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No. 63143-8-I

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COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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In re the Detention of

DAVID WRATHALL

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**STATE'S RESPONSE BRIEF**

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**ORIGINAL**

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**I. INTRODUCTION**

In this appeal, appellant David Wrathall challenges revocation of his less restrictive alternative (LRA) under grounds that were not raised before the trial court. Quite the contrary, in proceedings below, Wrathall agreed with the State's understanding of the revocation statute, RCW 71.09.098, which does not require that violations be willful or intentional before an LRA may be revoked. Because Wrathall cannot raise a new argument on appeal and the statute does not support Wrathall's position, this appeal should be rejected and the trial court affirmed.

**II. ISSUES**

A. Should this court consider a challenge to the statutory criteria for revoking an LRA when Wrathall accepted application of the statute before the trial court?

B. Does due process impose a willfulness requirement into RCW 71.09.098, thereby leaving a sexually violent predator on LRA status without a treatment or housing provider?

**III. FACTS**

**A. FACTS SUPPORTING WRATHALL'S CIVIL COMMITMENT**

As set out in the Clerk's Paper's, Wrathall is a violent and sadistic child rapist. *See* CP 3-14. By the age of 30, Wrathall had

acquired convictions for Kidnapping an eight-year-old boy and stuffing him in the freezer of an ice cream truck, Indecent Liberties after tying up a nine year old boy, and Attempted Indecent Liberties against another young boy. CP 70-72. He has numerous other victims that did not result in an adjudicated offense. CP 69-73.

Based on his lengthy history of child molestation rape, Wrathall has been diagnosed with Pedophilia (attracted to males with features of sadism and bondage), Paraphilia Not Otherwise Specified (rape of same sex individuals), and Personality Disorder Not Otherwise Specified (with antisocial and schizoid features). CP 28. The most recent evaluation adds a full diagnosis of Paraphilia, Sexual Sadism. CP 63. Although there is no evidence that Wrathall reoffended during his closely supervised LRA, he is an individual who has been consistently found to meet criteria for civil commitment as a sexually violent predator. CP 67-68.

**B. WRATHALL'S ATTEMPTS AT CONDITIONAL RELEASE**

Despite Wrathall's extreme danger kidnap and sadistically rape young boys, he has benefited from the conditional release provisions of RCW 71.09. In December 2001, with the agreement of the State, Wrathall was released to an LRA and housed at the Secure Community

Transition Facility (SCTF) on McNeil Island. The SCTF is a DSHS operated facility where a Wrathall may live with the permission of the DSHS Secretary. RCW 71.09.250. Pursuant to a conditional release order, Wrathall was subject to a number of conditions, including the requirement that he engage in community treatment with a certified sex offender treatment provider. The initial conditional release order was dated November 7, 2001. An amended order was entered on January 29, 2002.

In October 2002, Wrathall was arrested for violations of the LRA and placed back in the Special Commitment Center. He remained at the SCC for over a year.

On December 11, 2003, Wrathall's LRA violations were resolved through entry of an agreed order on LRA violations, which allowed Wrathall's return to the SCTF and the LRA. This order also amended the original conditional release order with regard to AA attendance. During this phase of his LRA, Wrathall engaged in treatment with Lang Taylor, a master's level certified Sex Offender Treatment Provider (SOTP) located in Tacoma, Washington.

In February 2008, the State filed a petition seeking modification of Wrathall's LRA to remove Mr. Taylor as his treatment provider. CP 336-338. The State filed its modification request after concerns were

raised by the Department of Social and Health Services (DSHS), through the Senior Clinical committee at the Special Commitment Center (SCC), with Wrathall's lack of progress under Mr. Taylor's care. CP 339-40. According to the Clinical Director of the SCC, Carey Sturgeon, Ph.D., Wrathall has "shown very little progress toward further transition to the community past the institutional setting of the Pierce County SCTF." *Id.* Despite years of outpatient treatment Wrathall had yet to complete his Relapse Prevention assignments -- a key component of community safety and sex offender treatment. *Id.* Mr. Taylor also indicated that Wrathall had been minimally complying with directives and feedback from his treatment provider. Senior clinical concluded that Mr. Taylor and Wrathall "are in a sort of therapeutic stalemate, with progress arrested in Mr. Wrathall's case." *Id.* As pointed out by Senior Clinical, Wrathall's lackadaisical efforts at treatment raise substantial concerns for community safety and for Wrathall's treatment. *Id.*

