

NO. 94477-6

SUPREME COURT OF THE STATE OF WASHINGTON

In re the Detention of Dale Roush:

DALE ROUSH,

Petitioner,

v.

STATE OF WASHINGTON,

Respondent.

STATE'S ANSWER TO PETITION FOR REVIEW

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TABLE OF CONTENTS

I. INTRODUCTION.....1

II. COUNTERSTATEMENT OF THE ISSUES1

 A. Where the only issues to be decided at a trial on the issue of conditional release to a less restrictive alternative were whether the proposed LRA is in the best interest of the sexually violent predator and includes conditions that would adequately protect the community, did the the trial court’s instruction to the jury stating that Roush continued to be an sexually violent predator constitute an unconstitutional comment on the evidence?2

III. COUNTERSTATEMENT OF THE CASE2

IV. REASONS WHY REVIEW SHOULD BE DENIED5

 A. The Statutory Scheme Relating To Less Restrictive Alternative Trials6

 B. Instruction No. 3 Was A Correct Statement Of The Law And Was Not A Comment On The Evidence7

 1. Instruction No. 3 was a correct statement of the law.7

 2. Roush’s trial counsel understood and repeatedly stated that Roush’s continuing SVP status was not at issue in his LRA trial.....13

 3. Instruction No. 3 did not unfairly prejudice Roush.15

V. CONCLUSION18

TABLE OF AUTHORITIES

Cases

In re Det. of Bergen,
146 Wn. App. 515, 195 P.3d 529 (2008)..... 9, 10, 11, 18

In re Det. of Petersen,
145 Wn.2d 789, 42 P.3d 952 (2002)..... 14

In re Det. of R. W.,
98 Wn. App.140, 988 P.2d 1034 (1999)..... 12, 13

In re Det. of Roush,
No. 48150-2-II, 2017 WL 1240117
(Wash. Ct. App. April 4, 2017)..... 5, 11, 13

Roush v. State,
No. 29679-9-II, 2004 WL 1157833
(Wash. Ct. App. May 25, 2004)..... 3

State v. Becker,
132 Wn.2d 54, 935 P.2d 1321(1997)..... 8

State v. Gentry,
125 Wn.2d 570, 888 P.2d 1105 (1995)..... 17

State v. Levy,
156 Wn.2d 709,132 P.3d 1076 (2006)..... 8

State v. McCuiston,
174 Wn.2d 369, 275 P.3d 1092 (2012)..... 7, 8, 9

State v. Rice,
48 Wn. App. 7, 737 P.2d 726 (1987)..... 17

Statutes

RCW 71.09 1, 8, 12

RCW 71.09.060(1)..... 9

RCW 71.09.060(4).....	9
RCW 71.09.070	3, 6
RCW 71.09.070(1).....	6
RCW 71.09.090(1).....	5
RCW 71.09.090(2)(b).....	7
RCW 71.09.090(2)(c)	7, 14
RCW 71.09.090(2)(d).....	4, 7
RCW 71.09.090(3)(c)	12
RCW 71.09.090(3)(d).....	12, 13, 14
RCW 71.09.094(2).....	14

Other Authorities

5 Karl B. Tegland, <i>Washington Practice: Evidence</i> (2nd ed. 1982)	17
---	----

Rules

RAP 13.4.....	1
---------------	---

Constitutional Provisions

Const. art IV, § 16.....	1, 6, 7
--------------------------	---------

I. INTRODUCTION

This case arises from the post-commitment procedures to the Sexually Violent Predator Act, RCW 71.09. Dale Roush was committed as a sexually violent predator in 2002, and has been continuously confined since that time. In 2014, the parties entered a stipulated order granting Roush a trial on the issue of placement in a Less Restrictive Alternative (“LRA”). Under the explicit terms of that order, which tracks the language of the statute, the only issues to be decided at the LRA trial were whether the proposed LRA: (i) is in Roush’s best interest; and (ii) includes conditions that would adequately protect the community. At the conclusion of trial, the court, over Roush’s general objection, instructed the jury that Roush was currently a sexually violent predator. Roush now argues that this instruction constituted a comment on the evidence, in violation of Art. IV, § 16 of the Washington State Constitution, and asks that the judgement be reversed. This Court should deny review. The instruction was an accurate statement of the law and was not a comment on the evidence because it did not go to a contested issue at trial. This Court should deny review.

II. COUNTERSTATEMENT OF THE ISSUES

There is no basis for this Court’s review of the Court of Appeals’ decision pursuant to RAP 13.4. If this Court were to accept review, the following issue would be presented:

- A. Where the only issues to be decided at a trial on the issue of conditional release to a less restrictive alternative were whether the proposed LRA is in the best interest of the sexually violent predator and includes conditions that would adequately protect the community, did the the trial court's instruction to the jury stating that Roush continued to be an sexually violent predator constitute an unconstitutional comment on the evidence?**

III. COUNTERSTATEMENT OF THE CASE

Dale Roush has a long history of sexual violence. In its unpublished decision affirming his commitment as a Sexually Violent Predator ("SVP") in 2002, the Court of Appeals summarized some of that history as follows:

In 1978, then-23-year-old Roush tried to rape a 16-year-old hitchhiker after threatening him with a pellet gun. Roush pleaded guilty to first degree assault, for which the court sentenced him to a maximum term of 20 years. He was paroled about five years later in May 1983.

Ten months later, in March 1984, Roush assaulted another hitchhiker, threatening him with a knife, tying him up, trying to perform oral sex on him, and trying unsuccessfully to rape him anally. The State charged Roush with assault, unlawful imprisonment, and robbery. A jury convicted Roush on the robbery charge, and the court sentenced him to the maximum term of 20 years. Roush was paroled four years later in October 1988.

Eight months later, in June 1989, Roush raped an 18-year-old co-worker, S.C. Roush put a knife to S.C.'s throat, handcuffed him, became aroused at the thought of beating him, performed oral sex on him, forced S.C. to do the same to Roush, and anally raped S.C. Roush was convicted of first degree rape, and the court sentenced him to 10 years and 6 months in prison.

In 2002, while Roush was in prison, the State filed a civil commitment petition under chapter 71.09 RCW. At the

hearing, the trial court permitted Roush's younger sister to testify, over objection, that Roush had sexually assaulted her several times a week beginning when she was about five years old and not ceasing until her early teens when Roush went to jail. She never reported these assaults. Roush maintains that his sexual orientation is strictly homosexual and that he has been in 'intimate and affectionate sexual relationships.'

Roush v. State, No. 29679-9-II, 2004 WL 1157833, at *1 (Wash. Ct. App. May 25, 2004).

