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Division I
State of Washington

NO. 73535-7

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

In re the Detention of:

BRADLEY WARD,

Respondent.

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

Bradley Ward is a severely impaired pedophile who was committed as a Sexually Violent Predator in 1991. His criminal history includes offenses against young children, both male and female, both familial and non-familial. In response to a motion challenging the conditions of his confinement at the Special Commitment Center (SCC), the trial court set an evidentiary hearing, ruling that the Department of Social and Health Services (DSHS), the entity responsible for Ward's care and treatment, was not a necessary party to this proceeding and that, if the court found the conditions of his confinement unconstitutional, it had authority to release him to the community. Case law is clear, however, that challenges to the conditions of confinement cannot be heard within the context of SVP proceedings, and that there are other avenues available for such challenges to be made. The law is equally clear that DSHS, as the entity charged with Ward's care and treatment, is a necessary party to any such challenge, and that release into the community, the only relief Ward has requested, is not an available remedy. This Court should reverse the trial court's order setting an evidentiary hearing on the conditions of Ward's confinement, and direct Ward to pursue other established and available avenues for relief.

II. ISSUES PRESENTED FOR REVIEW

Within the context of a Sexually Violent Predator proceeding pursuant to RCW 71.09, the trial court entered an order setting an evidentiary hearing regarding the constitutionality of conditions of confinement at the SCC. The trial court ruled that DSHS, which operates the SCC, was not a necessary party to the proceedings and that, if the court ultimately determined that the conditions of Ward's confinement were unconstitutional, the court had the authority to release him.

A. Did the trial court err as a matter of law by setting an evidentiary hearing regarding the constitutionality of conditions of confinement at the Special Commitment Center?

B. Did the trial court err as a matter of law by ruling that DSHS is not an indispensable party and need not be joined in that litigation?

C. Did the trial court err as a matter of law by concluding that it has authority to unconditionally release a person committed as a sexually violent predator if it finds that his constitutional and/or statutory rights are violated by his continued involuntary commitment?

III. STATEMENT OF THE CASE

Bradley Ward was civilly committed to the care and custody of DSHS as a sexually violent predator (SVP) after stipulating to commitment in February 1991. *In re Detention of Ward*, 125 Wn. App. 381, 384, 104 P.3d 747 (2005). He has committed sexual assaults against numerous young children, both within and outside of the family. *Id.* At

age 16 he suffered a traumatic brain injury when struck by a car and his deviant sexual behaviors thereafter greatly increased. *Id.* at 383.

Ward has resided at the SCC, a secure facility operated by DSHS on McNeil Island since commitment. In 2007, the parties agreed to Ward's conditional release to the Pierce County Secure Community Transition Facility (SCTF), a DSHS-operated less restrictive alternative (LRA) facility also on McNeil Island.[1] CP at 82, 139. The goal of this LRA facility "is to promote successful community reintegration" of persons formerly living in the total confinement of the SCC (CP at 417, 422), and persons committed as sexually violent predators may reside there only with permission of the DSHS secretary. RCW 71.09.250(1)(a). After a period of time during which all treatment occurs on the island, residents are allowed to leave the island to pursue employment opportunities, education/training, treatment or other approved activities. CP at 418.

After several years in the less restrictive facility, Ward began experiencing acute psychotic symptoms, so severe that, between February and October of 2012, it was necessary to return him to the SCC for periods of two to three months at a time to attempt to stabilize his mental

[1] A less restrictive alternative is defined as "court-ordered treatment in a setting less restrictive than total confinement" which satisfies certain statutory conditions set forth in RCW 71.09.092 related to housing, treatment, and cooperation with supervision by DSHS and the Department of Corrections. RCW 71.09.020 (6).

condition and manage his increasingly bizarre and dangerous behavior. CP at 139. In addition to entertaining bizarre delusions regarding SCC staff's spying on him(CP at 308), Ward threatened to hit a female resident of the SCTF with whom he had been having ongoing conflict (CP at 105) and told SCC staff that he had thoughts about hurting SCTF staff and residents. CP at 113, 313. While at the SCC, the SCC's resident psychiatrist made "dogged" attempts to find a medication "cocktail" that could "allow for a measure of re-compensation." CP at 313. In addition, the SCC arranged for specialized medical assessments, including a CAT scan and EEG, neither of which appear to have produced any new medical findings that could account for Ward's recent mental decline. CP at 1, 315. As noted by another psychiatrist who evaluated Ward, Ward's tendency to engage "in serious behavior without a whole lot of warning" made it "difficult to predict the times when he may be at greater risk of offending or at risk of aggression to self or others." CP at 182.