In order to address these concerns, the State asked to remove Mr. Lang from the case and commence treatment with Dr. Myrna Pinedo, Ph.D., who is a certified SOTP in Bellevue, Washington. CP 336-338. The State noted that Dr. Pinedo is well-qualified and has been treating sexually violent predator Joseph Aqui in the community for the past two years. CP 338. Prior to court action, Wrathall had refused to

voluntarily consent to the removal of Mr. Taylor and the substitution of Dr. Pinedo. *Id.* The State indicated that is sought "a smooth and orderly transition," but alternatively requested Wrathall's revocation if he continued to resist a new treatment provider. *Id.*

On February 28, 2008 and April 3, 2008, the trial court heard testimony on the status of Wrathall's LRA. Specifically, the trial court heard from Dr. Pinedo. Part of her demonstrated success with treating sexually violent predators on LRA status included a client who recently obtained a "step down" LRA by stipulation with the State, which is a precursor to unconditional release after satisfaction of the agreement.

At the conclusion of the April 2008 hearing, the court granted the State's petition and ordered Wrathall into treatment with Dr. Pinedo. Through her testimony, Dr. Pinedo had presented the court with specific goals for Mr. Wrathall's progress in treatment. The trial court's June 6, 2008 Conditional Release Order memorializes the court's findings that installed Dr. Pinedo as the treatment provider. The conditions in that order then governed Wrathall's continuing conditional release.

In accord with the statute and court order, Dr. Pinedo provided the trial court with monthly progress reports. CP 115. Her reports voiced constant concerns with Mr. Wrathall's treatment efforts, his disturbing attitudes, his concerning statements and his overall failure to

progress in treatment. *Id.*

In her July 16, 2008 report to the court, Dr. Pinedo notes a number of concerning actions and behaviors by Wrathall. CP 119-126. For example, Wrathall acknowledges to here that he likes responding in an oppositional way to his treatment/supervision providers even though he knows it is not beneficial to him because he finds people's responses "exciting" and he likes excitement. *Id.* He followed this up with statements that were alarming and raise serious community safety concerns:

- When questioned by Dr. Pinedo on whether his oppositional nature would cause him to affirmatively violate rules against giving drugs/alcohol to children or actually molesting children, he responded "maybe."
- When questioned as to what he would do when lonely angry and frustrated, Mr. Wrathall's apparent relapse prevention plan was to fist drink beer, then hard alcohol, then drugs and then molest a boy in order to improve his mood.

*Id.* Based on these responses and other issues discussed in here report, Dr. Pinedo rated Mr. Wrathall's treatment participation as "unacceptable" and openly questioned whether his LRA should continue. *Id.* at 126. She noted that Mr. Wrathall was high risk on a number of "acute risk factors." *Id.* at 119.

Based on Mr. Wrathall's actions, DSHS, DOC and Dr. Pinedo

determined to closely monitor the situation and reevaluate the viability of the LRA the following month. CP 115-116. Care was taken by Dr. Pinedo and the supervising agencies to minimize community risk. *Id.* Unfortunately, Mr. Wrathall's amenity to treatment in the community did not improve and the risk to the community increased. *Id.*

In her August 13, 2008 report, Dr. Pinedo determined that she would no longer treat Mr. Wrathall in the community. CP 130-137. She noted that Wrathall failed to adequately respond to concerns raised by the Transition Team in June and July of 2008. *Id.* Dr. Pinedo concluded that Mr. Wrathall "is making poor progress in his treatment." *Id.* Relying on her professional experience and status as a certified SOTP, Dr. Pinedo determined to terminate Mr. Wrathall from treatment because "he is not making adequate progress in treatment." CP 136. In her professional opinion, Mr. Wrathall "is not currently ready to be involved in transition back to the community." *Id.* Based on the same concerns that motivated Dr. Pinedo, the SCC revoked Wrathall's permission to reside in the DSHS-operated SCTF. CP 116.