Since his commitment, Roush has been continuously confined at the Special Commitment Center ("SCC") on McNeil Island. His condition has been reviewed annually by the Department of Social and Health Services ("DSHS") as required by RCW 71.09.070.¹ In 2014, based on Roush's submission of a conditional release plan to the community, the parties agreed that Roush was entitled to an evidentiary hearing on the question of whether conditional release to an LRA was in his best interests and whether

¹RCW 71.09.070 reads in pertinent part as follows:

- (1) Each person committed under this chapter shall have a current examination of his or her mental condition made by the department at least once every year.
- (2) The evaluator must prepare a report that includes consideration of whether:
 - (a) The committed person currently meets the definition of a sexually violent predator;
 - (b) Conditional release to a less restrictive alternative is in the best interest of the person; and
 - (c) Conditions can be imposed that would adequately protect the community...
- (6)(a) The committed person may retain, or if he or she is indigent and so requests, the court may appoint a qualified expert or a professional person to examine him or her, and such expert or professional person shall have access to all records concerning the person.

his proposed LRA plan included conditions that will adequately protect the community. CP at 212.²

Trial commenced on September 24, 2015, and concluded on October 6, 2015. At trial, the State presented the testimony of Dale Roush (9/28/15 RP at 6-160), Dwain Sparrowk, investigator for the Office of the Attorney General (9/28/15 RP at 161-174; 9/29/15 RP at 3-24), Robert Hall, manager of Roush's proposed housing in the community (9/29/15 RP at 25-64), and Amy Phenix, Ph.D., the State's expert (9/29/15 RP at 65-172; 9/30/15 RP at 3-133). Roush presented the testimony of his expert, Luis Rosell, Psy.D. (9/30/15 RP at 135-150; 10/1/15 RP at 4-150; 10/5/15 RP at 4-44), Heather Turner, a release-planning specialist employed by Roush's attorneys (10/5/15 RP at 45-80), Lawrence Jorden, a food service supervisor who supervised Roush in the SCC's kitchen (10/5/15 RP at 81-93), Michael Catania, a Residential Rehabilitation Counselor at the SCC (10/5/15 at RP at 94-102), and Jeanglee Tracer, Roush's proposed community treatment provider (10/6/15 RP at 4-61).

At the close of evidence, the court instructed the jury. Over Roush's objection, the court issued Instruction No. 3, which provided as follows:

² Because the court had not previously considered an LRA, Roush was not required to show probable cause that he had "so changed" such that an LRA was appropriate. RCW 71.09.090(2)(d).

Respondent is a sexually violent predator. “Sexually Violent Predator” means any person who has been convicted of a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence if not confined to a secure facility.

CP at 1352. The jury returned a unanimous verdict to deny Roush’s request for release to an LRA. CP at 1346. An order denying Roush’s release to an LRA was entered. CP at 1362.³ The Court of Appeals affirmed, holding that the trial court did not err in giving the instruction, which was a proper statement of the law and did not comment on a disputed fact at trial. *In re Det. of Roush*, No. 48150-2-II, 2017 WL 1240117, at *4 (Wash. Ct. App. April 4, 2017).

IV. REASONS WHY REVIEW SHOULD BE DENIED

Roush argues that the trial court erred in making “an unconstitutional comment on the evidence that prejudiced Mr. Roush[,]” that constitutes a “significant question of law under the Washington Constitution.” Petition at 5, 1. This argument fundamentally misapprehends both the law as it relates to Article IV, §16 of the Washington State

³ The Order denying Roush’s conditional release to an LRA was entered on October 14, 2015. CP at 1362. Roush was subsequently authorized to petition the trial court for release to an LRA at a Secure Community Transition Facility (“SCTF”) pursuant to RCW 71.09.090(1), and on June 27, 2016, an Order was entered directing Roush’s release to the SCTF on July 27, 2016, “or as soon thereafter as reasonably possible.” See Attachment A, Order on Release to LRA, at 5, No. 1. The Court of Appeals rejected the State’s argument that, in light of these developments, Roush’s appeal was moot, and the State does not seek review of that portion of the Court of Appeals’ Opinion.

Constitution and the nature of an LRA trial. First, as the Court of Appeals correctly determined, the trial court's instruction was a correct statement of the law, and as such did not constitute a comment on the evidence. Second, the question of whether Roush was an SVP at the time of the trial was not a disputed issue at trial, a fact supported by Roush's trial counsel making numerous statements to this effect. Finally, Instruction No. 3, which was an accurate statement of the law that did not involve a disputed issue at trial, did not prejudice Roush. This case does not present a significant question of law under the Washington State Constitution and does not merit review.

A. The Statutory Scheme Relating To Less Restrictive Alternative Trials

Pursuant to RCW 71.09.070, a person committed as an SVP to the custody of DSHS is entitled to an annual review of his mental condition by DSHS. DSHS's annual review evaluation must address whether the committed person continues to meet the definition of an SVP, as well as whether conditional release to an LRA is in the best interest of the person and conditions can be imposed that would adequately protect the community. RCW 71.09.070(1). The SVP may also submit his own expert evaluation to the court. *Id.* At the show cause hearing that follows these submissions, the prosecuting agency "shall present prima facie evidence establishing that the committed person continues to meet the definition of a

sexually violent predator and that a less restrictive alternative is not in the best interest of the person and conditions cannot be imposed that adequately protect the community.” RCW 71.09.090(2)(b). Once this prima facie showing has been made, a new trial may be ordered only if the respondent can show that “probable cause exists to believe that the person’s condition has so changed that: (A) The person no longer meets the definition of a sexually violent predator; or (B) release to a proposed less restrictive alternative would be in the best interest of the person and conditions can be imposed that would adequately protect the community.” RCW 71.09.090(2)(c). If the court has not previously considered the issue of release to a less restrictive alternative, no showing of change is required. RCW 71.09.090(2)(d). These requirements have withstood repeated challenge in the appellate courts of this State, most recently in *State v. McCuiston*, 174 Wn.2d 369, 275 P.3d 1092 (2012). In this case, the trial court set a hearing on the latter issue.

B. Instruction No. 3 Was A Correct Statement Of The Law And Was Not A Comment On The Evidence

1. Instruction No. 3 was a correct statement of the law.

A judge is prohibited by Art. IV, §16 of the Washington State Constitution from “conveying to the jury his or her personal attitudes toward the merits of the case” or instructing a jury that “matters of fact have

been established as a matter of law.” *State v. Becker*, 132 Wn.2d 54, 64, 935 P.2d 1321(1997). Any remark that has the potential effect of suggesting that the jury need not consider an element of an offense could qualify as judicial comment. *State v. Levy*, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006).

Whether Roush was or was not an SVP at the time of trial was not “an element of an offense” and was not at issue in his LRA trial. Roush’s argument that the trial court commented on the evidence fails because the instruction was simply an accurate statement of law and as such was entirely proper.

Both RCW 71.09 and related case law make clear that an individual, having been determined to be an SVP, remains an SVP until the person is judicially determined to no longer be an SVP and the SVP proceeding is dismissed. “[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.” *McCustion*, 174 Wn.2d at 384-85. Thus the “initial conclusion” reached in 2002 at the time of his initial commitment—that is, that Roush is an SVP—is accepted as a verity for purposes of determining whether Roush continued to be mentally ill and dangerous at the time of his LRA trial in 2015.

