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COURT OF APPEALS  
DIVISION II

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IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION II

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IN RE THE DETENTION OF:

CASPER ROSS,

Appellant.

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ON APPEAL FROM THE  
SUPERIOR COURT OF PIERCE COUNTY

Before the Honorable Brian Tollefson, Judge

OPENING BRIEF OF APPELLANT

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**A. ASSIGNMENTS OF ERROR**

1. The appellant was denied due process under the State and Federal constitutions due to outrageous governmental misconduct.

2. The trial court erred in entering Finding of Fact 10.

3. The trial court erred in entering Finding of Fact 11.

4. The trial court erred in entering Finding of Fact 13.

5. The trial court erred in entering Finding of Fact 14.

6. The trial court erred in entering Finding of Fact 15.

7. The trial court erred in entering Finding of Fact 16.

8. The trial court erred in entering Conclusion of Law 2 and each subsection thereof.

9. The trial court erred in revoking the appellant's conditional release from the Special Commitment Center to a Less Restrictive Alternative [LRA] where the findings were not proved by a preponderance of the evidence.

**B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Does the due process clause of the state and federal constitutions require reversal of an order revoking an order releasing a person committed to the Special Commitment Center to a Less Restrictive Alternative where the escorts responsible for supervising the appellant engaged in a pattern of deviating from the terms of the LRA and rules of

the Secure Community Transition Center? Assignment of Error No. 1.

2. Does a pattern of deviations from SCTF policy by DSHS escorts assigned to supervise a person on an LRA regarding SCTF approval for any deviation from the “travel log” constitute outrageous governmental misconduct? Assignment of Error No. 1.

3. Was the appellant denied due process when the record does not support by a preponderance of the evidence the court’s findings that the appellant’s LRA placement should be revoked where the possession of a photograph was not a “serious offense” since the record is unclear whether it was stolen? Assignments of Error No. 2, 3, and 9.

4. Was the appellant denied due process of law when the record does not support by a preponderance of the evidence the court’s findings that he deviated from travel logs without the approval of the treatment team, where the escorts responsible for supervising the appellant engaged in a pattern of making unauthorized deviations from the travel log, and where the appellant had previously made complaints about the practice and was told that escorts could engage in deviations, and where it was not possible for the appellant to know if an escort had legitimately obtained permission to deviate from the travel log? Assignments of Error No. 4, 5, 8 and 9.

5. Was the appellant denied due process of law where the

decision by sex offender treatment provider Lang Taylor to discontinue providing treatment to the appellant, and the decision of the SCTF to not house the appellant, were based in large part upon the deviations promulgated by the DSHS escorts and possession of a photograph of an DSHS escort, challenged *supra*? Assignments of Error No. 6, 7, 8, and 9.

### **C. STATEMENT OF THE CASE**

#### **1. Procedural history:**

Casper Ross [Ross] was civilly committed as a sexually violent predator [SVP] pursuant to chapter 71.09 RCW in 1998. Report of Proceedings [RP] at 17. A person may be civilly detained as an SVP if that person has been convicted of sexually violent offenses as defined by RCW 71.09.020(16). Ross was committed to the Special Commitment Center [SCC] at McNeil Island, where he participated in sex offender treatment. RP at 17. He remained in total confinement at the SCC until January 2, 2003, when he was released to the Secure Community Transition Facility [SCTF], also located on McNeil Island. RP at 10-11. The placement in the SCTF is a Less Restrictive Alternative [LRA] under 71.09.020(6). The SCTF is a separate physical facility from the SCC. RP at 194. The SCTF has a total of 24 residents. RP at 194.

SVPs who are transferred to the SCTF may leave McNeil Island for trips to the mainland, but are required to have an escort with them at all

times. RP at 11. Any trip to the community must be done with prior approval. RP at 11. Escorts are called Residential Rehabilitation Counselors [RRC]. RP at 11. On a trip to the mainland, all stops must be at preapproved locations. RP at 15. If there is a need for a restroom break, to stop for food, or to otherwise make a stop not on the trip plan, the RRC is required to notify the SCTF control of the proposed deviation. RP at 15, 200, 214. Each resident who goes off-island must wear an ankle bracelet and a motion tracking device that can be used with GPS to track the resident's movements. RP at 16. Escorts in the field are required to call the SCTF control room on a regular basis, including when they are on the boat to the mainland, when they get to Steilacoom, when they arrive at the prearranged location, and then at least hourly thereafter. RP at 201.