Because Wrathall lost both his treatment provider and housing provider, on August 29, 2008, the State moved to revoke Wrathall's conditional release. CP 113-117. Under RCW 71.09, a certified SOTP and a willing housing provider are mandatory conditions of any

conditional release. Because Wrathall was no longer able to satisfy these conditions, his LRA could not continue. Because Dr. Pinedo determined to terminate Mr. Wrathall as a treatment client due to Wrathall's actions, on August 21, 2008, he was arrested and returned to the Special Commitment Center by his CCO. CP 116.

### C. THE STATUTORY LRA REVOCATION PROCESS

When a person is civilly committed as a sexually violent predator, the term of commitment is indefinite.<sup>1</sup> The length of a person's commitment to the SCC is bounded only by the possibility of unconditional release should the mental abnormality remit, or conditional release to an LRA.

The primary path to an LRA is through completion of the SCC treatment program. Individuals that complete this program are given the

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<sup>1</sup> In *In re Petersen I*, 138 Wn.2d 70, 81 (1999), the supreme court held that “[o]ur sexually violent predator statute *unequivocally contemplates an indefinite term of commitment*, not a series of fixed one-year terms with continued commitment having to be justified beyond a reasonable doubt *annually* at evidentiary hearings where the State bears the burden of proof.” (Emphasis added). It is indefinite because the release or conditional release of a civil committee “depends on the cure or elimination of the person’s sexually violent predilections.” *Id.* at 81 n. 7. In 2005 amendments to RCW 71.09, the Legislature emphasized that sex predators “generally require prolonged treatment in a secure facility followed by intensive community supervision in the cases where positive treatment gains are sufficient for community safety.” Laws of 2005, Ch. 344.

opportunity to reside in a state-funded half-way house for sexually violent predators after receiving the recommendation of the DSHS secretary under RCW 71.09.090(1). The half-way house, known as the “Secure Community Transition Center” or SCTF, is located on McNeil Island. Another half-way house will soon open on Spokane Street in Seattle. The SCTF provides substantial supervision and support for transitioning sexually violent predators. *See generally* RCW 71.09.

Any LRA -- whether to the SCTF or a private residence -- must satisfy the legal definition of a “less restrictive alternative.” The phrase “less restrictive alternative” is specifically defined by statute to mean “court-ordered treatment in a setting less restrictive than total confinement *which satisfies the conditions set forth in RCW 71.09.092.*” RCW 71.09.020(7). The highlighted phrase was added by the Legislature in 2001 to clarify that any “LRA” under the statute must meet the minimum requirements of RCW 71.09.092. These requirements include the following:

- (1) The person will be treated by a treatment provider who is qualified to provide such treatment in the state of Washington under chapter 18.155 RCW;
- (2) the treatment provider has presented a specific course of treatment and has agreed to assume responsibility for such treatment and will report progress to the court on a regular basis, and will report violations immediately to the court, the prosecutor, the supervising community corrections officer, and the superintendent of the special commitment center;
- (3) housing exists that is sufficiently secure to protect the

community, and the person or agency providing housing to the conditionally released person has agreed in writing to accept the person, to provide the level of security required by the court, and immediately to report to the court, the prosecutor, the supervising community corrections officer, and the superintendent of the special commitment center if the person leaves the housing to which he or she has been assigned without authorization; (4) the person is willing to comply with the treatment provider and all requirements imposed by the treatment provider and by the court; and (5) the person is willing to comply with supervision requirements imposed by the department of corrections.

RCW 71.09.092.

Through this change, the Legislature clarified that any LRA must include each of these elements. When one of these elements is missing from an LRA, the statute authorizes summary judgment for the state. RCW 71.09.094. *E.g. In re Skinner*, 122 Wn. App. 620, 94 P.3d 981 (2004)(judgment as a matter of law when LRA statutorily deficient); *In re Mathers*, 100 Wn. App. 336, 339 (2000) (approving summary judgment where proposed LRA missing a statutory element).