If Roush were determined to no longer be an SVP, both the statute and the Constitution would require his unconditional release. Pursuant to RCW 71.09.060(1), if a court or jury determines that the State has not met its burden of proving that a person is a sexually violent predator, “the court shall direct the person’s release.” Likewise, “[u]nder the due process clause of the Fourteenth Amendment, an individual subject to civil commitment is entitled to release upon a showing that he is no longer mentally ill or dangerous.” *McCouston*, 174 Wn.2d at 384. The statute also emphasizes that an individual cannot be placed in a less restrictive alternative until the person is determined to meet commitment criteria: “A court has jurisdiction to order a less restrictive alternative placement *only* after a hearing ordered pursuant to RCW 71.09.090 *following initial commitment.*” RCW 71.09.060(4) (emphasis added).

That a person, once determined to meet criteria for commitment, continues to be an SVP until the proceeding is dismissed is illustrated by Division I’s decision in *In re Det. of Bergen*, 146 Wn. App. 515, 195 P.3d 529 (2008). This case, throughout, makes clear that the SVP’s continuing dangerous and mental illness is assumed in any case involving LRA placement. Bergen, an adjudicated SVP, sought release to an LRA, and alleged that certain of the Statute’s provisions relating to an LRA determination were unconstitutional. In considering his case, the court

repeatedly referenced the fact that Bergen's was not a case involving an initial commitment, and that, in analyzing his due process claim, "it is important to recognize that Bergen does not contend he is no longer an SVP. *He seeks release into the community as an adjudicated sexually violent predator.*" *Id.* at 525 (emphasis added). The Due Process Clause, the court wrote, "does not create a liberty interest when a sexually violent predator seeks release before the court has determined that he or she is no longer likely to reoffend..." *Id.* The State, the court continued, "must prove that a person is both mentally ill and dangerous to justify civil commitment under the due process clause of the Constitution." *Id.* at 527.

Here, the State met that burden when Bergen was adjudicated an SVP. As the State points out, he does not challenge that finding or seek release, but only seeks an alternative placement as an SVP. Thus, his continued commitment is still supported by findings of mental illness and dangerousness and his unchallenged status as an SVP. *The LRA determination is a separate inquiry and is focused on whether the SVP—who has already been found to be dangerous and mentally ill—should be transferred to a less restrictive placement* that will continue to serve the statutory objectives of treating the SVP and keeping the community safe.

Id. at 527-28 (emphasis added). Rejecting Bergen's argument that the "best interests" standard violated due process, the court concluded that:

[t]he "best interests" standard is *directly related to the SVP's dangerousness and mental illness* and is narrowly tailored to serve the State's compelling interest in appropriately treating dangerous sex offenders.

Id. at 529 (emphasis added). The SVP's continuing dangerousness and mental illness is assumed in any case involving LRA placement.

Although Roush, unlike Bergen, does not raise a challenge to the constitutionality of the Statute, his case is in the identical procedural posture as that of Bergen and the court's remarks regarding Bergen's continuing status as an SVP apply with equal force to Roush. There, as here, Bergen, an adjudicated SVP, sought release to the community. There, as here, Bergen did not challenge his continued status as an SVP. There, as here, the SVP's request for release to a less restrictive alternative occurred against the backdrop of his continuing status as a sexually violent predator. To instruct the jury on this uncontested matter of law was not error.

Roush argues that there was "no legal basis" for Instruction No. 3. Pet. at 10. While he concedes that, while "once upon a time," Roush was committed as an SVP, he argues that, if it is appropriate to instruct the jury that Roush is currently an SVP in an LRA trial "the same would be true for an unconditional discharge trial under .090(3)(c) and that would absurdly amount to directing the fact finder to render a verdict for the State." *Id.* This analogy is false and the Court of Appeals correctly rejected this argument. *Roush*, 2017 WL 1240117, at *n.3. During any post-commitment trial on the issue of unconditional release, "the burden of proof shall be upon

the state to prove beyond a reasonable doubt that the committed person's condition *remains such that the person continues to meet the definition of a sexually violent predator.*" RCW 71.09.090(3)(c) (emphasis added). Clearly, where the State has the burden of proof as to a particular issue ("that the committed person's condition remains such that the person continues to meet the definition of a sexually violent predator"), a statement to the effect that the very thing the State must prove has already been established would obviously be improper. Here, however, as repeatedly acknowledged by trial counsel, the question of whether Roush was or was not an SVP was not before the jury. Rather, the question was only as to the propriety of the proposed LRA. *See* Section B(2) of State's Answer, below.

Roush also cites *In re Det. of R. W.*, 98 Wn. App.140, 988 P.2d 1034 (1999), to claim Instruction No. 3 was an improper comment on the evidence. Pet. at 12-13. There, the contested jury instruction contained language from the statute that the court determined was "a statement of legislative intent, used by the Legislature as a preface to an enactment," and as such "lack[ed] operative force in itself[.]" *Id.* at 145. Roush argues that certain language in RCW 71.09 to the effect that "[e]vidence of the prior commitment trial and disposition is admissible" (RCW 71.09.090(3)(d)) is "similarly lacking in operative force," and hence renders Instruction No. 3 improper. Pet. at 14.

The Court of Appeals correctly dismissed this argument as “unpersuasive.” *Roush*, 2017 WL 1240117, at *4. First, RCW 71.09.090(3)(d) is not a “statement of legislative intent,” but a statute regarding the admissibility of evidence at an LRA proceeding. Moreover, Roush does not suggest that he ever argued below that evidence of his prior commitment was not admissible, and his proposed instruction explicitly referenced that fact. Pet. at 9; CP at 742. *R. W.* is inapplicable to the facts of this case, and Roush’s argument fails.

2. Roush’s trial counsel understood and repeatedly stated that Roush’s continuing SVP status was not at issue in his LRA trial.

The claim that the instruction is a comment on evidence stands in stark contrast to Roush’s position at trial. At trial, his attorney clearly understood—and even argued—that Roush’s continuing status as an SVP was not at issue in that trial. There, the parties stipulated to entry of an order granting Roush’s request for a trial on the issue of conditional release to an LRA. CP at 4-7. In that Stipulated Order, the trial court specifically found—based on the parties’ agreement—that the State had presented prima facie evidence that Roush continued to be an SVP. CP at 2, No. 5.

Had the State not made that prima facie case, or had the trial court determined that Roush had presented prima facie evidence that he was no longer an SVP, he would have been entitled to a trial on that issue.

In re Det. of Petersen, 145 Wn.2d 789, 799, 42 P.3d 952 (2002); RCW 71.09.090(2)(c). The State, however, made its prima facie showing and Roush did not, and thus Roush's trial was restricted to the question of whether he, as an SVP, should be released to an LRA. CP at 6, No. 4. As such, the fact finder's inquiry at trial was limited to whether the State has proven beyond a reasonable doubt that either: (a) the proposed less restrictive alternative is not in the best interest of Respondent; or (b) does not include conditions that would adequately protect the community. RCW 71.09.090(3)(d), .094(2).