Ross remained in the SCTF program for over four years. After transitioning to the SCTF in January, 2003, he obtained full-time employment in October, 2006 and started working in the concrete construction and general construction industries. RP at 24. His job sites ranged from Federal Way to Centralia and Chehalis. RP at 24, 161. He did well in the SCTF program, and in early 2007 his sister Carmen Perona's house in Tacoma was approved as a place for Ross' transition to the community. RP at 26, 27, 172.

Ross remained in the SCTF program until April 8 or 9, 2007, when

he was moved back to the SCC. RP at 155. The return to the SCC was precipitated by an incident on April 1, 2007 in Lakewood, Washington. RP at 18, 24, 177. On that date, Ross and his DSHS RSS escort, Nora Cutshaw, were visiting the house of Ross' cousin in Lakewood during a preapproved visit. RP at 176-79. While at the house, a Lakewood police officer knocked on the door while performing an unannounced visit to determine whether Ross was at the house as had been scheduled in the travel log. RP at 282-83. The SCTF van was not parked in front of the house, but was located at the back of the house. RP at 284. No one answered after the officer knocked on the door. He went to the back of the house and knocked on a window and Cutshaw answered the door. RP at 284. Cutshaw appeared to be disheveled and was adjusting her hair and her shirt. RP at 288-89. Ross walked out of a bedroom at that time and appeared to be adjusting his belt. RP at 176, 285. Following the incident, Ross was confined to SCTF while the matter was investigated. He was moved back to the SCC in April, 2007. RP at 18.

Ross' Community Corrections Officer Tela Wilson filed a Notice of Violation on April 19, 2007. Clerk's Paper [CP] at 36. Ross' personal effects were also moved back to the SCC. Among the items that were moved to the new facility was a framed picture, behind which was hidden a photo of Cutshaw in a swim suit. RP at 142-43. During a search of

Ross' room, an SCTF staff member also found another hidden photo of Cutshaw. CP at 37.

Lang Taylor, Ross' sex offender treatment provider, ended Ross' treatment on April 18, 2007. RP at 106. Dr. Mark Whitehill, a certified sex offender treatment provider, stated that he considers Ross to be still amenable to treatment in the community, but that Ross' possession of the photo and the concern that "there would be kind of sexual fantasizing about a staff [member]" would be "quite concerning issues that would be dealt with therapeutically . . . ." RP at 346.

The State filed a petition to revoke Ross' LRA pursuant to RCW 71.09.098 on May 1, 2007, alleging that he had violated the conditions of the court's release order. CP at 35-76.

The revocation petition was heard by the Honorable Brian Tollefson on February 29, March 10, and March 13, 2008.

Judge Tollefson considered whether Ross violated the terms of the court order, and if so, whether he would be revoked from the program, or whether the court would modify the terms of Ross' LRA.

The State argued that Ross violated the terms of his LRA by having deviations from the scheduled trips that he did not report and that deviation to malls and other places should have been reported to the treatment team. RP at 395.

The State also argued that Ross should not have left his work site to go eat lunch, and that going to an area where nobody is around with a female escort is a violation that should have been reported. RP at 395. The State conceded that Ross probably had absolutely nothing to with deviations to stop at gas stations “or even whether his escort should have been calling it in.” RP at 394. The State argued that Ross stole the photo of Cutshaw, and that the action constituted a “serious violation” as defined by RCW 71.09.325(1)(a). RP at 396.

The defense argued that the revocation petition was filed as a political response to negative publicity generated from the newspaper account of the April 1, 2007 incident in Lakewood. RP at 402.

On March 18, 2008, Judge Tomlinson ruled that the problem with continuing the LRA is that Ross doesn’t have an approved housing outside the SCC, that Mark Whitehill was equivocal about providing sex offender treatment for him, and that Ross therefore doesn’t have an approved treatment provider. RP at 439. The court found that he had no choice but to revoke the conditional release under RCW 71.09.098(3). CP at 159-60.

The court entered findings of fact on March 24, which included:

10. The Respondent admitted to stealing a photograph of DSHS escort Nora Cutshaw. The photograph depicts Ms. Cutshaw wearing a bathing suit. The Respondent concealed the photograph of Ms. Cutshaw in his room, hidden behind a photograph of his daughter.

11. The Respondent did not tell his treatment provider, Mr. Taylor, or any member of his treatment team or SCTF staff that he had a photograph of Ms. Cutshaw in his possession, nor did he seek permission from the Mr. Taylor [sic] any treatment team member or the SCTF to possess the photograph of Ms. Cutshaw.

...