In accord with RCW 71.09.092, the minimum conditions for any LRA include a treatment provider, a treatment plan, approved housing and supervision. If the jury approves the sexually violent predator's placement in the LRA, the statute provides an additional layer of protection for the community. Under RCW 71.09.096, the trial court is required to order further investigation of the LRA by the Department of Corrections. If the proposed LRA can no longer be implemented (e.g. the proposed housing is

no longer available) or the trial court does not find that conditions exist to protect the community, the trial court is granted the authority not to order the LRA. RCW 71.09.096(2). This statute also defines additional minimum conditions that must be part of any LRA release. *See* RCW 71.09.096(4).

Following issuance of a conditional release order, RCW 71.09.098 provides for revocation of the order following a violation or any concern that the person is in need of additional care control and treatment. There are two statutory avenues for revocation of an LRA and the State used both in the current case.

The first avenue for revocation is a revocation petition under RCW 71.09.098(1), which provides that:

Any service provider submitting reports pursuant to RCW 71.09.096(6), the supervising community corrections officer, the prosecuting attorney, or the attorney general may petition the court, or the court on its own motion may schedule an immediate hearing, for the purpose of revoking or modifying the terms of the person's conditional release to a less restrictive alternative if the petitioner or the court believes the released person is not complying with the terms and conditions of his or her release or is in need of additional care, monitoring, supervision, or treatment.

Under this statute, the court has the authority to "revoke or modify" the LRA if Wrathall is violating the LRA conditions, or if he is "in need of additional care, monitoring, supervision, or treatment." *Id.*

The State also sought to revoke Wrathall under the authority of RCW 71.09.098(2) because Wrathall was in violation of his LRA due to no longer being in treatment with Dr. Pinedo or housed at the SCC. He was arrested by his CCO under the authority of this statute. CP 117. The standards for a revocation under RCW 71.09.082(2) are set forth in RCW 71.09.098(3). Under this statutes, the court is required to decide “whether the state has proven by a preponderance of the evidence that the conditionally released person did not comply with the terms and conditions of his or her release.” RCW 71.09.098(3). In deciding this question, “hearsay evidence is admissible if the court finds it otherwise reliable.” *Id.*

Both subsection (1) and subsection (2) of RCW 71.09.098 provide the trial court with considerable discretion on revocation or modification. As quoted above, RCW 71.09.098(1) allows the trial court to opt for modification of the LRA or revocation when the person is in need of additional care, monitoring, supervision, or treatment. Likewise, at a hearing held under subsection (2), "the court shall determine whether the person shall continue to be conditionally released on the same or modified conditions or whether his or her conditional release shall be revoked and he or she shall be committed to total confinement, subject to release only in accordance with provisions of this

chapter." RCW 71.09.098(3).

#### **D. WRATHALL'S REVOCATION HEARING**

On October 16, 2008, the trial court held an evidentiary hearing on the State's petition to revoke Wrathall's LRA. Wrathall's defense attorney did not file a response to the State's petition. Instead, he noted that "the government (sic) submits the law and the law is clear there's no -- cites the statutory provisions we'd agree with." VRP 10/16/2008 at 4.

The court heard testimony from Dr. Pinedo who reiterated the concerns raised in her reports. With regard to Wrathall's statements, Dr. Pinedo noted that Wrathall's transparency was "good news," but "the bad news is that he was being transparent about reoffending." *Id.* at 11. On cross, she noted that Wrathall's statement that he "would get a kid" was "a huge red flag." *Id.* at 16. The court also heard from Kelly Cunningham, who was the LRA SCTF Administrator for the SCC. Mr. Cunningham explained that SCC provided permission to reside in the SCTF only when approved by Senior Clinical. *Id.* at 25-26. Due to his behavior, Wrathall's permission to reside in the SCTF was withdrawn by SCC. *Id.* He noted that Wrathall had refused all treatment since returning to the SCC. *Id.* at 27.

The court determined that the State had provided adequate grounds for revocation. In his oral ruling, Judge North indicated that:

THE COURT: Okay. Well, I agree with Mr. Hackett that clearly the State has proven its case by a preponderance of the evidence. The violations here, both of the court's order and the conditional release in the treatment agreement, he's been terminated from treatment and he's no longer residing at the Pierce County SCTF which is clearly a basis for revoking him under the circumstances.