Moreover, Roush's trial counsel made clear that Roush was not contesting his continuing status as a sexually violent predator. During argument outside the presence of the jury on the scope of the State's cross-examination of Dr. Rosell, Roush's trial counsel argued that, "We are not challenging his SVP status because I understand that if he is not a sexually violent predator, he's not eligible for a less restrictive alternative." 10/01/15 RP at 109-110; *see also* 10/01/15 RP at 66-75. "The issues before the Court," counsel argued, "are two, 'best interests' and 'adequate protection of the community.'" *Id.* at 113. Dr. Rosell, he continued, "did not opine that [Roush] doesn't meet criteria." *Id.* Indeed, Roush's counsel sought to prevent the State from asking questions "related to whether he meets criteria for a sexually violent predator" because "[t]hat's not the issue

for this trial.” *Id.* at 117. Such questions are “not properly presented to the jury and that’s the question ultimately of mental abnormality regarding criteria for a sexually violent predator, which is not the question today. That is not what’s before the Court. What’s before the Court is ‘adequate protection of the community’ and ‘best interests’ for Mr. Roush in treatment.” *Id.* at 119.

Given these concessions, it is not reasonable for Roush, having argued at trial that he was not contesting the question of whether he continued to be an SVP, only to argue on appeal that he was prejudiced by an instruction that simply informed the jury of that fact. And, as shown next, there is no possible prejudice from the instruction that would warrant a new trial given this record.

3. Instruction No. 3 did not unfairly prejudice Roush.

Roush argues that the court’s instruction “was a declaration that Dr. Rosell’s testimony on issues critical to the proceeding was wrong as a matter of law” and “condemned Mr. Roush’s expert on the whole as unreliable and not worthy of any respect.” Pet. at 15.

In making this argument, Roush attempts to elevate several lines of expert testimony at trial to the central issue before he jury. There was in fact virtually no discussion at trial as to whether Roush continued to meet commitment criteria or not, which is consistent with Roush’s counsels’

many statements to the effect that he understood that the trial was not about Roush's continuing status as an SVP. *See* Section B(2) of State's Answer, above. While Roush argues that the State used Instruction No. 3 "to show that as a matter of law, Dr. Phenix was right and Dr. Rosell was wrong," this was simply not the focus of either expert's testimony. Dr. Rosell never testified that Roush was not an SVP, and in fact testified that he had "not thought about" that question because his opinion on that issue "doesn't really matter." 10/6/15 RP at 58. He had been asked, he continued, "to determine if I feel he's adequate—the community can be adequately protected and it's in his best interest to be placed in an LRA in the community, and that's what I—that's my opinion." *Id.* at 59. And to the extent that Dr. Phenix provided testimony regarding Roush's continuing status as an SVP, it was in direct response to a question posed by the defense: Roush's trial counsel, noting that Dr. Phenix had evaluated Roush in 2002, asked whether Roush was "just as risky today as he was 13 years ago[.]" 9/30/2015 RP at 123. Dr. Phenix responded: "I don't think so. I think his risk has been reduced over that number of years, but I still think he qualifies as a sexually violent predator." *Id.* Roush was not prejudiced as a result of Instruction No. 3 because the question of his continuing status as an SVP was simply not an issue at trial.

Nor does the fact that the State referred to Roush's mental illness and dangerousness during closing demonstrate that this information was "prejudicial." "Almost all evidence is prejudicial in the sense that it is used to convince the trier of fact to reach one decision rather than another." *State v. Rice*, 48 Wn. App. 7, 12, 737 P.2d 726 (1987) (citing 5 Karl B. Tegland, *Washington Practice: Evidence* § 106 (2nd ed. 1982)). Where improper argument is claimed, "the defense bears the burden of establishing the impropriety of the prosecuting attorney's comments as well as their prejudicial effect." *State v. Gentry*, 125 Wn.2d 570, 596, 888 P.2d 1105 (1995). There was nothing improper in the State's repeated reference to the law, *i.e.* to Roush's continuing status as an SVP. Moreover, Roush did not object to these statements during closing. The failure to object to a prosecuting attorney's improper remark constitutes a waiver of such error unless the remark is deemed to be so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury. *Id.* Roush does not demonstrate, nor indeed even argue, that the State's remarks were "flagrant and ill-intended," and as such has waived this argument.

As previously discussed, the fact that Roush continued, as a matter of law, to be a sexually violent predator was not in dispute at trial. Instruction No. 3, in addition to stating that Roush was an SVP, explained

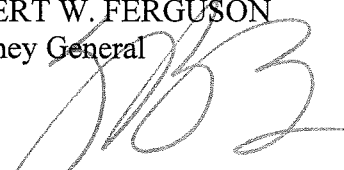
that this meant that he “suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence if not confined to a secure facility.” CP at 1352. While the State (properly) made reference to his risk during closing, the focus of closing remained whether, given that risk, he could be safely treated in his proposed LRA. See 10/6/15 RP at 3-39. Where “the committed individual has already been *found to be a danger to the community* and does not challenge that finding,” *Bergen*, 146 Wn. App. at 536 (emphasis added), there is no obstacle to the prosecutor arguing this to the jury.

V. CONCLUSION

For the reasons set forth above, this Court should deny review.

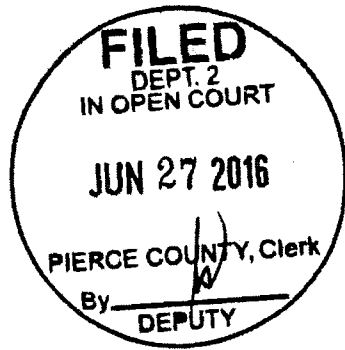
RESPECTFULLY SUBMITTED this 30th day of June, 2017.

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Attachment A



STATE OF WASHINGTON
PIERCE COUNTY SUPERIOR COURT

In re the Detention of:

NO. 02-2-08925-4

DALE ROUSH,

ORDER ON RELEASE TO LESS
RESTRICTIVE ALTERNATIVE

Respondent

THIS MATTER came before the Court on June 27, 2016, for entry of an Order conditionally releasing the Respondent, DALE ROUSH, from total confinement to a Less Restrictive Alternative (LRA). The Respondent appeared telephonically and was represented by his attorney, KELSEY PAGE. The Petitioner, State of Washington, was represented by Assistant Attorney General, FRED WIST. The Court having previously found the Respondent to be a sexually violent predator pursuant to RCW 71.09 and having considered the Department of Corrections (DOC) LRA investigation report dated June 10, 2016 and the files and records herein hereby enters the following Findings of Fact, Conclusions of Law, and Order conditionally releasing the Respondent to an LRA:

FINDINGS OF FACT

1. On October 25, 2002, after the initial commitment trial, a jury returned a verdict that Dale Roush was a sexually violent predator (SVP) and the Court committed Mr. Roush to the custody of the Department of Social and Health Services (DSHS) for placement at the Special

1 Commitment Center (SCC) on McNeil Island for control, care, and treatment until further order of
2 the Court.¹

3 2. On October 12, 2015, after a trial on conditional release, a jury returned a verdict
4 that Roush's proposed less restrictive alternative placement in the community did not include
5 conditions that would adequately protect the community. The Court entered an Order denying
6 conditional release to LRA.

