

No. 71930-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

IN RE THE DETENTION OF BRADLEY WARD

STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND  
HEALTH SERVICES

Petitioner/Appellant,

v.

BRADLEY WARD,

Respondent.

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COURT OF APPEALS DIV. I  
STATE OF WASHINGTON

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

BRIEF OF RESPONDENT

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A. SUMMARY OF ARGUMENT IN RESPONSE.

Respondent Bradley Ward, a person civilly committed pursuant to Chapter 71.09 RCW, was conditionally released from the Special Commitment Center (SCC) at McNeil Island to a less restrictive alternative to secure confinement (LRA) in 2007. Despite an organic brain disorder, he performed well in sex-offender-specific treatment, and eventually was approved for transfer from a pre-transitional to transitional placement. This approval, however, coincided with the worsening of symptoms of psychosis, and Mr. Ward was eventually remanded to the SCC, even though he had not engaged in any violent behavior. The transfer effectively discontinued Mr. Ward's treatment, since he was being treated by a community-based provider; at the same time, the high-stimulation environment of the SCC exacerbated Mr. Ward's symptoms of psychosis.

Treatment of the mental abnormality that gave rise to sexually violent acts is the overarching purpose of commitment under Chapter 71.09 RCW. But the SCC did not treat Mr. Ward. Instead, the SCC disciplined him for his symptoms of psychosis by repeatedly confining him—often for weeks or months at a time—in complete isolation in the IMU. The State then moved to revoke the LRA.

At the revocation hearing, the defense presented expert evidence that the conditions endured by Mr. Ward at the SCC amounted to deliberate indifference and may have caused irreversible psychological damage. The defense expert predicted that continuation of the conditions could lead to Mr. Ward's murder, suicide, or his permanent retreat from reality. The State did not rebut this evidence.

Based on this evidence and following a proper application of the relevant statutory factors, the superior court denied the State's motion to revoke Mr. Ward's LRA, found revocation was not in his best interest, and ruled that conditions could be imposed that would adequately protect the community at the secure facility where Mr. Ward was housed.

The State sought discretionary review of the Court's order, and Commissioner Mary Neel of this Court granted review. Commissioner Neel noted that there is no appellate case that addresses the specific issues presented here, chiefly, the "serious concerns about Mr. Ward's placement at the SCC, particularly his frequent and sometimes prolonged placement in the IMU, and the apparent absence of appropriate psychiatric treatment." The Commissioner ruled that "resolution of the scope of the trial court's authority to act in a case like this ... is critical for both Mr. Ward's and the State's interests."

The State addresses none of the critical issues identified by the Commissioner. Indeed, the State wholly omits mention of SCC's inhumane and unethical misuse of solitary confinement and subpar treatment of Ward's mental condition. Instead, the State presents an incomplete and distorted picture to support the false contention that the trial court's ruling was an abuse of discretion.

This Court should hold that since RCW 71.09.098 explicitly directs a trial court to weigh an SVP respondent's best interests, consideration of the deplorable conditions of Mr. Ward's confinement and the absence of constitutionally-mandated treatment was not merely appropriate but required. This Court should further hold that the trial court's ruling was soundly within its discretion, and affirm.

B. COUNTER-STATEMENT OF THE CASE.<sup>1</sup>

1. Mr. Ward's positive response to weekly treatment and consistently low risk of re-offense.

In 2007, Mr. Ward was released from the SCC to an LRA based on an agreed order, and was placed at SCTF-PC.<sup>2</sup> CP 79-89. Pursuant to the order granting conditional release, Mr. Ward participated in weekly individual sex offender treatment with Dr. Mark Whitehill, as well as group treatment at the SCC. CP 83-84, 90-93.

Mr. Ward suffers from an organic brain disorder that occasionally causes him to engage in delusional thinking and poor hygiene practices, and these features have been present since the beginning of Mr. Ward's

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<sup>1</sup> As noted, this case is on discretionary review from an interlocutory decision entered by the Snohomish County Superior Court. The conditions of Mr. Ward's confinement at the SCC, where Mr. Ward is housed, were identified as a critical issue by the Commissioner who granted review. Even though these are addressed at length in a comprehensive report that was submitted by Dr. Alan A. Abrams and un rebutted by the State below, the State, as the appellant, has provided a statement of the case in its opening brief that does not even reference these seminal facts. The State also provides a selective recitation of Mr. Ward's treatment history which omits facts that are salient to the Superior Court's ruling. Consequently this counter-statement of the case is necessary for this Court to have a fair understanding of the facts relevant to the issues presented for review, pursuant to RAP 10.3(a)(5).