Clearly, the kind of statements that Mr. Wrathall has made are almost guaranteed to provide revocation. It's an indication of an appalling lack of treatment having any effect upon the treatment offender where he's making statements that if he has a bad day he's going to drink alcohol and do drugs and go out and molest a child. That indicates that, you know, while he may have been in 14 years of treatment, it hasn't accomplished anything and he needs to go back, you know, and start over again and integrate the treatment somehow into his life so that it has some meaning.

VRP 10/16/2008 at 35.

Based on the evidence, which included a number of admitted exhibits, the court entered detailed findings of fact:

The State has proven the following facts by a preponderance of the evidence:

1. Under the court's June 6, 2008 Conditional Release Order, respondent was placed in treatment with Dr. Pinedo, a certified sex offender treatment provider. Participation in treatment with Dr. Pinedo was a condition of respondent's less

restrictive alternative (LRA) release. The order provides that "[i]f Respondent is terminated from treatment with Dr. Pinedo, the Respondent shall, consistent with RCW 71.09.098(2), immediately be taken into custody and a hearing scheduled to determine whether the Respondent's LRA will be revoked." 2008 Conditional Release Order at 11.

(2) Through her August 13, 2008 report to the court, Dr. Pinedo determined that she would no longer treat respondent in the community due to respondent's "poor progress in his treatment." She also offers her professional opinion that respondent "is not currently ready to be involved in transition back to the community."

(3) Under the 2008 Conditional Release Order, respondent is required to reside in the Pierce County Secure Community Transition Facility (SCTF). Due to his lack of progress in treatment and concerning behaviors, DSHS has withdrawn its permission for respondent to reside in this facility.

(4) Respondent has made a number of statements to Dr. Pinedo and others that demonstrate a lack of progress in treatment, an oppositional attitude and an unacceptable level of risk to the community. These statements indicate that respondent requires treatment in a secure facility rather than a transitional community setting.

(5) Respondent indicated to Dr. Pinedo that he "liked getting people [officials] excited" and watching them cope with his provocative statements. He indicated that he did not like being told what to do and would sometimes do the opposite in order to elicit a response. For example, when asked if he would use drugs, give drugs to a child, give pornography to a child, and/or molest a child because he was told not to engage in these behaviors, respondent indicated that he would "maybe" engage in these activities merely because he was told not to do them.

(6) On another occasion, respondent was asked what he would do on the worst day of his life when he was feeling lonely and frustrated. Rather than providing strategies for preventing a relapse into child sexual assault, respondent

indicated that he would first go to a bar for hard alcohol. If his feelings were not cured by alcohol, he would then obtain drugs. If the drugs did not improve his mood, respondent indicated to Dr. Pinedo that he "might get a kid." He indicated that sex makes him feel better so he would molest a child.

(7) Respondent's statements and attitudes are incompatible with continued treatment in a less restrictive alternative setting. With these attitudes, respondent presents an unacceptable risk to reoffend if he remains in a community setting.

(8) Pending these revocation proceedings, respondent has been placed in the Special Commitment Center (SCC) and has not engaged in treatment during this time.

CP 138-140.

In accord with the findings of fact, the court entered the following conclusions of law:

(1) Respondent is not complying with the terms of this court's 2008 Conditional Release Order; namely his actions have caused him to be terminated from sex offender treatment with Dr. Pinedo and declared ineligible to reside at the Pierce County SCTF;

(2) Respondent is in need of additional care, monitoring, supervision and treatment, which is best provided in the setting of a secure DSHS facility like the SCC. At this time, conditions do not exist that would make respondent's continued release adequate to protect the community or in his best interests.

CP 140-41. As a result, the trial court revoked Wrathall's LRA and returned him to placement in the Special Commitment Center. *Id.* at 41.