7 3. Mr. Roush has resided at the SCC since his civil commitment.

8 4. On February 29, 2016, DSHS submitted an annual review of Mr. Roush's mental
9 condition pursuant to RCW 71.09.70. In the annual review, the evaluator; Brendan R. McDonald,
10 Ph.D., opined that while Mr. Roush continues to meet criteria as a sexually violent predator,
11 conditional release to a less restrictive alternative placement in a highly secure community
12 facility, staffed with trained professionals who can provide 24-hour monitoring and support would
13 be in Mr. Roush's best interest and provide conditions adequate to protect the community.
14 A copy of the 2016 Annual Review is attached hereto as **Exhibit A**.

15 5. On February 29, 2016, the Chief Executive Officer (CEO) of the SCC authorized
16 Mr. Roush to petition this Court for release on an LRA at a Secure Community Transition Facility
17 (SCTF). *See* Notice of Authorization to Petition for Conditional Release, attached hereto as
18 **Exhibit B**.

19 6. The parties subsequently received information that the CEO authorized Mr. Roush
20 to reside in a transitional bed at the Secure Community Transition Facility in Pierce County
21 (SCTF-PC).

22 7. The parties have reached an agreement to release Mr. Roush on an LRA to the
23 SCTF-PC.

24
25 ¹ A copy of the Order of Commitment was filed with the Court on October 25, 2002 and is part of this
26 Court's file.

1 8. Mr. Roush will be treated in the community by Ms. Jeanglee Tracer, LICSW,
2 ACSW, a Certified Sex Offender Treatment Provider (SOTP), who is qualified to provide such
3 treatment in the State of Washington under RCW 18.155, as required by RCW 71.09.092(1).
4 Additionally, the Court finds that Ms. Tracer is qualified to provide treatment under
5 RCW 71.09.350. A copy of Ms. Tracer's curriculum vitae is attached hereto as **Exhibit C**.

6 9. Ms. Tracer has presented a specific course of treatment and has agreed to assume
7 responsibility for Mr. Roush's treatment and will report progress to the Court on a regular basis,
8 not less than monthly, and will report violations immediately to the Court, the Attorney General's
9 Office, Mr. Roush's attorney, the CEO of the SCC, and the supervising Community Corrections
10 Officer (CCO) as required by RCW 71.09.092(2) and RCW 71.09.096(5).

11 10. Mr. Roush has agreed to cooperate with Ms. Tracer and to comply with all
12 requirements imposed by Ms. Tracer, as set forth in the Community Treatment Plan, attached
13 hereto as **Exhibit D**, and the Sex Offender Treatment Program Contract, attached hereto as
14 **Exhibit E**. Mr. Roush has also agreed to comply with all conditions imposed by the Court, as set
15 forth in this order, as required by RCW 71.09.092(4). By signing the treatment documents and
16 LRA order, Mr. Roush is authorizing Ms. Tracer to disclose all treatment information to his CCO,
17 the SCC/SCTF, the Attorney General's Office, Mr. Roush's attorney, and the Court.

18 11. Housing for Mr. Roush exists that is sufficiently secure to protect the community
19 as required by RCW 71.09.092(3). Mr. Roush shall reside at a SCTF, a secure residential facility
20 in either King County or Pierce County, Washington, which is operated by DSHS.

21 12. The DSHS/SCTF has agreed to accept Mr. Roush, to provide the level of security
22 required by this Court, to immediately report to the Court, the Attorney General's Office,
23 Mr. Roush's attorney, supervising CCO, and the SCC CEO, if Mr. Roush leaves the housing to
24 which he has been assigned without authorization pursuant to RCW 71.09.092(3).
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1 The SCC/SCTF representative understands and agrees that any change of residence must have
2 prior written approval of the Court.

3 13. Based on this Court's Order from March 9, 2016, the Department of Corrections
4 (DOC) investigated the proposed LRA and made recommendations regarding conditions to this
5 Court. A true copy of the DOC investigation, dated June 10, 2016, is attached hereto as **Exhibit F**.
6 Pursuant to RCW 71.09.096(2) and RCW 71.09.096(4), the Court finds that the LRA conditions
7 included in this Order are necessary to ensure Mr. Roush's compliance with treatment and to
8 protect the community.

9 14. By signing this Order, Mr. Roush agrees to comply with any and all of the
10 supervision requirements imposed by DOC outlined in this Order, as required by
11 RCW 71.09.092(5).

12 15. A copy of this document and the exhibits attached hereto have been provided to
13 Mr. Roush and his attorney. Mr. Roush understands the English language and has the ability to
14 read and write. Mr. Roush's attorney, Kelsey Page, has reviewed this Order and the Exhibits with
15 him, and Mr. Roush has acknowledged understanding of the aforementioned documents.
16 By signing this document, Mr. Roush is indicating to this Court that he understands this document
17 and the attached exhibits and has no questions about any of the documents or conditions of
18 release. This Court finds that the Mr. Roush understands the release conditions and all aspects of
19 this Order.

20 CONCLUSIONS OF LAW

- 21 1. This Court has jurisdiction over the parties and over the subject matter herein.
- 22 2. Mr. Roush continues to meet criteria as a Sexually Violent Predator.
- 23 3. Conditional release to an LRA, as outlined in this Order, is in the best interest of
24 Mr. Roush and includes conditions that will adequately protect the community.

1 The Court having entered the above Findings of Fact and Conclusions of Law, now,
2 therefore, enters the following:

3 **ORDER**

4 For the purposes of this Order and any subsequent modifications thereto, Mr. Roush's
5 Transition Team is defined as his sex offender treatment provider (SOTP), assigned CCO, and the
6 designated representative of the SCC.

7 During his conditional release, Mr. Roush shall always act in a manner that is consistent
8 with the goal of community safety and treatment for his sexual deviance. Mr. Roush shall
9 construe the Court's conditions in the broadest possible manner for these dual purposes.
10 If Mr. Roush is unsure whether his behavior is prohibited, he shall refrain from engaging in the
11 behavior until he obtains approval from the Transition Team.

12 **A. RESIDENTIAL CONDITIONS:**

13 1. Mr. Roush shall be conditionally released on July 27, 2016, or as soon thereafter
14 as reasonably possible, to a transitional bed at the SCTF-PC. He shall not change his residence
15 without further written Order from the Court and in compliance with RCW 71.09.140 for
16 notification to ensure safety to the community.

17 2. Mr. Roush shall register as a sex offender with the Pierce County Sheriff's
18 Office on the first day of his release and pursuant to RCW 9A.44.130 thereafter. Prior to this
19 release, Mr. Roush shall have DNA test results on file with the Washington State Patrol in
20 concurrence with RCW 43.43.754.