Since his most recent return to the SCC in October 2012, he has resided in a unit that offers a high level of supervision, and is escorted to appointments by security staff. His problematic behavior has continued since returning to the SCC: Many of Ward's acting-out behaviors are sexual, and are consistent with his offending history of exposure and

sexual aggression.[2] Other behaviors are reminiscent of his history of attempted suicides and suicidal ideation.[3] Ward also demonstrated a capacity for assaultive outbursts, including threatening and physically charging staff.[4] Because of his badly decompensated condition, he initially

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[2] These included walking naked between his room and the bathroom (CP at 143), masturbating openly during a census check (CP at 143), and walking around with his penis showing or entirely naked. CP at 143-44. On November 13, 2012, Ward was questioned by SCC staff as to why he was walking around naked at the SCC. CP at 123. Ward responded, "'Cause I want to have sex." CP at 123. When asked with whom he wanted to have sex, he responded, "Anybody." CP at 123. Ward also admitted to walking around in the nude with an erection at times. CP at 123. The following day, Ward was seen lying nude on his bed during a census check, standing outside his room naked, and later walking naked from his room to the bathroom. CP at 143. That same day, two residents approached SCC staff indicating that they were uncomfortable with Ward's behavior. CP at 121. They reported that, while they were at the urinal, Ward had approached them and stood "right next" to them; another resident reported that, while he was using the computer, Ward had approached him and "started caressing" his neck. CP at 121. On November 26, 2012, Ward, while in the Intensive Management Unit, "kept taking his clothes off to masturbate." CP at 121. Two days later, Ward put his arms around another resident, who pushed him away; Ward said he loved the other resident and wanted to marry him. CP at 143. The other resident responded by shoving Ward to the floor and kicking him, requiring staff intervention. CP at 123, 143-44. The next day, Ward approached a person identified as "the most dangerous person at the SCC" and gave him a bear hug, in response to which the other resident shoved Ward away and kicked him in the ribs. CP at 121.

[3] Ward, on October 27, 2012, climbed on a counter and threatened to jump. Security was called and moved Ward to another room. CP at 143-44. Two days later, the transition team was notified that Ward had been "sticking his head in the toilet and trying to drown himself." CP at 123. He also attempted to flood his cell. CP at 141. On November 13, 2012, Ward stated, "I want to die," and reported banging his head against the wall. CP at 123.

[4] On June 10, 2013, Ward, when told that security might be called to help him into the shower, or that the medical unit might try further to have him take his medications, stated that "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 here and see what happens." CP at 65-68. On September 25, 2013, Ward, after being asked about the smell coming from his room, "threw his hands up, then yelled [at SCC staff] 'WHAT THE FUCK'" before charging toward staff "in an aggressive manner." CP at 65-68. One of the staff put his arm up so that Ward—a large man who weighs well over 200 pounds (CP at 107)—could not physically assault the other staff. CP at 65-68. After being directed to return to his room, Ward "began to bang his head against the door and kick and hit the door." CP at 65-68.

spent a significant amount of time in the intensive management unit (IMU). *Id.* [5]

Although Ward, after his return to the SCC in October of 2012, was never able to be returned to the SCTF, his conditional release to the SCTF had never been officially revoked. In January 2014, the State filed a motion to formally revoke his LRA status. CP at 75-125. This request was based on the July 2013 request by the Department of Corrections Community Corrections Officer who supervised Ward while at the SCTF. He filed a violation report documenting numerous instances in which Ward had refused to comply with directives, exposed himself by walking around naked, smeared his feces or defecated on himself, and engaged in inappropriate behavior towards other residents. CP at 128-31.[6]

After hearing the State's motion to revoke Ward's less restrictive alternative, the trial court, in May of 2014, ordered that Ward be returned

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[5] Because Ward's condition has improved since that time, he does not appear to have been placed in the IMU since December of 2014. *See* State's Reply to Respondent's Answer to State's Emergency Motion to Stay, dated September 9, 2015, COA No. 73535-7.

