually violent behavior has not been "meaningfully addressed" by that substance abuse program. BR at 58 n. 23. The State is weighing the evidence. Dr. Phenix opined that Lough's change in condition — his substance use disorders being in remission and his lowering of the risk of reoffense below the statutory cutoff for SVPs — was attributable to Lough's substance abuse treatment. It doesn't matter if the State thinks this is "clear." And the trial court is forbidden from weighing the evidence in determining

whether a release trial is warranted at the show cause stage. In re Detention of Elmore, 162 Wn.2d 27, 37, 168 P.3d 1285 (2007).

The State writes: "Even if substance use were an applicable risk factor, substance use treatment would solely relate to how to refrain from abusing the substance(s) at issue; it would not cover how substance use impacts the person's sexual offending behaviors or, moreover, address the many other risk factors that contribute to a person's offending behavior." BR at 52.

Even assuming this description of substance abuse treatment is accurate, Lough's argument holds. The State is again weighing the evidence without recognizing it is doing so. The State is saying Dr. Phenix's opinion that Lough no longer meets the SVP definition is insufficient to garner a release trial because substance abuse treatment did not cover areas that the State thinks Lough needs to address. The State thinks successful participation in SCC

substance abuse treatment cannot result in a change in a detainee's mental condition such that he no longer meets the SVP definition. Dr. Phenix didn't see it that way. In assessing whether there is probable cause for a release trial at the show cause stage, Dr. Phenix's opinion is assumed to be accurate. In re Detention of Jacobson, 120 Wn. App. 770, 780-81, 86 P.3d 1202 (2004) (at the show cause stage, the court is forbidden from weighing the evidence presented in the annual evaluation and judging the expert's credibility); McCuistion, 174 Wn.2d at 382 (the court "must assume the truth of the evidence presented.").

A person can cease to meet the SVP definition without addressing every risk factor. If successful management of even one risk factor drops the person below the requisite 50% risk of reoffense threshold, then that person does not meet the SVP definition. In re Detention of Post, 170 Wn.2d 302, 310, 241 P.3d 1234

(2010); RCW 71.09.020(19). It doesn't matter whether other risk factors are still present if they don't amount to making the person more likely than not to reoffend. There is nothing in the statute that requires a detainee to address all risk factors in treatment.

The State relies on how Dr. Bain and Dr. Phenix conceptualize sex offender treatment as different from substance abuse treatment, as if what either of them think demonstrates legislative intent. BR at 64-65. Their understanding does not control. Their opinions, express or implied, do not constitute competent evidence of what the law means. See State v. Olmedo, 112 Wn. App. 525, 532, 49 P.3d 960 (2002), review denied, 148 Wn.2d 1019, 64 P.3d 650 (2003) (improper legal conclusions include testimony that a particular law applies to the case and opinions of law in the guise of expert testimony). "In interpreting a statute, it is the duty of the court to ascertain and give effect to legislative intent and purpose,

as expressed in the act." Nisqually Delta Ass'n v. City of DuPont, 103 Wn.2d 720, 730, 696 P.2d 1222 (1985). It is for the court, and the court alone, to decide what treatment means and whether Lough's substance abuse treatment qualifies as such under RCW 71.09.020(21).

Lough is not a model SCC treatment participant. He has not participated in the group cohort or individualized treatment offered by the SCC that the State insists he needs. But the legislature did not define treatment as any particular mode of treatment within the SCC program. As relevant here, it defined treatment as "the sex offender specific treatment program at the special commitment center[.]" RCW 71.09.020(21). The legislature did not, in turn, define "the sex offender specific treatment program at the special commitment center." The term is open ended enough to encompass the drug abuse treatment provided by the SCC.

The State asserts that equating substance abuse treatment with qualifying treatment under the statute "would defy the purpose of the statute to appropriately treat individuals who have been civilly committed for offending in a sexually violent manner." BR at 69.

What does it mean to "appropriately treat" individuals? The legislature intended SVP detainees to get treatment for mental conditions that make them likely to sexually reoffend. This follows from the legislative determination that "[a] showing that a person has 'so changed' requires a showing that . . . the person no longer meets the commitment standard[.]" Ambers, 160 Wn.2d at 555 (quoting Senate Bill 5582, Final Bill Report). What that treatment looks like for a given individual will differ. Treatment is individualized. RCW 71.09.080(3) ("Any person committed pursuant to this chapter has the right to . . . individualized treatment[.]").

Where, as here, a substance use disorder is a mental abnormality relied on by the State to commit the person as an SVP, and that person receives treatment for that disorder at the SCC, that treatment must be deemed sex offender specific treatment because it treats a mental condition that is a "congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to the commission of criminal sexual acts in a degree constituting such person a menace to the health and safety of others." RCW 71.09.020(9).