21 3. Mr. Roush shall not be at large alone in the community. He shall not leave the
22 confines of his residence except for activities pre-approved by the Court or his Transition
23 Team. During any such approved outing, he must be accompanied at all times and be under the
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1 direct supervision of an "approved monitoring adult"² who must supervise him closely and
2 maintain close proximity pursuant to RCW 71.09.305(1)(b). Staff employed by the
3 SCC/SCTF, the supervising CCO (or designee), and the designated SOTP are automatically
4 approved monitoring adults. Additional individuals may be designated as approved monitoring
5 adults by the Transition Team or by the Court. Any person agreeing to provide monitoring
6 services must immediately notify DSHS of any serious violation, as defined in
7 RCW 71.09.325, and must immediately notify law enforcement of any violation of law by
8 Mr. Roush. Such person(s) may be compelled to testify and any privilege with regard to such
9 person's testimony is deemed waived pursuant to RCW 71.09.096(3).

10 4. Mr. Roush shall abide by all rules, regulations, and policies of the Court, DOC,
11 SOTP, SCC/SCTF, including staff directives. The SCTF Handbook will be provided to and
12 signed by Mr. Roush upon his transfer to the facility, and a signed copy will be provided by
13 SCTF staff to his Transition Team.

14 5. The SCC/SCTF shall immediately notify law enforcement, the Court, the
15 Attorney General's Office, Mr. Roush's attorney, the CCO, and the SCC Chief Executive
16 Officer (CEO) if Mr. Roush leaves the SCTF without authorization or violates any of the
17 conditions of this Court Order.

18 **B. SUPERVISION CONDITIONS:**

19 1. The Department of Corrections shall supervise Mr. Roush. Mr. Roush will
20 initially report to the supervising CCO on the day of his conditional release from the SCC, and
21 weekly or as otherwise directed thereafter.

22 2. Mr. Roush will comply with all DOC verbal and written instructions.

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25 ² An "approved monitoring adult" is a person designated to monitor Mr. Roush when he leaves his
26 residence. The Transition Team must approve this person in writing. The person must have complete knowledge
of Mr. Roush's offense cycle and history of sexual offending.

1 3. The assigned CCO shall report to the Court, Assistant Attorney General,
2 Mr. Roush's attorney, SCC representative, SCC CEO, and SOTP any violations of
3 Mr. Roush's Court Order. The CCO shall notify the Attorney General's Office by email at the
4 following email address: CRJSVPEF@atg.wa.gov. Copies shall be emailed to Mr. Roush's
5 attorney at the following email address: kpage@co.pierce.wa.us, pbanken@co.pierce.wa.us,
6 and mbenton@co.pierce.wa.us.

7 4. Pursuant to RCW 71.09.098, if the assigned CCO reasonably believes that
8 Mr. Roush is not complying with the terms and conditions of his conditional release order, the
9 CCO may order that he be taken into custody until such time as a hearing can be scheduled to
10 determine the facts and whether Mr. Roush's LRA should be revoked or modified. The Court,
11 Attorney General's Office, and Mr. Roush's attorney shall be notified before the close of the
12 next judicial day of Mr. Roush's detention.

13 5. Mr. Roush will submit a travel request log to the SCTF scheduler at least one
14 week in advance of proposed travel. The travel log will include the date, time, and any contacts
15 he may have during each proposed outing.

16 C. TREATMENT CONDITIONS:

17 1. Mr. Roush shall engage in sex offender treatment with Ms. Jeanglee Tracer,
18 a certified SOTP. Mr. Roush shall not change treatment providers without permission of the
19 Court.

20 2. Mr. Roush shall sign and comply with Ms. Tracer's community treatment plan
21 and Treatment Agreement for him, both written and verbal.³ Any proposed modification of the
22 community treatment plan or treatment agreement must be provided to the other Transition
23 Team members. If the members of the Transition Team disagree on a proposed modification,
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25 ³ The community treatment plan and treatment sex offender program contract are attached as Exhibits D
26 and E.

1 the Court shall decide the matter. Mr. Roush must sign any modified treatment plan and
2 treatment agreement, and the SOTP must immediately provide a signed copy to the SCC, the
3 Attorney General's Office, Mr. Roush's attorney, and the CCO.

4 3. Mr. Roush shall participate in any treatment, including but not limited to sex
5 offender treatment, chemical dependency treatment, Alcoholics/Narcotics Anonymous, couples
6 counseling, and any other treatment or therapy as recommended by the Transition Team and
7 approved by DSHS.

8
9 4. Ms. Tracer shall submit a written report to the Court each month addressing
10 Mr. Roush's treatment progress and compliance with the Court Order, with copies to the
11 Attorney General's Office, Mr. Roush's attorney, and each member of the Transition Team.
12 Copies to the Attorney General's Office shall be sent by email to the following email address:
13 CRJSVPEF@atg.wa.gov. Copies to Mr. Roush's attorney shall be sent by email to the
14 following email address: kpage@co.pierce.wa.us, pbanken@co.pierce.wa.us, and
15 mbenton@co.pierce.wa.us.

16
17 5. Ms. Tracer will immediately report any violations or possible violations of this
18 Court Order or treatment condition to the Court, the Attorney General's Office, Mr. Roush's
19 attorney, CCO, SCC representative, and SCC CEO.

20 6. If Mr. Roush is terminated from treatment with Ms. Tracer, he shall, consistent
21 with RCW 71.09.098(2), immediately be taken into custody and a hearing will be scheduled to
22 determine whether his LRA will be revoked or modified pursuant to RCW 71.09.098(3).

23 7. If Ms. Tracer decides to discontinue treatment for any reason other than
24 non-compliance or lack of progress, he must give forty-five (45) days written notice to the Court,
25 the Attorney General's Office, Mr. Roush's attorney, CCO, SCC representative, and SCC CEO.
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1 Treatment with this provider shall continue until such time that the Court may conduct a hearing
2 to consider approval of an alternative provider pursuant to RCW 71.09.092.

3 **D. STANDARD CONDITIONS:**

4 1. Mr. Roush shall comply with all verbal and written instructions of the Court, his
5 SOTP, DOC, and SCC/SCTF representatives.

6 2. Mr. Roush shall be subject to electronic home monitoring at all times, as required
7 under RCW 71.09.305(1)(a). The electronic monitoring devices shall employ global positioning
8 system (GPS) technology and/or such monitoring devices as may become technologically
9 advanced.

10 3. Mr. Roush shall obtain approval from the Transition Team prior to acquiring or
11 participating in employment, educational, social, or volunteer opportunities in the community.

12 4. Mr. Roush shall have no intentional direct or indirect contact with any prior
13 victims or their families without the express written consent of the Court. For purposes of this
14 condition, "victim" is defined as anyone with whom Mr. Roush has had unwanted or illegal
15 sexual contact in the past, regardless of whether the contact resulted in a conviction or legal
16 action. The Transition Team will resolve any questions as to what constitutes a "victim."
17 If there is a question as to whether an individual is a prior victim, Mr. Roush shall have no
18 contact with that individual.