[6] Other documented behaviors included threats to a female resident of the SCTF (CP at 105), putting his head into a toilet bowl containing feces (CP at 123), smearing feces (CP at 123, 128-32, 143-44), attempting to hug other residents, who responded aggressively (CP at 121, 123), repeatedly ignoring staff directives (CP at 65-68,104-05, 128-32), refusing his medications (CP at 65-68); sitting on a bed saturated with urine and refusing a shower, threatening staff should anyone attempt to force him to take his medications, and physically "charging" staff "in an aggressive manner." *Id.* As noted by Dr. McClung, Ward's "tendency to engag[e] in serious behavior without a whole lot of warning" made it "difficult to predict the times when he may be at greater risk of offending or at risk of aggression to self or others." CP at 182.

to the SCTF under the terms of his existing less restrictive alternative order. CP at 952-53. The State sought and was granted review of that Order. In an unpublished opinion, this Court held that the trial court's decision to order Ward returned to the SCTF was not a manifest abuse of discretion, and affirmed. *In re Ward*, -- Wn. App. --; 2015 WL 4232058.

While the State's appeal related to the revocation action was pending before this Court, Ward filed a Motion to Dismiss and Detain in Superior Court, this time arguing not that he should be returned to and permitted to remain at the SCTF, as he had previously argued, but that he should be released and the sex predator action dismissed based on allegedly unconstitutional conditions of Ward's confinement. CP at 781-951. Ward argued, based on various reports from his expert, that Ward was being isolated as "punishment" for his behavior, (CP at 787) that his treatment has been "at best ineffective," and that "[t]here has been considerable malpractice and deliberate indifference at SCC regarding Mr. Ward's care and treatment." CP at 788. The State responded, arguing that the trial court had no authority under RCW 71.09 to adjudicate such a claim, that Ward should be required to file a separate cause of action in order to challenge the conditions of his confinement, and that any such action could not proceed without DSHS, which operates the SCC and the transitional facility. CP at 705-30. The State further argued that Ward's

requested remedy was unavailable to him, in that case law established that dismissal was not a proper remedy where inadequate conditions are alleged. CP(citing *In re Detention of Turay,* 139 Wn.2d 379, 986 P.2d 790 (1999), *Seling v. Young*, 531 U.S. 250, 265, 148 L.Ed.2d 734, 121 S.Ct. 727 (2001), and *In re Campbell*, 139 Wn.2d 341, 968 P.2d 771 (1999).

The matter was heard by the trial court on May 20, 2015. After a contested hearing, the trial court entered findings of fact and conclusions of law concluding that:

- The trial court "has jurisdiction to hear Respondent's motion to dismiss" based on alleged unconstitutional conditions of confinement." CP at 702, C of L No. 1;

- DSHS was not an indispensable party to this action and that Ward's motion "may be heard without joining DSHS/ SCC as a party." CP at 702., C of L No. 2;

- The court could unconditionally release Ward and dismiss this SVP action if the court were to find that his statutory and/or constitutional rights were being violated by his continued commitment. CP at 703; C of L No. 5.

The trial court denied Ward's Motion to Dismiss and Detain, concluding that he "has not presented sufficient evidence to support his claim that he has been subjected to inadequate treatment at the SCC." CP at 703. The court ruled, however, that if he re-filed his Motion to Dismiss, an evidentiary hearing on the merits of the motion would be set. CP at 703.While it does not appear that Ward's Motion to Dismiss and Detain

was actually re-filed, the trial court subsequently entered an Order setting the matter for trial on September 14, 2015. CP at 697-98. The State timely sought review of both orders, which was granted.

IV. ARGUMENT

The trial court erred as a matter of law by 1) setting an evidentiary hearing on an issue it has no authority to hear in proceedings pursuant to RCW 71.09; 2) finding that DSHS, the party responsible for the conditions of confinement that will be the focus of that evidentiary hearing, is not an indispensable party and need not be joined in the action; and 3) concluding that, if it determines that Ward's conditions of confinement violate the Statute or the Constitution, it has authority to release Ward.