Dr. Phenix opined, based on evidence, that Lough no longer meets the SVP definition as a result of his participation in substance abuse treatment, which caused his substance use disorder to go into remission and lowered his risk of reoffense. That is a relevant change in Lough's mental condition since the commitment trial.

Under these circumstances, the statute requires a release trial and the trial court erred in concluding otherwise.

2. THERE IS A DUE PROCESS VIOLATION IF A RELEASE TRIAL IS NOT WARRANTED UNDER THE STATUTE.

a. The statute defining "treatment" violates procedural due process because it is vague.

The State says "[t]he 'sex offender specific' treatment to which the statute refers is the sex offender specific treatment that the SCC provides via cohort groups and individual sex offender treatment." BR at 70. As support, the State cites to what Dr. Lopez and Dr. Bain think it is. BR at 73.

The subjective conceptions of government actors in a state agency do not provide the degree of definiteness needed to prevent arbitrary enforcement. To guard against subjective interpretation and application, the term "sex offender specific treatment program" should at least be defined in the Washington Administrative Code. There

is no such definition. See WAC 388-880-010. The problem with subjective terms is that they "allow a 'standardless sweep' that enables state officials to 'pursue their personal predilections[.]'" State v. Johnson, 180 Wn. App. 318, 327, 327 P.3d 704 (2014) (quoting City of Spokane v. Douglass, 115 Wn.2d 171, 180 n.6, 795 P.2d 693 (1990)). In the absence of a statutory or regulatory definition of what "sex offender specific treatment program" means, it comes down to the personal predilections of SCC personnel. It also leaves trial judges at sea, relying on their own or other's arbitrary line drawing.

The State defends the ability of the SCC "to dictate which of the many programs offered at the SCC are or are not considered to be part of the core sex offender treatment program for sexual offenders[.]" BR at 76. No doubt the SCC does dictate what counts and what doesn't. Therein lies the vagueness problem. There is no

objective standard to answer the question of what qualifies as part of the sex offender specific treatment program at the SCC. Lough does not ask for an impossible standard of impossibility. What Lough deserves, and what everyone imprisoned at the SCC deserves, is an objective definition of treatment that does not invite inordinate discretion and arbitrary application.

The State questions in passing whether Lough's vagueness challenge can be raised for the first time on appeal. BR at 65. Lough did not raise a specific vagueness claim below but it is is related to the overarching debate about what qualified as sex offense treatment. "[W]hen the issue raised for the first time on appeal is arguably related to issues raised in the trial court, a court may exercise its discretion to consider newly articulated theories for the first time on appeal." Wilcox v. Basehore, 189 Wn. App. 63, 90, 356 P.3d 736, 750 (2015), aff'd, 187 Wn.2d 772, 389 P.3d 531 (2017).

Regardless, Lough's vagueness claim is a manifest error of constitutional magnitude that can be raised for the first time on appeal. Under RAP 2.5(a)(3), a party can raise a "manifest error affecting a constitutional right" for the first time on appeal. Lough's vagueness challenge undeniably affects a constitutional right — his right to due process under the Fourteenth Amendment of the United States Constitution. In re Detention of LaBelle, 107 Wn.2d 196, 201, 728 P.2d 138 (1986); Connally v. Gen. Constr. Co., 269 U.S. 385, 391, 46 S. Ct. 126, 70 L. Ed. 322 (1926).

"Void-for-vagueness challenges may be brought against statutes that deprive one of a protected liberty or property interest within the meaning of procedural due process." In re Pers. Restraint of Troupe, 4 Wn. App. 2d 715, 724, 423 P.3d 878 (2018). "It is consistent with RAP 2.5(a) for a party to raise the issue of denial of procedural due process in a civil case at the appellate level for the

first time." Conner v. Universal Utilities, 105 Wn.2d 168, 171, 712 P.2d 849 (1986). Lough's vagueness challenge falls into this category.

To determine whether a constitutional error is manifest, there must be a showing of "actual prejudice," meaning a "plausible showing" that the asserted error had practical and identifiable consequences. State v. O'Hara, 167 Wn.2d 91, 99, 217 P.3d 756 (2009). The practical and identifiable consequence of the vague statute in Lough's case is that it enabled the trial court to deny a release trial on the ground that Lough had not changed in response to treatment. Lough can raise his vagueness claim for the first time on appeal.

b. Application of the statute to the specific circumstances of Lough's case results in a procedural due process violation.