19 5. Mr. Roush shall not have intentional direct or indirect contact with minor
20 children under the age of eighteen (18) without the express written consent of the Court, and
21 then only in the presence of an approved adult monitor.

22 6. Mr. Roush shall not frequent or loiter outside of establishments that cater
23 primarily to minors without the express written permission of the Transition Team and then
24 only in the presence of an approved adult monitor. For purposes of this condition,
25 establishments that cater primarily to minors include the following: elementary, junior high, or
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1 high schools, daycares, parks, recreation areas, playgrounds, school bus stops, swimming
2 pools, zoos, and arcades. The Transition Team may modify this condition in the Transition
3 Team determines that a specific proposed establishment does not cater primarily to minors and
4 is an appropriate location for Mr. Roush to visit.

5 7. Mr. Roush shall not have intentional regular contact with any individual who has
6 not previously been approved by his Transition Team. This condition does not affect the ability
7 SCC/SCTF representative, DOC representatives, treatment providers, attorneys, or other members
8 of his legal team to be assigned to his case.

9 8. Mr. Roush shall not initiate or engage in a physical or romantic relationship with
10 another person without the express written approval of his Transition Team. Any such
11 relationship will require the individual's consent.

12 9. Mr. Roush is prohibited from having contact with known convicted felons or
13 persons with any type of sex crime conviction, with the exception of individuals also
14 participating in his treatment groups or other mandatory activities or residing at the SCTF. The
15 Transition Team may review and modify this condition in writing with respect to specific
16 individuals.

17 10. Mr. Roush shall not own, possess, receive, ship, or transport any firearm,
18 ammunition, incendiary device, or explosive, nor shall he have any parts thereof.

19 11. Mr. Roush shall not purchase, possess, or view any pornographic materials, as
20 defined by his SOTP, including but not limited to materials depicting consensual sex, sex with
21 violence or force, sex with non-consenting adults, or sexual activity with children. The SOTP
22 may make exceptions to specifically identified pornographic materials upon written
23 notification to the other members of the Transition Team. However, Mr. Roush shall not share
24 such approved materials with any other SCC/SCTF residents.
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1 12. Mr. Roush shall not purchase, possess, or view movies, or play video games,
2 depicting sexual themes, children's themes, or excessive violence or any R-rated movies or
3 M-rated video games. The Transition Team will resolve any questions as to what constitutes
4 sexual themes, children's themes, or excessive violence.

5 13. Mr. Roush shall not use or have access to the internet, including via computer,
6 cellular telephone, iPad, tablet, game console, or any other computer modem or communications
7 software without the prior written permission of the Transition Team or the Court. If Mr. Roush
8 is granted permission to use or possess the above noted devices, the Transition Team or the Court
9 may, at its discretion, impose limitations and controls over the use of these devices. Mr. Roush
10 shall not possess a personal computer in his room at the SCTF without prior approval of the
11 Transition Team or the Court. Mr. Roush shall abide by any computer usage safety plan
12 approved by his Transition Team for all computer use.

13 14. Mr. Roush shall not enter into nor loiter outside of any adult entertainment
14 center where nudity, erotic entertainment or erotic literature/magazines are the primary service
15 or commodity for sale.

16 15. Mr. Roush shall not purchase, possess, or consume alcohol, marijuana/THC, or
17 any controlled substances, except pursuant to a lawfully issued prescription made out for him
18 by a licensed physician. Mr. Roush shall immediately provide written verification of any
19 prescription medication to the Transition Team.

20 16. Mr. Roush shall submit to drug screens, Breathalyzer alcohol assessments, or
21 other methods of detecting the use of or presence of alcohol, marijuana/THC, and controlled
22 substances at the discretion of any member of the Transition Team.

23 17. Mr. Roush shall abide by any medications/therapy prescribed by his medical
24 and psychological treatment providers.
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1 18. Mr. Roush shall not frequent bars, taverns, casinos, or any establishment where
2 the primary commodity for sale is alcoholic beverages or marijuana/THC.

3 19. Mr. Roush shall obey all state, county, federal, tribal, and municipal laws.

4 20. Mr. Roush shall not leave the State of Washington without an Order from the
5 Court.

6 21. Mr. Roush shall not leave his county of residence without the prior written
7 approval from his Transition Team and written authorization from his CCO.

8 22. To maintain compliance with the conditions of the LRA Court Order,
9 Mr. Roush shall submit to searches of his person, computer, residence, or property at the
10 discretion of any member of his Transition Team. SCTF staff is permitted to conduct
11 authorized searches of Mr. Roush's residence to ensure the safety and smooth operation of the
12 facility.

13 23. Mr. Roush shall participate in periodic polygraph testing at the discretion of any
14 member of the Transition Team. Polygraph assessments can assess sex offender specific
15 compliance issues or any other general compliance issues. Mr. Roush shall submit to
16 plethysmograph assessment at the discretion of the SOTP.

17 24. Mr. Roush shall make no effort to thwart, disable, or limit the effectiveness of
18 any monitoring mechanism imposed upon him, including but not limited to polygraphs,
19 plethysmographs, GPS, and other forms of electronic monitoring. Mr. Roush shall strictly
20 comply with all monitoring protocols required. Mr. Roush shall be required to pay for any
21 damages to monitoring equipment that is caused by negligent actions on his part.

22 25. Mr. Roush shall not drive any motor vehicle or possess a driver's license
23 without the prior written permission of his Transition Team. In the event that Mr. Roush
24 obtains a legal Washington State driver's license, he shall provide proof of valid insurance, as
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1 well as the make, model, and year of any vehicle he drives. Mr. Roush shall not provide rides
2 to anyone without permission from his Transition Team.

3 26. Mr. Roush shall report the make, model, and year of any private vehicle he rides
4 in, as well as the driver's contact information, to the Transition team prior to riding in the
5 vehicle.

6 27. Mr. Roush shall make regular monetary payments toward any outstanding
7 court-ordered Legal Financial Obligations (LFOs) or any other financial commitments. Any
8 such payments shall be made from Mr. Roush's private funds.

9 28. Mr. Roush must provide a copy of his monthly bank and/or credit card
10 statements to the Transition Team upon request.

11 29. Mr. Roush shall maintain an accurate phone log of his phone calls he makes or
12 receives and provide a copy to the Transition Team upon request.

13 30. DSHS shall be responsible for treatment costs pursuant to RCW 71.09.110.
14 DSHS may obtain reimbursement for the cost of care and treatment pursuant to
15 RCW 71.09.110 and the applicable Washington Administrative Code.

16 31. If Mr. Roush is not in compliance with the terms and conditions of his LRA
17 Order, he may, consistent with RCW 71.09.098(2), immediately be apprehended and taken into
18 custody until such time as a hearing can be scheduled to determine the facts and whether or not
19 the conditional release should be revoked or modified. The revocation or modification hearing
20 shall be scheduled immediately with the Court pursuant to RCW 71.09.098.