13. On multiple occasions while on off-island trips, the Respondent deviated from the travel plans approved by his treatment team. Some of those deviations occur without the permission of any member of his treatment team.

14. The respondent did not report to his treatment team all of the repeated deviations from the travel log.

15. The SCC SCTF are no longer willing to provide housing for the Respondent at the SCTF.

16. Lang Taylor is currently not willing to provide community based treatment to the Respondent.

17. The allegations relating to April 1, 2007 were dismissed by agreement of the parties.

The court also entered conclusions of law, including the following:

2. The evidence presented demonstrates by a preponderance of the evidence that the Respondent violated this Court's release order by:

a. Failing to comply with all SCTF regulations, treatment plans and treatment rules by:

- i. Deviating from his approved travel logs;
- ii. Stealing and possessing a photograph of his DSJS escort, Nora Cutshaw;

- b. Being terminated from treatment by Lang Taylor, the only treatment provider approved by the Court in its release order;
- c. Failing to having approved housing at the SCTF, the only residential placement approved by the Court in its release order.

CP at 157-160. Appendix B.

Timely notice of appeal was filed on April 21, 2008. CP at 11. Ross appeals from the designated Findings of Fact and Conclusions of Law and order revoking his 2003 Conditional Release Order and returning him to the SCC. CP at 157-60.

**2. Substantive facts:**

The SCTF superintendant received notice from the Lakewood Police Department of a possible violation of conditions of Ross' LRA during an approved off-island trip to Ross' cousin's house in Lakewood on April 1, 2007. RP at 18, 177, 283-84. Lakewood police conduct random spot checks of persons in the SCTF who travel to that jurisdiction. RP at 246. The officer who went to the house knocked on the door and did not immediately receive an answer. RP at 283. Cutshaw stated that she was sitting on a couch watching a movie and did not answer the door because it was not her house and she did not know who was knocking. RP at 283. The officer knocked on a window at the back of the house, and she

answered the door and let him into the house. RP at 284. Cutshaw stated that she parked the van in the back of the house in the parking area. RP at 284. Cutshaw acknowledged that the officer claimed to have seen her “answering the door in a disheveled manner and playing with [her] hair.” RP at 288. She denied that she was disheveled and said that she had “just gotten up off the couch so of course I was adjusting my clothes.” RP at 289. She stated that it was “normal for me to be touching and messing with my hair.” RP at 289. The officer questioned her and then looked inside her trip bag. RP at 285. A trip bag contains a detainee’s photo and court papers and the escort is required to carry during an off-island trip. RP at 284. After about three minutes the officer left. RP at 287. Ross’ visit at the cousin’s house then continued. RP at 288.

The incident was reported in a Tacoma newspaper article suggesting that there was a sexually inappropriate relationship between Ross and Cutshaw. RP at 168.

Cutshaw denied having inappropriate contact or an inappropriate relationship with Ross. RP at 280.

Ross stated that he was coming out the bathroom and was asked by police officer to show his GPS unit. RP at 178.

The notice to the SCTF resulted in a search of Ross’ room and his possessions, and a photograph of Cutshaw was found hidden behind

another photograph in his room. RP at 19, 20. Exhibits 2 and 3. The photo of Cutshaw was hidden in a frame behind a picture of Ross' daughter taken during a graduation ceremony. RP at 143.

Following the complaint regarding the April 1 incident, Ross was moved back to the SCC and his community-based LRA treatment option of moving into Perona's house was terminated. RP at 172. Ross was sent back to the SCC in early April, 2007. RP at 142.

Ross' sex offender treatment provider, Lang Taylor, stated that Ross told him that he had taken the photos out of an album without Cutshaw's knowledge. RP at 385. Ross acknowledged that he told Lang Taylor that he had stolen the pictures and that he was not supposed to have them. RP at 143. He testified at the revocation hearing that he found the photo of Cutshaw on the floor of the SCTF but couldn't remember when that occurred. RP at 142. He said that he hid it behind the graduation picture of his daughter because he couldn't find a good way to return it to Cutshaw. RP at 143. He was in treatment with Lang Taylor during that time, but did not tell him about the photo until its discovery in April. RP at 144.

Cutshaw said that she brought a photo album to the island and that some of her albums have loose pictures in the back. RP at 259. She said that she brought the album to work and had it in her bag at work and when

she “went on escort” that day. RP at 259. She stated that she was not aware that the picture was in the album and was not aware that had been lost from the album. RP at 260.