First, it is well established that matters relating to the conditions of confinement are not relevant within the context of a sexually violent predator proceeding brought pursuant to RCW 71.09. Second, by scheduling such a hearing, the court has created a situation in which an indispensable party over whom it has no personal jurisdiction —DSHS— cannot be joined and as such cannot protect its own interests. Finally, the trial court, by identifying release as an appropriate remedy for unconditional conditions of confinement, has ignored well-established case law holding that release is not an available remedy. Ward has other remedies available to him, and he should follow established procedures

that would allow appropriate review of his complaints. This Court should reverse the trial court's order and strike the trial in this matter.

A. Standard of Review

Issues of law are reviewed de novo. *Kaplan v. Northwestern Mutual Life Ins. Co.*, 115 Wn. App. 791, 800, 65 P.3d 16 (2003).

B. The Trial Court Lacks Authority To Consider Conditions of Confinement Within the Context of an SVP Proceeding

The trial court's authority to act in any sexually violent predator matter "is limited to that found in the statute, and the court's failure to follow the statute renders the court's action void." *In re Skinner*, 122 Wn. App. 620, 632, 94 P.3d 981 (2004) (published in part). Fundamentally, the SVP statute deals with only two basic questions: First, does a respondent meet the statutory definition of a sexually violent predator? Second, if the respondent meets the definition, is his conditional release appropriate? The trial court placed Ward on a less restrictive alternative and determined that revocation based on his rule violations was not appropriate, a decision that was upheld by this Court. *Ward,* 2015 WL232058. Therefore, the only remaining question is whether Ward continues to be a sexually violent predator. Pursuant to a trial court finding entered in July, 2011 that Ward is entitled to a new trial on that issue, trial on that matter is set for May of

2016.[7] CP at 697-98. At that trial, the finder of fact must determine whether Ward continues to meet the definition of a sexually violent predator. RCW 71.09.090(2)(c). Questions outside the scope of the present litigation – such as the adequacy of treatment conditions at the SCC – are not before the court.

Likewise, case law clearly establishes that consideration of conditions of confinement has no place in an SVP proceeding, and numerous courts have addressed the inter-relationship between conditions of confinement/adequacy of treatment claims and SVP commitment proceedings. Our supreme court has, for example, determined that attempts to invalidate commitment by arguing that conditions of confinement at the SCC are inadequate "demonstrate a fundamental misunderstanding of the purpose of an SVP commitment proceeding." *In re Turay,* 139 Wn.2d at 404. There, Turay had unsuccessfully attempted to introduce evidence of the conditions of confinement at the SCC as well as the verdict in his federal litigation relating to those conditions at his commitment trial.[8] *Id.* Rejecting his argument that such evidence was

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[7] Prior to Ward's dramatic mental deterioration in 2011, the court, after a contested show cause hearing pursuant to RCW 71.09.090, determined that Ward had demonstrated that he had "so changed" that he was entitled to a trial on the issue of unconditional release. The delay in actually holding the trial has been due to Ward's repeated requests for continuance.

[8] Turay filed a lawsuit in the United States District Court for the Western District of Washington against several officials at the SCC. In this suit, which he

"relevant and powerful," the Supreme Court, citing RCW 71.09.060(1),[9] stated "[t]he trier of fact's role in an SVP commitment proceeding, as the trial judge correctly noted, is to determine whether the defendant constitutes an SVP; *it is not* to evaluate the potential conditions of confinement." *Id.* "The particular DSHS facility to which a defendant will be committed," the court continued, "should have no bearing on whether that person falls within [the] definition of an SVP." *Id.*

C. The Trial Court Lacks Personal Jurisdiction Over The SCC, Which Is An Indispensable Party To Any Action Relating To Conditions Of Confinement

The trial court's decision to entertain a motion to dismiss based on conditions of confinement within the context of Ward's SVP proceeding creates a basic technical problem: DSHS[10] is a necessary party to any

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maintained under 42 U.S.C. § 1983, Turay alleged that the conditions of his confinement at the SCC were unconstitutional and thus violated his civil rights under the United States Constitution. A federal court jury found that the officials at the SCC had violated Turay's constitutional right to access to adequate mental health treatment and awarded him $100.00 in compensatory damages. Following receipt of the verdict, the United States District Court placed the SCC under an injunction "narrowly tailored to remedy this constitutional violation." *Turay,* 139 Wn.2d at 386. The injunction was dismissed in 2007, the federal court concluding that DSHS had "worked long and hard to meet the constitutional requirements identified by this Court, and there is no longer any basis or the Court's continued oversight." http://www.seattletimes.com/seattle-news/judge-lifts-injunction-against-state-program-for-sex-offenders-after-13-years/ .