<sup>2</sup> The Department of Social and Health Services (DSHS)'s website describes the SCTF-PC as a "securely designed" facility "with access in and out strictly controlled." Residents of the facility are only permitted to leave if specifically authorized in advance of the scheduled travel, and if accompanied by DSHS staff supervising and monitoring the resident's activities. Staff at the SCTF-PC "are well-trained in incident response and emergency procedures," and work in conjunction with local law enforcement to ensure community safety. This cooperation includes staff training, joint exercises, and procedure development. *See* <https://www.dshs.wa.gov/sites/default/files/SESA/publications/documents/22-007.pdf>, last visited February 20, 2015.

confinement. CP 331, 464, 576, 613, 644, 657, 663-64, 678, 687. Even so, Mr. Ward did very well in treatment, and, in monthly reports to the court, Dr. Whitehill consistently assessed him as a low risk to reoffend sexually or engage in other forms of violence. CP 100, 309, 312, 314, 316, 318, 325, 332, 339, 363, 479, 488, 494, 503, 510, 516, 524, 531, 539, 546, 554, 562, 569, 577, 584, 591, 599, 605, 621, 624, 627, 630, 633, 636, 639, 642, 645, 648, 651, 655, 667, 669, 671, 674, 677, 680, 682, 684, 686, 688, 691.

Mr. Ward progressed so well in treatment that in 2009 an unconditional release trial was ordered. Trial was delayed due to the onset of symptoms of psychosis. There is some indication that Mr. Ward's periods of decompensation corresponded to stressors, including the 21-year anniversary of Mr. Ward's confinement at SCC and the prospect of unconditional release. CP 308, 322, 452. However, at the same time that Mr. Ward's cognitive functioning declined, Dr. Whitehill noted a corresponding diminution of sexual thoughts and feelings. CP 453. Although Mr. Ward's mental condition deteriorated, he continued to participate in individual treatment with Dr. Whitehill.

2. Mr. Ward's remand to the SCC and the facility's misuse of solitary confinement as a means of discipline, punishment, coercion, convenience, and retaliation.

In October 2012, due to the increased symptoms of Mr. Ward's mental illness, SCC staff, working in conjunction with the Department of Corrections, unilaterally determined that he should be moved from SCTF-PC to SCC. The rationale for this transfer is unclear;<sup>3</sup> on May 24, 2012, a conference call between members of the Transition Team, other interested parties at SCC, and Dr. Whitehill resulted in a consensus that Mr. Ward was better off housed at SCTF-PC than at the SCC because "the high stimulation environment of the SCC was thought to be triggering certain delusions and instances of negative behavior (e.g., exposing himself while showering)." CP 311.<sup>4</sup>

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<sup>3</sup> Neither Dr. Whitehill's reports to the court nor the LRA notice of violation submitted by the Department of Corrections (DOC) fully explains this decision. The notice of violation references a "clinical decision" to return Mr. Ward to the SCC. The principal issue identified by Dr. Whitehill was an increase in delusional thinking, the etiology for which was unclear. CP 1, 3-4. Mr. Ward had not engaged in any violent behavior. Dr. Whitehill noted in a report dated November 29, 2012, that there were concerns as to whether, given his current state of decompensation, Mr. Ward could comport himself safely in the community, and that it was believed that the confines of the SCC would enable more careful assessment and management of his psychiatric condition. CP 1. As discussed *infra*, the SCC chose to "manage" Mr. Ward's psychiatric condition by repeatedly placing him in the IMU.

<sup>4</sup> See also CP 644 (Dr. Whitehill notes that Mr. Ward's poor personal hygiene had been observed "in years past" while in total confinement, but had largely been in abeyance since his placement at the SCTF-PC); CP 678 ("historical concern" of poor hygiene associated with confinement at SCC).

At SCC, Mr. Ward has been segregated—sometimes for weeks or months at a time—within the Intensive Management Unit (IMU) at the SCC, where he is kept in total isolation. CP 454-56, 457-58, 460-62. On one occasion, Mr. Ward was confined in the IMU for 89 days.<sup>5</sup> On another, he was confined for 66 days. There is no indication in the chart notes that Mr. Ward’s placement was periodically reviewed. See CP 454-63. There is no suggestion that his mental status and adjustment to seclusion were assessed during these months-long periods of enforced isolation. See id. Mr. Ward in fact has spent the majority of his time since being remanded to SCC in the IMU; at least 276 out of 413 days.<sup>6</sup>

As is extensively documented by psychiatrist Alan A. Abrams,<sup>7</sup> SCC staff utilize isolation as a means of disciplining Mr. Ward for outbursts or as a mechanism of convenience, with little consideration for

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<sup>5</sup> A chart documenting the use of solitary confinement by SCC staff, the reasons cited for the placement, and the length of time spent by Mr. Ward in total seclusion since his remand to SCC on October 17, 2012 through December 11, 2013, was prepared by undersigned counsel based upon records summarized in a report by Dr. Abrams. The chart is attached as an Appendix.