#### **IV. LEGAL ARGUMENT**

##### **A. WRATHALL CANNOT ARGUE A POSITION CONTRARY TO THE ONE HE ADOPTED BELOW**

Wrathall's theory on appeal is that due process requires proof of a willful violation of his conditional release order. He cites no direct authority for this position, but cannot raise is on appeal because no similar argument was made below. Indeed, during proceedings below, Wrathall agreed that the State properly represented the applicable law. Wrathall's due process claim should not be entertained under these circumstances.

As noted above, Wrathall's defense counsel agreed with the State's presentation of the applicable law. He stated that "the government (sic) submits the law and the law is clear there's no -- cites the statutory provisions we'd agree with." VRP 10/16/2008 at 4. As a result, there was no questioning addressed to the willfulness of Wrathall's behavior. Wrathall's counsel made no argument before the trial court that it was necessary for the State to prove a willful or intentional violation. *See* VRP 10/16/2008 at 32-34 (defense argument). Due to Wrathall's acquiesce on the law, the State rightfully concluded that the "law is agreed on by the parties." VRP 10/16/2008 at 30.

Having agreed to the law before the trial court, Wrathall cannot change his position before the appellate court. First, under RAP 2.5, an “appellate court may refuse to review any claim of error which was not raised in the trial court.” In general, “an issue not briefed or argued in the trial court will not be considered on appeal.” *Brower v. Ackerley*, 88 Wn.App. 87, 96, 943 P.2d 1141 (1997). A litigant cannot remain silent as to claimed error during trial and later, for the first time, urge objections thereto on appeal. *State v. Guloy*, 104 Wash.2d 412, 421, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020, 106 S. Ct 1208, 89 L. Ed. 2d 321 (1986).

The Washington Supreme Court recently applied the preservation of error doctrine to sexually violent predator cases because, among other reasons:

[O]pposing parties should have an opportunity at trial to respond to possible claims of error, and to shape their cases to issues and theories, at the trial level, rather than facing newly-asserted errors or new theories and issues for the first time on appeal.

*In re the Detention of Audett*, 158 Wash.2d 712, 725, 147 P.3d 982 (2006) (citing 2A Karl B. Teglund, *Washington Practice: Rules Practice RAP 2.5(1)*, at 192 (6th ed. 2004). In this case, the State could have easily focused its proof on the willfulness of Wrathall's behavior if Wrathall had

attacked the statutory criteria before the trial court. He did not and this court should not allow review on this issue.<sup>2</sup>

A second reason to refuse Wrathall's argument is found in the doctrine of judicial estoppel. Here, Wrathall not only failed to argue his due process theories before the trial court. To the contrary, he affirmatively acknowledged that the State correctly stated the law by relying on the statute. This court should not allow Wrathall to switch positions on appeal.

Judicial estoppel “serves to preclude a party from gaining an advantage by asserting one position before a court and then later taking a clearly inconsistent position before the court” *Garrett v. Morgan*, 127 Wash.App. 375, 112 P.3d 531, 533 (2005). As noted in *Mastro v. Kumakichi Corp.*, 90 Wash.App. 157, 163-164, 951 P.2d 817 (1998),

A party is not permitted to maintain inconsistent positions in judicial proceedings. *It is not as strictly a question of estoppel as it is a rule of procedure based on manifest justice and on a consideration of orderliness, regularity and expedition in litigation.*

(Emphasis added; citing *Mueller v. Garske*, 1 Wash.App. 406, 409, 461 P.2d 886 (1969)).

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<sup>2</sup> The court should not consider any new claims of ineffective assistance of counsel raised in Wrathall's reply brief. Allowing Wrathall to raise such an important issue in a reply brief would deprive the State of the ability to respond and violate the rules of appellate procedure.

The doctrine has been applied to preclude inconsistent positions before the appellate courts. *Mastro*, 90 Wn.App. at 163-64 ("Because this factual concession is central to Kumakichi's argument here that it did not breach the covenant of seisin merely by virtue of this encroachment, the doctrine of judicial estoppel precludes this argument on appeal."). A key purpose in precluding inconsistent positions is "to avoid inconsistency, duplicity, and ... waste of time." *Cunningham*, 126 Wn.App. 222, 225, 108 P.3d 147 (2005).