[9] RCW 71.09.060(1) provides, in pertinent part, "[t]he court or jury shall determine whether, beyond a reasonable doubt, the person is a sexually violent predator.... If the court or jury determines that the person is a sexually violent predator, the person shall be committed to the custody of the department of social and health services [DSHS] for placement in a secure facility operated by the department of social and health services for control, care and treatment...."

[10] As noted above, the SCC is operated by DSHS. As used herein, "DSHS" is intended to embrace the SCC, the facility at which Ward physically resides.

challenge to Ward's conditions of confinement. Because the trial court lacks personal jurisdiction over DSHS within the context of an SVP action, however, DSHS cannot be joined to this action and the trial in this matter should be stricken. Ward must file an action in the proper forum if he wishes to contest the conditions of his confinement.

1. DSHS must be a party to any action to assess conditions created by DSHS

"Cases should be brought and defended by the parties whose rights and interests are at stake." *Riverview Cmty. Grp. v. Spencer & Livingston*, 181 Wn.2d 888, 893, 337 P.3d 1076 (2014) (internal citations omitted). This principle is supported in common law, statute, and court rule. In some circumstances, it may be necessary to join a non-party. A party must be joined if "(1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (A) as a practical matter impair or impeded his ability to protect that interest or (B) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest." CR 19(a). DSHS is required, by law, to provide care and treatment to persons committed as sexually violent predators until such time that they can safely be released.

RCW 71.09.060. Under the logic of the trial court's order, DSHS could be ordered to release Ward, who has been determined beyond a reasonable doubt to be a dangerous sex offender and who has never been determined to no longer meet criteria for commitment, without ever having appeared in the proceeding or been represented by its own counsel.[11] If DSHS complies with a court order releasing someone based on grounds outside of the statute, it might well face lawsuits by parties opposing the release. If it refuses to obey a court order ordering release, it could well face threats of contempt. As such, DSHS' absence from the action would impair its ability to protect its own interests. In order to hear this motion, DSHS must be a party to the case.

When a party fits either category (1) or (2) of CR 19, the court must join the party if feasible. "A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined..." CR 19(a). Joinder is not discretionary. *State ex rel. Continental Cas. Co. v. Superior Court of Spokane County*, 33 Wn.2d 839, 842, 207 P.2d 707 (1949). "When a complete determination of a controversy cannot be had without the

[11] The SCC is a separate entity created by statute. RCW 43.20A.030. The SCC has its own counsel within the Attorney General's Office. RCW 71.09 does not confer on this court general supervisory authority over the SCC any more than it would have general supervisory authority over the Snohomish County jail or the State Department of Corrections in a criminal action.

presence of other parties, a mandatory duty is imposed upon the court to bring them in." *Id.* (*citing* 39 Am.Jur. 956, Parties § 85). Because DSHS is a mandatory joiner to any suit involving conditions of confinement at the SCC, any court hearing such claims must join DSHS.

2. The trial court cannot join DSHS because it lacks *in personam* jurisdiction over DSHS.

Although DSHS' participation in any action involving conditions of confinement for which it is responsible is essential, it cannot be joined in the suit contemplated by the trial court's Order because the trial court has no personal jurisdiction over DSHS within the context of an SVP proceeding.

By statute, an SVP case has two parties: the Respondent (Ward) and the State of Washington, represented here by the Office of the Attorney General.[12] Generally speaking, the Attorney General's only role in this action is to prove that Ward continues to be a sexually violent predator. In these cases, the Attorney General stands in the shoes of the prosecutor and does not represent DSHS, which is a separate party, represented by a different division of the Attorney General's Office and not associated with the civil commitment proceedings.

[12] Pursuant to RCW 71.09.030 (2)(b), the Attorney General, if requested by the prosecuting attorney, is authorized to represent the State in these actions.