<sup>6</sup> In this brief, the time spent in isolation is noted as “at least 276 ... days” because on one occasion, on November 20, 2011, an order was entered by Dr. Leslie Sziebert, chief psychiatrist at the SCC, to “continue seclusion” without any indication being given as to when seclusion commenced or concluded.

<sup>7</sup> For unknown reasons, the State elected to designate a version of the report authored by Dr. Abrams that omitted his curriculum vitae. Since Dr. Abrams’s credentials to offer an opinion are germane to the analysis, the complete document has been designated by Mr. Ward. Dr. Abrams’s curriculum vitae appears at CP 466-75.

the impact that this drastic measure is likely to have on Mr. Ward's fragile mental health. CP 454-62, 463.

As Dr. Abrams observes, the SCC's liberal use of isolation appears to violate SCC Policy 419 regarding involuntary seclusion.<sup>8</sup> CP 462, 463.

That policy provides, in relevant part, that seclusion may only be used

in an acute situation when a resident's behavior presents a likely risk of physical harm to self or others, or of causing significant property damage or of creating serious disruption of the therapeutic milieu ... Seclusion may only be used when less restrictive measures are determined by the authorizing entity to be insufficient or have failed. Seclusion shall not be used as a means of discipline, punishment, coercion, convenience, or retaliation.

CP 462.

In apparent recognition of the deleterious effects of seclusion, the policy outlines several mandatory procedures to be followed even when seclusion is deemed appropriate, including, *inter alia*, regular review of the resident's status, face-to-face evaluations of the resident at least once every four hours, and documentation when the period of seclusion exceeds 72 hours. *Id.* The policy does not provide any review procedure to monitor compliance, or to handle investigations of misuse of seclusion.

CP 463.

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<sup>8</sup> Dr. Abrams notes that there is a sunset provision in the policy of April 22, 2011. Undersigned counsel was unable to locate an updated version of the policy via internet research.

As noted, SCC does not seem to have complied with its own internal procedures governing the use of isolation. As long ago as 2006, mental health experts noted “the chronic tendency of SCC staff to minimize Mr. Ward’s mental illness and to attribute his behavior to willful personality flaws.” CP 450 (Dr. Abrams summarizing report of Dr. Brian Judd, PhD). Similar thinking appears to underlie the SCC’s use of involuntary solitary confinement.

Dr. Abrams writes,

My review of the documentation does not suggest that Mr. Ward being in an unresponsive chronically deteriorated state meets the reasonable understanding of an acute situation presenting a likely risk of physical harm to self or others, or of causing significant property damage or of creating serious disruption of the therapeutic milieu. It does appear that there is an absence of therapeutic approaches to Mr. Ward’s deterioration and/or regression. It appears that involuntary seclusion was primarily used as both punitive and coercive “treatment” based on staff assumptions that Mr. Ward was willfully disobeying their directives. “Punishment treatment” and solitary confinement to force compliance with authority’s expectations have no place in the treatment of a severely mentally ill person.

CP 463.

3. The SCC's repeated use of solitary confinement as "punishment treatment" and deliberate indifference to Mr. Ward's well-being cause possibly irreparable harm.

Dr. Abrams notes that the clinical charting at SCC is "of generally poor quality."<sup>9</sup> CP 463. Although Mr. Ward has received a "considerable variety" of psychotropic medications, the progress notes "give little indication which have been beneficial for which symptoms." CP 446. The charting also does not address Mr. Ward's experience of nearly being murdered by another resident or being subjected to extended punitive isolation. CP 463. Dr. Abrams observes, as well, that although Mr. Ward's mental disorders are "extremely complex," his treatment and assessment at SCC have "primarily been with psychologists who are recent graduates or pre-doctoral level." CP 464. Dr. Abrams finds little evidence that the insights of the qualified experts who have evaluated Mr.

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<sup>9</sup> Dr. Abrams notes,

Leslie Sziebert, MD has been MR. Ward's psychiatrist for over ten years at SCC. His progress notes are superficial with minimal listing of target symptoms, rationales for medication choices, or medication side effects; there is no indication of any consideration about Mr. Ward's deterioration or the lack of efficacy of his treatment of Mr. Ward. Dr. Sziebert appears to diagnose Mr. Ward with "mood impulse control disorder" (see 10/6/03) which does not appear in DSM or seem to have any meaning. More recently in a note dated August 26, 2013, Dr. Sziebert describes Mr. Ward as showing "no overt psychoses" but then assesses "psychosis".

CP 449.