In this case, Wrathall agreed with the prosecutor's understanding of the law. Due to this agreement, the prosecutor did not pursue possible testimony supporting the willfulness of Wrathall's threats to "get a boy." Under the doctrine of judicial estoppel, Wrathall cannot be allowed to seek advantage "by asserting one position in a court proceeding and later seeking a second advantage by taking a clearly inconsistent position" on appeal. *Johnson v. Si-Cor, Inc.*, 107 Wash.App. 902, 906, 28 P.3d 832 (2001).

**B. DUE PROCESS IMPOSES NO REQUIREMENT THAT A SEX PREDATOR COMMIT A WILFULL VIOLATION IN ORDER TO REVOKE AN LRA**

Wrathall fails to cite any case law directly supporting a due process requirement of a willful or intentional violation prior to revocation of an

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LRA. He further fails to undertake the appropriate due process analysis mandated by the case law. When the proper legal analysis is used, there is no colorable claim of a due process requirement to prove willfulness.

Under the federal constitution, a person may not be deprived of life, liberty, or property without due process of law. U.S. Const. amend. XIV, § 1. As our Supreme Court recently noted, the "threshold question in every due process challenge is whether the challenger has been deprived of a protected interest in life, liberty, or property." *In re Pullman*, \_\_\_ Wn.2d \_\_\_, \_\_\_ P.2d \_\_\_ (2009).

In answering this threshold question, there are two possible sources for a liberty interest -- the constitution and/or the applicable statute. *Id.* As for the first ground, "A liberty interest may arise from the Constitution, from guarantees implicit in the word liberty, or from an expectation or interest created by state laws or policies." *In re Pers. Restraint of Bush*, 164 Wash.2d 697, 702, 193 P.3d 103 (2008) (internal quotation marks omitted) (quoting *In re Pers. Restraint of McCarthy*, 161 Wash.2d 234, 240, 164 P.3d 1283 (2007)).

In addressing persons serving time on a criminal conviction, the court has consistently held that:

"There is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence." *Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1,

7, 99 S.Ct. 2100, 60 L.Ed.2d 668 (1979); *Meachum v. Fano*, 427 U.S. 215, 96 S.Ct. 2532, 49 L.Ed.2d 451 (1976); *Cashaw*, 123 Wash.2d at 144, 866 P.2d 8. The constitution likewise "itself does not guarantee good-time credit for satisfactory behavior while in prison." *Wolff v. McDonnell*, 418 U.S. 539, 557, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974).

*Pullman*, \_\_\_ Wn.2d at \_\_\_.

Similarly, a civilly committed SVP has no due process liberty interest in an LRA placement. The question of whether there is a due process right to an LRA was squarely addressed in *In re Detention of Bergen*, 146 Wash.App. 515, 523-524, 195 P.3d 529, 533 (2008). In *Bergen*, this court recognized that there is no due process right to an LRA placement:

Liberty interests may arise from either of two sources: the due process clause and state laws. The due process clause does not, of its own force, create a liberty interest when an inmate seeks release before serving the full maximum sentence. *Similarly, the due process clause 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 or that he or she is entitled to conditional release to a less restrictive alternative.*

*Id.* (Emphasis added). As a result, the court held that "the due process clause does not create a liberty interest in a conditional release to a less restrictive alternative because an SVP offender does not have a liberty interest in being released before a court determines that the SVP is entitled to such a release." *Id.* at 526-27. *Accord In re Detention of*

*Enright*, 131 Wash.App. 706, 714, 128 P.3d 1266, 1269 -  
1270 (Wash.App. Div. 3,2006)

With no underlying due process right to placement in a less restrictive alternative, Wrathall cannot claim a constitutional liberty interest in proof of a "willful violation" before his conditional liberty interest is revoked. Indeed, the *Bergen* case recognizes that an SVP's liberty interest in LRA placement arises solely from the procedures and provisions of RCW 71.09. *Id.* In these circumstances, he cannot use the constitution's due process clause to claim more "ordered liberty" than the statute already provides.