The State contends McCuistion controls. It asserts Lough's case cannot be meaningfully distinguished

because McCuistion did not premise its opinion on the lack of participation in treatment. BR at 79.

The State does not engage a key part of the procedural due process analysis in McCuistion: "Assuming — as we must — that the legislature is correct that a single demographic is insufficient to demonstrate that the individual has 'so changed' as to no longer be mentally ill and dangerous and, additionally, *that change of that nature requires participation in treatment*, the procedure established by the legislature ensures that individuals who remain committed continue to meet the constitutional standard for commitment, namely dangerousness and mental abnormality." McCuistion, 174 Wn.2d at 394 (emphasis added). This is why the McCuistion court concluded "it is unlikely to result in an erroneous deprivation of liberty." Id.

Unlike the petitioner in McCuistion, Lough has participated in SCC treatment and does not rely solely on

change in a single demographic factor — age — to show a change in his SVP status. The risk of erroneous deprivation of liberty therefore comes out differently in favor of Lough.

Under McCuistion, the show cause scheme satisfied procedural due process in part because "the SVP need only present evidence that refutes the State's probable cause showing." McCuistion, 174 Wn.2d at 394. Lough did just that. He presented evidence of change in his condition through treatment that refuted the State's probable cause showing but the court still denied him a release trial. If the statute truly permits this outcome, it violates procedural due process as applied to Lough's case.

The State, though, focuses exclusively on the notion that "the risk of erroneous deprivation was minimal as the result of the annual review process under RCW 71.09.090(1), which is presumed to determine when

someone is no longer mentally ill and dangerous." BR at 79. That is part of the analysis but not the whole analysis. The annual review determination did not by itself ensure procedural due process was satisfied — the procedure that ensured only those who continued to meet the commitment criteria remained committed was predicated on the notion that change requires participation in treatment and a single demographic change is insufficient to demonstrate that change. McCuistion, 174 Wn.2d at 394.

One of the procedural safeguards identified by McCuistion is that "the individual is entitled to annual written reviews by a qualified professional to ensure that he continues to meet the criteria for confinement. RCW 71.09.070." McCuistion, 174 Wn.2d at 393. "Where DSHS finds that the individual no longer meets the criteria for confinement, he is entitled to an evidentiary hearing[.]"

Id. McCuistion cited RCW 71.09.070, which addresses the annual review evaluation prepared by DSHS.

In claiming no due process violation, the State points to Lough's 2019 annual review evaluation, wherein the DSHS evaluator (Dr. Bain) concluded that Lough continued to be mentally ill and dangerous. BR at 80. But then, when that same DSHS evaluator opined as part of the 2020 annual review that Lough no longer meets commitment criteria, the State maintains there is still no due process problem. BR at 92-94. Heads, the State wins; tails, Lough loses. The whimsical significance the State ascribes to the validity of the DSHS annual review — credited as correct one year when it satisfies the State's prima facie burden, disregarded as erroneous the next when it would get Lough a release trial — belies its insistence that the procedural safeguards were sufficient in Lough's case to ensure his liberty interest was not erroneously deprived.

c. The failure to provide PTSD treatment violates due process, such that the statutory requirement for showing change through treatment cannot be used to bar a release trial.

The SCC does not offer PTSD treatment. There is no dispute about this. The State, though, maintains "Lough was never entitled to a release trial because he failed to participate in the requisite sex offender treatment." BR at 91. It says sex offender specific treatment is readily available at the SCC and Lough simply chooses not to participate in it. BR at 82, 87, 88.

Dr. Lopez, though, acknowledged that failing to treat a responsivity need — a need that limits a person's ability to benefit from other forms of treatment — does not constitute adequate treatment. 1CP 350 (Lopez deposition, p. 17-18). Lopez acknowledged treatment for PTSD could be a responsivity need. 1CP 350 (Lopez deposition, p. 20). Dr. Bain said Lough's untreated PTSD

was a responsivity need for him. 1CP 411 (Bain deposition, p. 24). The State acknowledges none of this.

Lough's lack of access to PTSD treatment at the SCC formed a barrier to participation in the sex offender specific treatment that the State says he must do to get a release trial. As a matter of due process, the government should not be able to use the statute to block a release trial when it is not following the statutory and constitutional requirements for providing treatment necessary for a release trial.

3. THE COURT ERRED IN DENYING LOUGH A RELEASE TRIAL AS PART OF THE 2020 ANNUAL REVIEW BECAUSE, AS A MATTER OF DUE PROCESS, A RELEASE TRIAL IS REQUIRED WHEN THE DSHS EVALUATION SHOWS THE DETAINEE HAS CHANGED AND NO LONGER MEETS THE COMMITMENT CRITERIA.

a. Substantive due process.