Ward outside the SCC have been incorporated into Mr. Ward's treatment plans at the facility. Id. Dr. Abrams comments,

There is a remarkable lack of assessment to explain the marked deterioration from 2011 to the present. If the best explanation offered at SCC is some form of fear of success, there has not been any effort at SCC to remedy or treat this. Rather the records reflect chaotic psychopharmacology, and a preoccupation with forcing Mr. Ward to follow staff directives as the primary treatment. The use of punitive isolation is particularly counter-productive.

....

In many ways Mr. Ward, through his injury, isolation, institutional priorities and ineffective treatment, is now stuck in the worst aspects of arrested development – fearful, mistrusting, bitter, despairing, paranoid, impulsive and resentful. He has few internalized coping strategies available to him, other than his habitual withdrawal. His identity and self-esteem are fragile. At present a treatment approach needs to be developed to avoid this present psychological implosion from becoming chronic or ending in Mr. Ward's suicide or murder.

Id.

Dr. Abrams assesses the treatment that Mr. Ward has received at SCC as "at best ineffective," CP 446, and opines that "[t]here has been considerable malpractice and deliberate indifference at SCC regarding Mr. Ward's care and treatment." CP 464-65. Dr. Abrams believes that "[t]here is minimal evidence that Mr. Ward is a sexually violent predator

presently.” CP 446.<sup>10</sup> Dr. Whitehill concurs with Dr. Abrams that Mr. Ward would be best treated in a psychiatric facility. CP 454.

Dr. Abrams answers the question whether Mr. Ward is receiving appropriate and adequate care at the SCC in the negative. CP 466. Further, Dr. Abrams believes that SCC’s mistreatment and malpractice of Mr. Ward have caused him severe and possibly permanent psychological damage, “and it will require significant effort and resources to find a treatment path out of the present state.” Id.

Since his return to SCC, Mr. Ward has repeatedly reported suicidal thinking and fear for his life. CP 455, 458, 460. As noted by Dr. Abrams and Dr. Whitehill in a progress report to the court, this fear is not unjustified; as Mr. Ward’s personal hygiene has deteriorated, the risk that other residents will vent their ire physically has increased. CP 2, CP 454. On January 21, 2013, Mr. Ward was violently attacked by another resident at SCC. CP 455. This attack appears to have been foreseeable. CP 446. Dr. Abrams writes, “Had [the attack] not been discovered and stopped it would have resulted in a homicide.” CP 455.

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<sup>10</sup> Dr. Abrams notes that Megan Carter, PsyD., who completed Mr. Ward’s annual reviews, “places great weight on Mr. Ward’s behaviors twenty years earlier in finding that Mr. Ward is a sexual[ly] dangerous violent predator.” CP 456. He notes that her use of the Static 99R on a brain-damaged psychotic individual lacks clinical support, and that she “does not distinguish Mr. Ward’s grave disability from his comorbid sexual disorders.” CP 456-57.

4. The trial court finds, in light of the appalling conditions of Mr. Ward's confinement and his relatively low risk, that neither his best interests nor the interests of the community are served by "warehousing" him without treatment.

The State's motion to revoke Mr. Ward's LRA was filed on January 10, 2014. A hearing on the motion was held on May 7, 2014, before the Honorable Marybeth Dingley.

The court found that the State had proved by a preponderance that Mr. Ward violated the conditions of his release. RP 23. The court then carefully weighed the statutory factors contained in RCW 71.09.098(6)(a).

The court found that the nature of the condition that was violated weighed in the State's favor. RP 24. The second factor, the degree to which the violation was intentional or grossly negligent, the court ruled "tips towards the defense" since the violation was a consequence of Mr. Ward's mental condition, rather than willful behavior. *Id.* With regard to Mr. Ward's ability to strictly comply with the conditional release order, the court found that he might be able to comply with engaging in treatment with Dr. Whitehill, but that otherwise he would have difficulty following the conditions of treatment. RP 24-25. This factor the court counted in the State's favor. RP 25. The court found that Mr. Ward's degree of progress in treatment was a neutral factor, as he had progressed well in treatment until the onset of the current mental health issues. CP

25. On the issue of risk to the public or particular persons if conditional release continues, the court ruled that “there’s not a risk to the public since Mr. Ward would still be under the care of . . . the SCTF, but he wouldn’t be released.” CP 25. The court further found that the State had not identified any person as being particularly at risk. This factor too it counted as neutral. Id.

The court ultimately ruled that although it was “a pretty close call,” the State’s revocation motion should be denied. RP 26. The court noted that it would be in Mr. Ward’s best interest to stay at the SCTF, “because he would be able to get help for his problems.” Id. The court explained,

[P]utting Mr. Ward in solitary isn’t going to solve any problem except maybe make things easier for people at the SCC and SCTF. But ultimately, if the idea is to protect the public from Mr. Ward, they’re not going to be protected by putting him in solitary confinement and just warehouse[ing] him there and essentially not giving him any treatment . . . I think that it’s important that he get at least access to treatment and have a chance to get back on the right track.