As *Bergen* recognizes, where the constitution imposes no liberty interest, it may nonetheless arise from statutory procedures. The *Pullman* court notes, "For a state law to create a liberty interest, 'it must contain 'substantive predicates' to the exercise of discretion and 'specific directives to the decision maker that if the [law's] substantive predicates are present, a particular outcome must follow'." \_\_\_ Wn.2d at \_\_\_ (citations omitted). Only statutes that prescribe a given outcome for a specific set of facts create these "due process liberty interests"; "laws granting a significant degree of discretion cannot." *In re Personal Restraint of Mattson*, 166 Wash.2d 730, 737-738, 214 P.3d 141, 145 - 146 (2009).

Here, Wrathall has no argument that the applicable statute, RCW 71.09.098, creates a due process liberty interest in requiring proof of a willful violation prior to revocation. The statute nowhere uses the terms willful or intentional. To the contrary, it allows revocation even in the absence of any violation where the trial court believes that the person is in need of additional care, control and treatment. RCW 71.09.098(1). It grants considerable discretion to the trial court.

In *Pullman*, the court specifically noted that "the legislature did not intend for this statute to create *any* expectation of a specific release date or a specific classification level." \_\_\_ Wn.2d \_\_\_. In the absence of legislative intent, the statute cannot be read to create a liberty interest. As in *Pullman*, the SVP revocation statute "is clear" in not imposing a willfulness requirement. Indeed, because the statute clearly delegates substantial discretion to the trial court to decide the remedy of revocation or modification, the *Pullman* case prevents it from being read to create a due process liberty entitlement. *See Pullman*, \_\_\_ Wn.2d at \_\_\_ (no liberty interest where DOC granted discretionary authority).

Any possible merit to Wrathall's position is resolved by the recent decision in *State v. McCormick*, 166 Wn.2d 689, 213 P.3d 32 (2009). In *McCormick*, a sex offender challenged revocation of his SSOSA because the State had failed to prove a willful violation. 166 Wn.2d at 692-93.

Like Wrathall, McCormick claimed a due process entitlement to proof of a intentional violation. *Id.*

In rejecting a due process "willfulness" requirement, the court observed that:

Examining the State's interests, the government has an important interest in protecting society, particularly minors, from a person convicted of raping a child. That interest is rationally served by imposing stringent conditions related to the crime McCormick committed. The condition forbidding McCormick from frequenting areas where minors congregate serves as a way to prevent McCormick from being in a situation where he would have an opportunity to again harm a child.

*State v. McCormick*, 166 Wash.2d at 702. The court thus held that "[g]iven the State's strong interest in protecting the public, McCormick's diminished interest because of his status as a convicted sex offender serving a SSOSA sentence, and that McCormick's proposed scenario leads to dangerous situations where McCormick can frequent places where minors are known to congregate, due process does not require the State to prove that McCormick willfully violated the condition." *Id.*

Here, a sexually violent predator who is careless on conditional release to the point of "getting a boy" on a bad day presents a danger at least as severe as the SSOSA offender in McCormick. Indeed, it would make little sense to limit LRA revocations to willful violations because an SVP *who is unable to control his behavior on an LRA* would be entitled to

continued to release under Wrathall's theories. This is inherently incompatible with public safety. Although supervision on an LRA is intensive, Wrathall fails to cite any portion of the record where these conditions are sufficient, without the full cooperation of the sex predator, to prevent significant public harm.

Even without the risk of harm, Wrathall ignores the statutes compelling interest in treating sexually violent predators. *State v. Williams*, 135 Wash.App. 915, 923, 146 P.3d 481, 485 (2006). The trial court found in this case that Wrathall "requires treatment in a secure facility rather than a transitional community setting." CP 139. In making this finding of fact, which is not challenged, the court specifically noted Wrathall's failure to progress in community-based treatment.<sup>3</sup> This finding along and the State's compelling interest in treatment is enough to justify Wrathall's return to the SCC without a finding of a willful violation.

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<sup>3</sup> Wrathall assigns error to a number of factual findings, but no where challenges their sufficiency. His claim that certain findings of fact are conclusions of law fails to provide cogent reasoning.

V. CONCLUSION

For the foregoing reasons, the trial court's decision to revoke Wrathall's LRA should be affirmed.

DATED this 30th day of October 2009.

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