The fact that DSHS is not a party in sex predator proceedings means that the trial court does not have personal jurisdiction over DSHS within the context of sex predator actions. This principle is illustrated by this Court's decision in *State v. G.A.H.,* 133 Wn. App. 567, 571, 137 P.3d 66 (2006). There, after G.A.H. pled guilty to criminal charges, the court ordered that he be released to DSHS for assessment and placement, even though DSHS was not a party to the juvenile proceeding. DSHS appealed.[13] This Court ruled that, because DSHS was "not a party to G.A.H.'s juvenile offender proceeding . . . the court did not have personal jurisdiction over DSHS. . . ." and that "[t]he court['s] order requiring DSHS to place G.A.H. in foster care is . . . void and must be reversed." *Id.* at 576 (internal citation omitted).

Once the court determines a person is a mandatory joiner but that joining him to the action is not feasible, the court must determine whether to proceed without the party or dismiss the action. CR 19(b); *Spencer & Livingston*, 181 Wn.2d at 895. In conducting this analysis, the court must consider four factors:

> (1) to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; (2) the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or

[13] The court found that DSHS, although not a party to the litigation, could appeal because it was "aggrieved" by the trial court's order. 133 Wn.App. at 575.

> avoided; (3) whether a judgment rendered in the person's absence will be adequate; (4) whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

CR 19(b).

In Ward's case, application of these factors weighs in favor reversing the trial court's order setting an evidentiary hearing in this matter and requiring Ward to pursue his claims for unconstitutional conditions of confinement in the proper forum. As noted above, there is undeniable potential that a judgment rendered in DSHS's absence will be prejudicial to DSHS. Not only is there the possibility of an order of release with which DSHS cannot, under the law, comply, but there is the possibility that the trial court might believe that its jurisdiction over this matter extends to a grant of injunctive relief that could directly affect the internal operations of DSHS and the SCC. That prejudice cannot be "shaped" such that that prejudice is "reduced or avoided" since the relief requested by Ward will unavoidably affect DSHS and require some action on its part. Nor will any relief granted in the absence of DSHS be adequate: If the court finds that release is appropriate, but has no jurisdiction over DSHS and as such cannot order DSHS to comply, the relief Ward is able to obtain will not, as a practical matter, be "adequate." Finally, and perhaps most importantly, Ward has adequate remedies if the

trial court's order setting a trial date is stricken and he is required to pursue other, more appropriate, avenues of relief.

3. Ward must file a separate cause of action in order to challenge the conditions of his confinement

As noted above, conditions of confinement are not properly considered within the context of a proceeding pursuant to RCW 71.09. This does not mean, however, that Ward is without a remedy. Pursuant to RCW 71.09.080(3), any person committed pursuant to the SVP law "has the right to adequate care and individualized treatment." DSHS is required to keep records "detailing all medical, expert, and professional care and treatment received by a committed person," and such records must be made available to that person's attorney upon request. As observed by the United States Supreme Court, "if the [Special Commitment] Center fails to fulfill its statutory duty [under this section], those confined may have a state law cause of action." *Seling*, 531 U.S. at 265.

Other avenues are also available: The Rules of Appellate Procedure provide for the filing of a personal restraint petition where "[t]he conditions or manner of the restraint of petitioner are in violation of the Constitution of the United States or the Constitution or laws of the State of Washington." RAP 16.4(c)(6). Likewise, a confined person challenging the conditions of his confinement can also file an action

pursuant to 42 U.S.C. § 1983, as did Turay. *See* n.4, *infra*. *See* also *Badea v. Cox*, 931 F.2d 573, 574 (9th Cir. 1991) (civil rights action is the proper method of challenging conditions of confinement). Requiring Ward to bring this action as a PRP or civil rights action pursuant to 42 U.S.C. § 1983 would allow for joinder of the proper parties. Ward, however, has made no such challenges, and the important question of the conditions of his confinement should not be litigated within the context of a proceeding in which the only questions before the court are whether he continues to meet criteria for commitment and, if so, whether conditional release is appropriate.

D. Ward's Request For Release To The Community Is Not an Available Remedy in this Proceeding

The trial court wrongly concluded that, if it finds that Ward's statutory and/or constitutional rights are violated by continued involuntary commitment under RCW 71.09, it would have the power to grant Ward's Motion to Dismiss and unconditionally release him. CP at 703, C of L No. 5. This conclusion is at odds with applicable statutes, case law, and public policy.