RP 26-27.

The court directed Mr. Ward be returned to the SCTF-PC, but specifically authorized the State to remand Mr. Ward to the SCC in the event of concerns for the safety of staff or other residents.<sup>11</sup> CP 28-29.

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<sup>11</sup> Execution of this order was stayed by the Commissioner pending further order of the Court.

C. ARGUMENT.

After considering the statutory factors set forth in RCW 71.09.098, the trial court determined that Mr. Ward's continued placement at SCC was harmful, that he did not pose an immediate risk of harm to anyone, and, consequently, that revocation of his less restrictive alternative was not in his best interests or necessary to protect the community. The State concedes that the trial court has discretion in deciding whether to revoke conditional release. Br. App. at 23. The State also concedes that in deciding whether revocation is appropriate, the court evaluates five statutory factors, which the trial court considered here. In claiming, however, that the trial court's ruling denying the motion to revoke was an abuse of discretion, the State misrepresents the factual record and the trial court's ruling, fails to address Mr. Ward's best interests, a statutorily-mandated consideration, and fails to factor its own obligation to treat Mr. Ward's mental abnormality. The State's arguments must be rejected, and the trial court should be affirmed.

**In denying the State’s motion to revoke Mr. Ward’s LRA, the trial court thoroughly and carefully weighed the pertinent statutory factors and appropriately concluded revocation was not in Mr. Ward’s best interests given the SCC’s “warehousing” of this severely mentally ill individual in solitary confinement without treatment.**

1. The superior court carefully weighed the five statutory factors in RCW 71.09.098 (6)(a) and substantial evidence supports its ruling.

The abuse of discretion standard will apply where “a court or judge decides questions arising in a particular case not expressly controlled by fixed rules of law according to the circumstances and according to the judgment of the court or judge.” State v. Osman, 168 Wn.2d 632, 640, 229 P.3d 729 (2010). As the Washington Supreme Court stated in State v. Sisouvanh, 175 Wn.2d 607, 290 P.3d 942 (2012),

An abuse of discretion standard often is appropriate when (1) the trial court is generally in a better position than the appellate court to make a given determination; (2) a determination is fact intensive and involves numerous factors to be weighed on a case-by-case basis; (3) the trial court has more experience making a given type of determination and a greater understanding of the issues involved; (4) the determination is one for which “no rule of general applicability could be effectively constructed,”; and/or (5) there is a strong interest in finality and avoiding appeals.

Sisouvanh, 175 Wn.2d at 621 (internal citations omitted).

The abuse of discretion standard is sometimes called the “no reasonable judge” standard. State v. Hager, 171 Wn.2d 151, 156, 248 P.3d 512 (2011). It is rare that an exercise of judicial discretion will warrant reversal. The State contends that no reasonable judge would have failed to grant the State’s motion to revoke Mr. Ward’s conditional release, but the State’s recitation of facts and analysis are selective and highly misleading.

The State chose not to rebut Dr. Abrams’s report below, but in its briefing to this Court, it wholly omits mention of the report, even though Dr. Abrams’s findings and conclusions were the principal basis for the court’s ruling. The State does not address the SCC’s irresponsible and abusive misuse of solitary confinement as “punishment treatment” to force Mr. Ward—a highly vulnerable, severely mentally ill individual—to comply with staff directives. It does not attempt to defend the “poor quality” charting of its meager attempts to treat Mr. Ward’s symptoms, even though Dr. Whitehill previously noted that earlier instances of significant decompensation were because Mr. Ward “had not received his medication for several days through no fault of his own.” CP 530. The State does not mention that Mr. Ward was attacked and nearly killed by

another resident who the SCC knew to be “the most dangerous person at the SCC.”<sup>12</sup>

RCW 71.09.098 provides that once the trial court has found that the State has proven that a person has violated his conditions of release to an LRA,

the court shall consider the evidence presented by the parties and the following factors relevant to whether continuing the person’s conditional release is in the person’s best interests or adequate to protect the community:

- (i) The nature of the condition that was violated by the person or that the person was in violation of in the context of the person’s criminal history and underlying mental conditions;
  - (ii) The degree to which the violation was intentional or grossly negligent;
  - (iii) The ability and willingness of the released person to strictly comply with the conditional release order;
  - (iv) The degree of progress made by the person in community-based treatment; and
  - (v) The risk to the public or particular persons if the conditional release continues under the conditional release order that was violated.

RCW 71.09.098(6)(a).