The State argues "the release procedures in RCW 71.09.090(1) — not simply the evaluation in RCW

71.09.070 — provide the constitutionally required periodic review." BR at 98. It draws a distinction between the DSHS annual review evaluation under RCW 71.09.070 and the annual review "process" under RCW 71.09.090, which it maintains can include the State hiring its own expert to satisfy its prima facie burden of proof when the DSHS annual evaluation concludes the detainee is no longer an SVP. BR at 96, 100.

The State overlooks key parts of the McCuistion court's substantive due process analysis. In McCuistion, the statutory commitment scheme satisfied substantive due process because it required the State to "justify continued incarceration through an annual review." McCuistion, 174 Wn.2d at 388. In support of that proposition, McCuistion cited RCW 71.09.070, which requires annual mental examination by DSHS to determine whether the committed person currently meets

the definition of an SVP with a report of the findings sent to the court. McCuistion, 174 Wn.2d at 388.

"If the individual no longer meets the definition of an SVP," as shown by the annual review under RCW 71.09.070, then the DSHS secretary "shall authorize" the person to petition for unconditional discharge under RCW 71.09.090(1). Id. "This statutory scheme comports with substantive due process because it does not permit continued involuntary commitment of a person who is no longer mentally ill and dangerous." Id. This statutory scheme includes use of the DSHS annual review evaluation under RCW 71.09.070, not some other expert report the State obtains when it does not feel like being bound by the DSHS annual evaluation.

"Once an individual has been committed, he is entitled to a written annual review by a qualified professional to ensure that he continues to meet the criteria for confinement. RCW 71.09.070." McCuistion,

174 Wn.2d at 379. Again, McCuistion cited RCW 71.09.070 as what ensures a person continues to be committed only when he is both mentally ill and dangerous.

McCuistion says nothing about the State getting its own expert to establish its prima facie case for continued commitment when the DSHS annual review shows the detainee no longer meets commitment criteria. McCuistion does not contemplate that scenario.

This is no wonder. McCuistion was decided based on the expectation that a release trial would be forthcoming when the DSHS annual evaluation came back in favor of the detainee. The Attorney General assured the Supreme Court that "any time the DSHS annual review does not find both mental illness and danger, a new trial is automatic pursuant to RCW 71.09.090(1)." Supplemental Brief of Respondent in 81644-1 at p. 12, filed March 18, 2011. The McCuistion

court's repeated citation to the DSHS annual review under RCW 71.09.070 as the means to ensure substantive due process is consistent with the Court taking the Attorney General at its word — a word that has since been broken.

The State says McCuistion "lays out clearly that after the annual review evaluation is completed under RCW 71.09.070, it is DSHS (*not* the individual evaluator) that decides if an SVP no longer meets criteria and can petition for release under RCW 71.09.090(1)." BR at 100 (citing McCuistion, 174 Wn.2d at 380). McCuistion recognized, in accordance with 71.09.090(1), that it is the DSHS secretary that authorizes a petition for a release trial. But as set forth above, it did so based on the assumption, which has since proved wrong in practice, that the DSHS secretary will automatically authorize a trial when the DSHS annual review evaluation concludes the person no longer meets the commitment criteria.

The State claims "such a requirement would result in unnecessary trials as well as enormous administrative and fiscal costs." BR at 94. A trial is "unnecessary" only if one presumes the detainee continues to meet the SVP definition. That presumption is undermined when the DSHS annual review shows the detainee no longer meets the commitment criteria. When that happens, a trier of fact should be allowed to make the ultimate determination at a release trial. Lough is not asking to simply walk out as a free man. He's asking to have a trier of fact make the call on whether he still meets the requisite commitment criteria at a trial.

As for "enormous administrative and fiscal costs," how many DSHS annual review evaluations are concluding that the detainee no longer meets the SVP definition? The State isn't saying but it must be a sizable number if granting release trials on that basis would impose such "enormous" costs. A further, albeit unwitting,

sign that the system is broken. When the State can circumvent the DSHS annual review evaluation at will to avoid a release trial, the annual review scheme does not ensure only those who continue to meet the SVP definition remain committed without a release trial.

b. Procedural due process.

Lough stands by the procedural due process argument made in his supplemental brief.

B. CONCLUSION

For the reasons stated above and in his previous briefing, Lough requests that this Court reverse the trial court's show cause decision and remand for an unconditional release trial.

I certify that this document was prepared using word processing software and contains 5,743 words excluding those portions exempt under RAP 18.17.

DATED this 30th day of December 2022.

Respectfully submitted

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