1. No statute or court rule provides authority for dismissal or release

Once a person has been determined beyond a reasonable doubt to be an SVP, the statute does not permit unconditional release in the absence

of a judicial determination that the person no longer meets commitment criteria. RCW 71.09.090(3)(c). In fact, the word "dismiss" appears only once in all of RCW 71.09 and only relates to an action by the prosecutor: "If the jury is unable to reach a unanimous verdict, the court shall declare a mistrial and set a retrial within forty-five days of the date of the mistrial unless the prosecuting agency earlier moves to *dismiss* the petition." RCW 71.09.060(1) (emphasis added).

There is no statutory authority for the claim that dismissal or release is a remedy available to Ward if the trial court determines that conditions of his confinement are unconstitutional. Civil cases may be dismissed under the circumstances outlined in RCW 4.56.120.[14] However,

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[14] RCW 4.56.120 provides as follows:

An action in the superior court may be dismissed by the court and a judgment of nonsuit rendered in the following cases:

> (1) Upon the motion of the plaintiff, (a) when the case is to be or is being tried before a jury, at any time before the court announces its decision in favor of the defendant upon a challenge to the legal sufficiency of the evidence, or before the jury retire to consider their verdict, (b) when the action, whether for legal or equitable relief, is to be or is being tried before the court without a jury, at any time before the court has announced its decision: PROVIDED, That no action shall be dismissed upon the motion of the plaintiff, if the defendant has interposed a setoff as a defense, or seeks affirmative relief growing out of the same transaction, or sets up a counterclaim, either legal or equitable, to the specific property or thing which is the subject matter of the action.
>
> (2) Upon the motion of either party, upon the written consent of the other.
>
> (3) When the plaintiff fails to appear at the time of trial and the defendant appears and asks for a dismissal.
>
> (4) Upon its own motion, when, upon the trial and before the final submission of the case, the plaintiff abandons it.

none of the circumstances addressed in that rule apply in this case. Dismissal as a remedy may also be found under RCW 12.20.010,[15] but it too is inapplicable. The civil rule governing dismissal is equally irrelevant. See CR 41.

2. Case Law establishes that dismissal is not an appropriate remedy for unconstitutional conditions of confinement

Moreover, relevant case law establishes that dismissal/unconditional release *is not* the remedy for unconditional

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(5) Upon its own motion, on the refusal or neglect of the plaintiff to make the necessary parties defendants, after having been ordered so to do by the court.

(6) Upon the motion of some of the defendants, when there are others whom the plaintiff fails to prosecute with diligence.

(7) Upon its own motion, for disobedience of the plaintiff to an order of the court concerning the proceedings in the action.

(8) Upon the motion of the defendant, when, upon the trial, the plaintiff fails to prove some material fact or facts necessary to sustain his or her action, as alleged in his or her complaint. When judgment of nonsuit is given, the action is dismissed, but such judgment shall not have the effect to bar another action for the same cause. In every case, other than those mentioned in this section, the judgment shall be rendered upon the merits and shall bar another action for the same cause.

[15] RCW 12.20.010 provides as follows:

Judgment that the action be dismissed, without prejudice to a new action, may be entered, with costs, in the following cases:

(1) When the plaintiff voluntarily dismisses the action before it is finally submitted.

(2) When he or she fails to appear at the time specified in the notice, upon continuance, or within one hour thereafter.

(3) When it is objected at the trial, and appears by the evidence that the action is brought in the wrong precinct; but if the objection be taken and overruled, it shall be cause only of reversal or appeal; if not taken at the trial it shall be deemed waived, and shall not be cause of reversal.

conditions of confinement. In *Turay*, the supreme court considered the question of whether unconstitutionally inadequate conditions would permit Turay's unconditional release. The court rejected that option, and found that his remedy was not a release from confinement but, rather, an injunction or award of damages. *Turay*, 139 Wn.2d at 420.