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<sup>12</sup> To the extent that the State does mention this event, *see* Br. App. at 31, the State attempts to lay the blame at Mr. Ward’s feet, although it is the State that failed to segregate a vulnerable inmate such as Mr. Ward from known aggressors. The violent assault succeeded notations by staff that Mr. Ward was “at risk for assault” by other residents, suggesting that they were on notice of Mr. Ward’s vulnerability.

The court carefully weighed each of these factors and acted well within its discretion when she denied the State's motion to revoke the LRA. It applied the correct legal standard. The ruling was based on facts in the record. The court familiarized itself with the case history, read the briefing submitted by both parties, studied the applicable statutes, and carefully weighed each statutory factor in RCW 71.09.098(6)(a). RP 23-26. The court's determination that the LRA should not be revoked was within the range of reasonable choices: the court considered Mr. Ward's best interests, found they would not be served by warehousing him in solitary confinement at the SCC, and concluded that conditions could be imposed to protect the community.

The court's conclusions were reasonable given the wealth of data from Dr. Whitehill regarding Mr. Ward's low risk of re-offense and the beneficial effects of treatment. In 2010, Dr. Whitehill had spent nearly 700 direct contact hours with Mr. Ward. CP 530. He described his therapeutic bond with Mr. Ward as "robust." CP 530-31. During previous periods of decompensation, Dr. Whitehill was able to maintain good communications with Mr. Ward and assist him in achieving mental stability. It was reasonable for the court to conclude that if he again had access to treatment with Dr. Whitehill, Mr. Ward's status might improve.

2. The State did not prove that revocation was necessary to protect the community.

The State broadly contends that Mr. Ward's "bizarre" behavior "has frequently implicated safety and security, thereby creating a threat to both Ward and those around him." Br. App. at 30. The State concludes that "as such, many of his violations constitute 'a threat to society.'"<sup>13</sup> *Id.*

The vague threat that the State envisages is unlikely to materialize. The SCTF-PC is a secure facility, where Mr. Ward is not allowed to have contact with the general public unless such contact is expressly permitted and arranged by the Transition Team. CP 43. When he was housed there, the staff apparently addressed potential areas of concern by designating Mr. Ward an "Accommodated Transition resident" who could only visit others if a staff person was present. CP 574.

With respect to the State's claimed desire to protect Mr. Ward himself, as the State concedes, he is at *greater* risk of harm at the SCC than he would be at the SCTF-PC. The State notes that many of the roughly 300 persons housed at the SCC "are not only sexually dangerous, but have histories of significant physical violence as well." Br. App. at 31-32. One of these individuals perpetrated such a brutal assault on Mr.

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<sup>13</sup> The State's own expert has conceded "it is not clear" that the "hugging" behavior referenced by in the State's brief, see Br. App. at 28-29, "is sexual in nature." CP 18.

Ward that if it had not been stopped, it would have resulted in a homicide.  
CP 455.

The trial court's order authorizes Mr. Ward's return to the SCC if he "poses a direct and specific threat to the safety of himself or the staff or other residents of the SCTF-PC." CP 29. Thus, the court's order contemplates the possibility of further proceedings and expressly provides the State with an avenue of relief in the event of a threat to the safety of Mr. Ward, SCTF-PC staff, or other residents of the facility. The State's contention, therefore, that revocation was necessary to protect the community is unpersuasive.

3. The trial court appropriately weighed the dangerous and harmful conditions at SCC as part of the statutorily-mandated consideration of Mr. Ward's best interests.

RCW 71.09.098(6)(a) mandates that in a proceeding on a motion to revoke conditional release, a court must consider "whether continuing the person's conditional release is in the person's best interests." RCW 71.09.098(6)(a); Erection Co. v. Department of Labor & Indus., 121 Wn.2d 513, 518, 852 P.2d 288 (1993) (noting general rule that the word "shall" in a statute is imperative and operates to create a duty).

Given this statutory mandate, the trial court appropriately factored Mr. Ward's appalling conditions of confinement into her assessment whether revocation was proper. The court accurately observed that Mr.

Ward is “not getting any kind of help” in isolation. RP 26. Instead, he is getting “worse and worse and worse.” Id. He has suffered extraordinary psychological harm as a consequence of the SCC’s inhumane and indefensible use of involuntary isolation as “punishment treatment.” Dr. Abrams believes that if the conditions of Mr. Ward’s confinement at the SCC are permitted to continue unchecked, they will cause permanent psychological damage or they literally will kill him.