21 32. Law enforcement and/or peace officers are authorized to arrest Mr. Roush for
22 any violation of the LRA Order as described in RCW 71.09.098.

23 33. Mr. Roush shall comply with all provisions of the LRA Order and any
24 subsequent modifications thereof. Mr. Roush shall immediately notify his treatment provider,
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1 his CCO, and SCC representative if he has violated, or arguably violated, any provision of the
2 LRA Order.

3 34. The conditions required of Mr. Roush by his Transition Team and imposed
4 upon Mr. Roush by this Court, should, where possible, be read together and in harmony with
5 one another. However, there may be a situation in which they conflict. If this occurs, the
6 SOTP, CCO, and SCC/SCTF representative shall consult with one another to resolve the
7 conflict. If the Transition Team is unable to resolve the conflict, the Court will determine the
8 matter. Until such time as any conflict is determined, Mr. Roush shall follow the strictest rule
9 applicable, consistent with ensuring public safety.

10 **E. SPECIAL CONDITIONS:**

11 1. Mr. Roush shall not hold any position of authority or trust involving children
12 under the age of eighteen (18), and shall not supervise or participate in any program that
13 includes anyone who is under the age of eighteen (18).

14 2. Mr. Roush shall not possess images of children or view media directed towards
15 or focused on children without the prior consent of his Transition Team. Possession of visual
16 depictions of semi-clad or naked children is prohibited.

17 3. Mr. Roush shall not access premium cable television channels without the prior
18 written approval of his Transition Team.

19 4. The SCC shall provide a list of all approved media (books, movies, video
20 games, CDs, etc.) to the assigned CCO upon Mr. Roush's release from the SCC. Any
21 additional media must be pre-approved by the Transition Team prior to purchase, rental, and/or
22 possession.

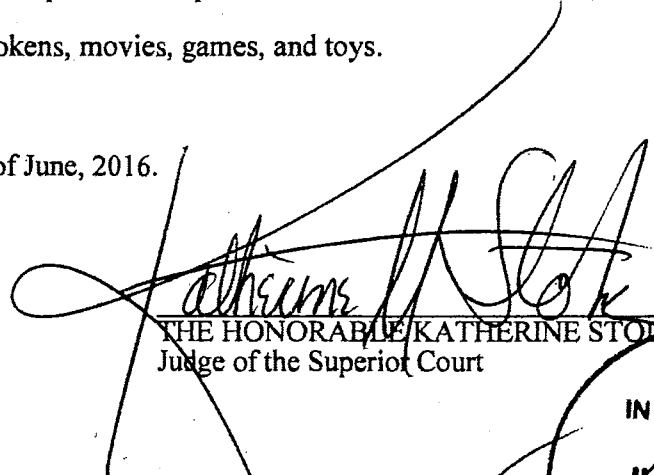
23 5. Mr. Roush shall not possess a police scanner or short wave device.

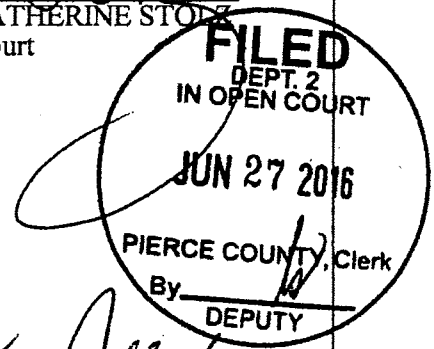
24 6. Unless otherwise authorized by the Transition Team, Mr. Roush shall only use
25 solo occupant restrooms when out in the community and shall not enter any multi occupant
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1 public washroom or other rest facility that has not been checked for the presence of minor
2 children and found to be free of minors by an approved monitoring adult immediately prior to
3 his entering the facility.

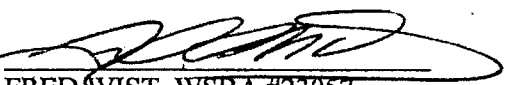
4 7. Mr. Roush shall not purchase or possess items meant for children, including but
5 not limited to, clothing arcade tokens, movies, games, and toys.

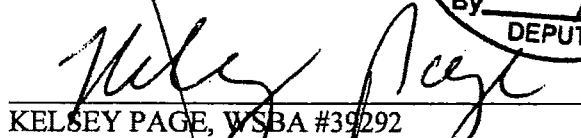
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7 DATED this 27th day of June, 2016.

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10 
11 THE HONORABLE KATHERINE STONE
12 Judge of the Superior Court

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12 Presented by:
13 ROBERT W. FERGUSON

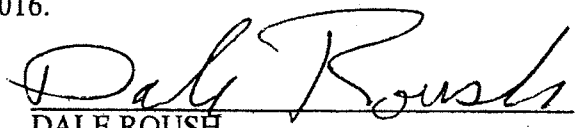
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17 FRED WIST, WSBA #23057
18 Assistant Attorney General
19 Attorneys for Petitioner

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22 
23 KELSEY PAGE, WSBA #39292
24 Attorney for Respondent

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26
CERTIFICATION OF DALE ROUSH

27 I agree to abide by the terms and conditions of this LRA Order. I have reviewed this
28 Order with my attorney and have no unanswered questions.

29 Dated this 24 day of June, 2016.

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31
32 
33 DALE ROUSH
34 RESPONDENT

No. 94477-6

WASHINGTON STATE SUPREME COURT

In re the Detention of:

DALE ROUSH,

Petitioner.

DECLARATION OF
SERVICE

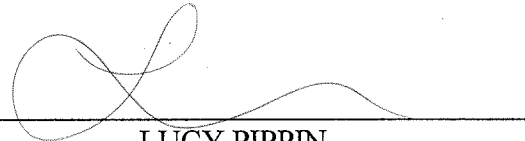
I, Lucy Pippin, declare as follows:

On June 30, 2017, pursuant to the Electronic Service Agreement,
I served a true and correct copy of State's Answer to Petition for Review
and Declaration of Service via electronic mail, addressed as follows:

Marla Zink
Washington Appellate Project
marla@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 30th day of June, 2017, at Seattle, Washington.



A handwritten signature in black ink, appearing to read 'Lucy Pippin', is written over a horizontal line.

LUCY PIPPIN

WASHINGTON STATE ATTORNEY GENERAL'S OFFICE - CRIMINAL JUSTICE DIVISION

June 30, 2017 - 2:37 PM

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: 94477-6
Appellate Court Case Title: In re the Detention of Dale E. Roush
Superior Court Case Number: 02-2-08925-4

The following documents have been uploaded:

- 944776_Answer_Reply_20170630143516SC987829_5066.pdf
This File Contains:
Answer/Reply - Answer to Petition for Review
The Original File Name was Roush - Answer.pdf

A copy of the uploaded files will be sent to:

- marla@washapp.org
- wapofficemail@washapp.org

Comments:

Sender Name: Lucy Pippin - Email: lucyp1@atg.wa.gov

Filing on Behalf of: Sarah Sappington - Email: sarahs@atg.wa.gov (Alternate Email: crjvspef@ATG.WA.GOV)

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