In other contexts, SVPs have attempted to challenge the conditions at the SCC claiming, they were so punitive as applied to the litigants that continued detention amounted to Double Jeopardy and *Ex Post Facto* violations, and argued that, if the law was unconstitutional as applied to them, they should be released from total confinement. *Seling* 531 U.S. at 251; *In re Campbell*, 139 Wn.2d at 349. Both the Washington and U.S. supreme courts rejected the claim. In *Campbell*, the court found Campbell's relief would properly be remediation of the offending conditions:

> "[T]he State argues persuasively that even if [the detainee] were correct that the Center failed to develop a treatment program for his special needs, [the detainee's] conclusion that he should be released would place society at risk for his acts of sexual violence and produces an absurd result. Rather, [the State] argue[s], his remedy is to litigate that issue and, if successful, obtain appropriate treatment, not supervised release."

139 Wn.2d at 350, quoting *In re Seibert* 220 Wis.2d 308, 320, 582 N.W. 2d 745 (Wis.Ct.App., 1998). In *Seling*, the U.S. Supreme Court found SVP Young's challenge to the Washington SVP law would not result in

release from confinement in part because he had other causes of actions available to him, including injunctive relief and a suit for damages under 42 U.S.C. § 1983. *See generally Seling,* 531 U.S. 250.

3. Dismissal of this action places the public at danger from a sexually violent predator.

In creating the SVP law, the legislature specifically found that the SVP population is extremely dangerous and their treatment needs are very long-term, implying the statute contemplates a prolonged period of treatment. RCW 71.09.010; *In re Petersen,* 138 Wn.2d 70, 78, 980 P.2d 1204 (1999) (*Petersen I*). The statute involves indefinite commitment, "not a series of fixed one-year terms with continued commitment having to be justified beyond a reasonable doubt *annually* at evidentiary hearings where the State bears the burden of proof." *Id.* at 81 (emphasis in original). Following the most recent jury trial in this matter, the Court ordered Ward committed to "the custody of the Department of Social and Health Services, for control, care, and treatment until such time as the Respondent's mental abnormality and/or personality disorder has so changed that the Respondent is safe to be conditionally released to a less restrictive alternative or unconditionally discharged." CP at 303-304. Because Ward has not been found to have "so changed" since that time, he

remains an SVP, and will continue to be an SVP at the time of his conditions of confinement hearing in September of 2015.

Ward seems to believe that, if released, he will be evaluated for commitment to Western State Hospital. *Id.* Even if such an evaluation occurs, however, there is no guarantee that he will be found suitable for commitment under the terms of RCW 71.05. Dismissal of this case would unconditionally release Ward to the community with no supervision, no plan, and no support, in contravention of the legislature's intent and with a disregard toward public safety.

While the issue of Ward's release can and will be properly considered at his scheduled trial on the issue of his unconditional release, it is not an available remedy within the context of an evidentiary hearing on conditions of confinement.

V. CONCLUSION

The trial court abused its discretion by entering orders that are in direct contravention to the terms of the statute and to relevant case law. By holding a hearing on whether he will be released based on conditions of confinement, the issue of his suitability for release pursuant to the terms of RCW 71.09 will be circumvented and, potentially, a dangerous offender released not because he is no longer dangerous, but because a trial court with no jurisdiction over the subject matter or the relevant agency has

decided that his conditions of confinement are unconstitutional. This Court should reverse the trial court's orders and strike the hearing on conditions of Ward's confinement

RESPECTFULLY SUBMITTED this 21st day of December, 2015.

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Senior Counsel

NO. 73535-7

WASHINGTON STATE COURT OF APPEALS, DIVISION I

In re the Detention of: BRADLEY B. WARD, Respondent.	DECLARATION OF SERVICE

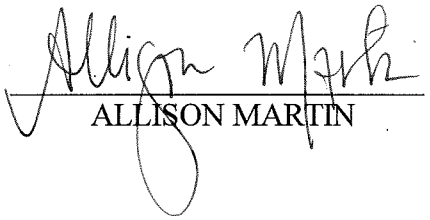
I, Allison Martin, declare as follows:

On December 21, 2015, I sent by electronic mail true and correct copies of Appellant's Opening Brief, and Declaration of Service, , addressed as follows:

Nancy Collins
Nancy@Washapp.org
WAPOFFICEMAIL@WASHAPP.ORG

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

DATED this 21st day of December, 2015, at Seattle, Washington.



ALLISON MARTIN