There is broad consensus that prolonged solitary confinement causes profound and sometimes irreparable harm. See generally, Shira E. Gordon, Solitary Confinement, Public Safety, and Recidivism, 47 U. Mich. J. L. Reform 495 (2014); Thomas L. Hafemeister, Jeff George, The Ninth Circle of Hell: An Eighth Amendment Analysis of Imposing Prolonged Supermax Solitary Confinement on Inmates With a Mental Illness, 90 Denv. U. L. Rev. 1, 17-18 (2012). For individuals with mental illnesses, solitary confinement inflicts a level of suffering tantamount to torture. See Scarver v. Litscher, 434 F.3d 972, 975-76 (7th Cir. 2006) (referencing “extensive literature” on the devastating effect of isolation on mentally disturbed prisoners); Madrid v. Gomez, 889 F.Supp. 1146, 1264 (N.D. Cal. 1995) (“if the particular conditions of segregation being challenged are such that they inflict a serious mental illness, greatly exacerbate mental illness, or deprive inmates of their sanity, then

defendants have deprived inmates of a basic necessity of human existence—indeed, they have crossed into the realm of psychological torture”); see also id. at 1255 (characterizing the placement of the mentally ill in solitary confinement as the “mental equivalent of putting an asthmatic in a place with little air to breathe”).

The SCC’s mistreatment of Mr. Ward is particularly shocking given that the SCC is charged with the responsibility of providing care and treatment to persons committed under Chapter 71.09 RCW. In re Detention of Morgan, 180 Wn.2d 312, 320, 330 P.3d 774 (2014); RCW 71.09.060(1). Instead of developing therapeutic approaches to address Mr. Ward’s decompensation, the SCC’s response has been to repeatedly isolate him in the IMU, often for months at a time, with little or infrequent internal review, and no apparent consideration for the impact this practice has on a fragile mentally ill individual such as Mr. Ward. The court correctly noted that in the end, the community is not served or protected when this is the institutional response to a person such as Mr. Ward.

4. Since RCW 71.09.098(7) pertains to proceedings to modify conditional release, the statute is inapplicable here.

In the order granting discretionary review, Commissioner Neel noted that “neither party has addressed the effect of RCW 71.09.098(7).” That subsection of the statute provides:

If the court determines the state has met its burden referenced in subsection (5)(c) of this section, and the issue before the court is modification of the court's conditional release order, the court shall modify the conditional release order by adding conditions if the court determines that the person is in need of additional care, monitoring, supervision, or treatment. The court has authority to modify its conditional release order by substituting a new treatment provider, requiring new housing for the person, or imposing such additional supervision conditions as the court deems appropriate.

RCW 71.09.098(7).

When construing a statute, the Court's objective is to determine the Legislature's intent. State v. Jacobs, 154 Wn.2d 596, 600, 115 P.3d 281 (2005). Where a statute's plain meaning is evident, then the Court should give effect to that plain meaning. Id. "The 'plain meaning' of a statutory provision is to be discerned from the ordinary meaning of the language at issue, as well as from the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole." Id.

RCW 71.09.098 governs the procedure for both motions to revoke and for motions to modify conditional release. See RCW 71.09.098(1); (3)(a)(i); (4); (5)(a). Subsection 6(a) of the statute sets forth the considerations where "the issue before the court is revocation of the court's conditional release." RCW 71.09.098(6)(a). Subsection 7 outlines the procedure where "the issue before the court is modification of the court's conditional release." RCW 71.09.098(7).

The proceedings here involved a motion to revoke, not modify, Mr. Ward's conditional release, thus RCW 71.09.098(7) is inapplicable. Instead, the pertinent provision is RCW 71.09.098(6)(a), which the court carefully considered and applied.

Nevertheless, the circumstances of this case are extraordinary. The record contains compelling, un rebutted evidence that the conditions of Mr. Ward's confinement rise to an Eighth Amendment level of indifference to suffering. Far from providing constitutionally-mandated treatment for his mental abnormality, since his remand from the SCTF-PC, SCC staff have cruelly subjected Mr. Ward to "punishment treatment."

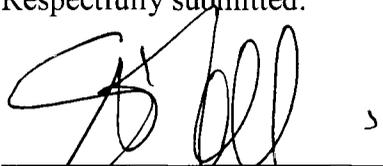
RCW 71.09.098(7) evinces the Legislature's intent to confer upon the trial court the broad authority to oversee the "care, monitoring, supervision, or treatment" of a person committed under Chapter 71.09 RCW. The trial court is thus vested with the discretion to intervene where, as here, the State is violating its statutory and constitutional duties. To the extent that Commissioner Neel believed "the scope of the court's authority to act in a case like this" is an issue that must be resolved, this Court should hold that the trial court may modify the conditions of Mr. Ward's release to the extent the court believes is necessary to protect him from further harm.

D. CONCLUSION

After fully and fairly considering extensive documentary evidence and affording both parties an opportunity to argue their positions, the trial court applied the law to the facts and determined revocation of Mr. Ward's LRA was not in his best interests and conditions could be imposed that would adequately protect the community. The court's decision was reasonable given the extensive evidence of Mr. Ward's prior positive response to treatment and low risk of re-offense. And it was reasonable given that the likely alternative would be that the SCC would continue to warehouse Mr. Ward in solitary confinement. The trial court's ruling should be affirmed.

DATED this 20th day of February, 2014.

Respectfully submitted:



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SUSAN F. WILK (WSBA 28250)  
Washington Appellate Project (91052)  
Attorneys for Respondent

State v. Ward, No. 71930-1-I

Appendix

<b>DATE MR. WARD REMANDED TO SECLUSION</b>	<b>REASON CITED BY SCC STAFF FOR PLACEMENT IN SECLUSION</b>	<b>LENGTH OF TIME SPENT IN SECLUSION</b>
10/24/12-10/29/12	No reason supplied in materials reviewed	5 days
10/29/12-11/4/12 Date of release unknown; see next entry	Mr. Ward put his head in a toilet bowl containing feces	5 days
Date of commencement unknown; at least 11/20/12-Unknown	Order by Dr. Leslie Sziebert on 11/20/12 to continue seclusion; no documentation otherwise	Unknown
11/24/12-11/27/12	Failure to follow staff directives and being on unit naked	3 days
11/30/12-12/3/12	Failure to follow staff directives	3 days
12/3/12-12/6/12	Mr. Ward put his head in a toilet bowl	3 days
12/6/12-12/12/12	No reason supplied in materials reviewed	6 days
12/12/12-1/19/13	"Resident was going into other resident's rooms and taking items. Staff worried he would be at risk for assault. This RN speaks with resident who responds with grandiose delusions. Agreed to go into his room and stop getting into other resident's space. This nurse did not make it up to medical before a phone call was made stating he was out of his room on the phone. Dr. Sziebert called, order to place back in IMU."	38 days
1/23/13-1/29/13	Mr. Ward was attempting to hug other residents	6 days
2/1/13-4/30/13	"Resident continually is unable to follow instructions, wanders into others' room and frequently attempts to touch and hug other residents. Resident was banging his head this am."	89 days
6/10/13-6/20/13	"Resident has been refusing his meds for multiple days. Today medical is informed that he is sitting on his bed saturated with urine and refusing a shower. Per unit Mr. Ward has not eaten anything today. This RN, after Residential staff attempts getting him in the shower and getting a 'no' from Mr. Ward, goes down to see him. He refuses to take a shower or his medication from this RN. Per our discussion as to having security help him into the shower and medical try further to have him take his meds he responds with Mr. Ward states clearly [sic] 'if you or anyone else here tries to make me take a shower or take medications that I don't want try to come in	20 days

	here and see what happens.' Due to self-harm issues sitting in urine it is the decision to place him in IMU. Security staff provided this transfer but he continues to refuse a shower. He does however willingly take oral medications.'"	
7/1/13-9/5/13	Mr. Ward would not stay in his room when a hostile resident was out.	66 days
9/25/13-10/1/13	"Call from OSA Jeff Cutshaw stating that Mr. Ward is attempting to charge staff on Cedar. Apparently Mr. Ward was informed that he has body odor issues by an RRC and he immediately became belligerent and attempted to go after RRC staff. He was secured in his room in Cedar South; I was called to assess him. He tells me 'Nothing has changed since Billy Aschenbrenner [the resident who attempted to murder Mr. Ward], they continue to question and put quizzes on me and I am not going to take it anymore. They tell me that they will take me to IMU and actually I could care less.' Physically shaking and not in control. Describes other delusional ideas and at this point I describe his mood and irrational thoughts and concern for his safety so he will be placed in IMU. Dr. Sziebert called and approved placement in IMU through 0800 9/26/13.	6 days
11/15/13-12/11/13	Mr. Ward was defecating and urinating on himself.	26 days

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

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IN RE THE DETENTION OF	)	
	)	
BRADLEY WARD,	)	NO. 71930-1-I
	)	
	)	
RESPONDENT.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, DECLARE THAT ON THE 20<sup>TH</sup> DAY OF FEBRUARY, 2015, I CAUSED THE ORIGINAL **BRIEF OF RESPONDENT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] MALCOLM ROSS, AAG		(X) U.S. MAIL
[malcolmr@atg.wa.gov]		( ) HAND DELIVERY
OFFICE OF THE ATTORNEY GENERAL		( ) _____
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SEATTLE, WA 98104-3188		

**SIGNED** IN SEATTLE, WASHINGTON THIS 20<sup>TH</sup> DAY OF FEBRUARY, 2015.

X \_\_\_\_\_ 

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