Ross was permitted to leave the island and go into the community during the four years, three months he was at the SCTF. RP at 157. He was always accompanied by an escort when he left the island. RP at 157. When he started at the SCTF, he usually had one escort, and then when he got a full time job he had two escorts at all times. RP at 157. Cutshaw was an escort for him for the last two years of the four year period. RP at 158. Ross got a full time construction job in 2006, and was off the island “practically every day.” RP at 164.

Ross testified that although any proposed off-island location he went to had to have a “site check” by an escort, a site check was not done for every location he submitted. RP at 146. He stated that some places he was approved to go that were not checked was the Tacoma Mall, parks, and a McDonald’s restaurant where he worked but at which he had not been authorized to eat. RP at 147, 149. While off the island, Ross testified that he was taken by SCTF escorts to various places that were not approved locations, including malls and parks. RP at 147. He stated that during these trips, he was transported by staff members and that “he didn’t have a choice” in where they went. RP at 147. He stated that he did not

report some of the deviations because he did not believe that they were deviations. RP at 147. At other times Ross reported incidents that were not considered violations and “nothing was done about it . . . .” RP at 147. Ross stated that he did not complain about being taken by staff members to places where he wasn’t supposed to be “[b]ecause the staff informed me that things that they—places that they were going for part of their routine for something they needed to do and I was supposed to follow the directive and stay in the van and go with them at all times.” RP at 149. He testified that when he did complain about deviations from the travel log, he was told that the staff members were allowed to do certain things if they deemed it was necessary to perform their job duties. RP at 153.

Ross testified that he had no way of knowing whether an escort had called back to the SCTF for a trip deviation authorization. RP at 162, 167, 175.

Ross acknowledged that he was dishonest with Lang Taylor about having the picture of Cutshaw in his possession and that there were times when he did not keep Taylor apprised of his movements in the community. RP at 152, 153.

Cutshaw was investigated regarding the allegation of sexual contact with Ross on April 1, and she subsequently resigned from DSHS in October, 2007. RP at 290, 291. Cutshaw acknowledged making

unapproved deviations in her trips. RP at 300-01. She admitted that on at least one occasion she called into the SCTF control room, in Ross' presence, and lied about where they were located. RP at 309.

Cutshaw was questioned regarding a variety of stops with Ross in 2007 at locations such as the Bank of America, Lakewood Towne Center Mall, a shopping center in Federal Way, the South Sound Center in Tukwila, a shopping center in Redmond and Snoqualmie Falls. RP at 300-01. Of these stops, she stated that the majority of these stops were her idea, except Snoqualmie Falls, which was requested by another escort. RP at 301. When asked if Ross had told the escort that they were not approved locations, Cutshaw stated that it was not Ross' job to do so. RP at 302.

#### **D. ARGUMENT**

1. **THE ACT OF DSHS ESCORTS IN CHARGE OF SUPERVISING ROSS WHO ENGAGED IN A PATTERN OF UNAUTHORIZED DEVIATIONS DURING OFF-ISLAND TRIPS, DURING WHICH THE ESCORT WAS RESPONSIBLE FOR REPORTING ANY DEVIATION, IS SUCH OUTRAGEOUS BEHAVIOR THAT THE DUE PROCESS CLAUSE REQUIRES REVERSAL OF THE ORDER FOR REVOCATION AND DISMISSAL OF THE PETITION FOR REVOCATION OF ROSS' LRA.**

The state and federal constitutions guarantee the right to due

process of law. U.S. Const. amend 14; Wash. Const. art. 1, § 3. A person's right to be free from physical restraint "has always been at the core of the liberty protected by the Due Process Clause from arbitrary government action." *Foucha v. Louisiana*, 504 U.S. 71, 80, 112 S. Ct. 1780, 118 L. Ed.2d 437 (1992). In this case the government has engaged in a continuing cycle of outrageous misconduct by placing Ross in an impossible situation where he was subjected to the control of DCFS escorts who exhibited a pattern of breaking DCFS rules, but nevertheless made Ross liable for their misconduct. DSHS escorts engaged in a pattern of governmental conduct by promoting deviations from the travel log during off-island trips. Ross was required to comply with the requirements of his release order, including reporting all deviations by staff from the trip plan, no matter how minor. The DSHS escorts, however, deviated from the trip plan without reporting the deviations to the SCTF manger.

The conduct of the DSHS escorts in part resulted in the State's petition for revocation filed in May, 2007. The actions of the escorts constitute outrageous governmental conduct.

In the context of a claim of "outrageous conduct is founded on the principle that the conduct of police officers or informants may be 'so outrageous that due process principles would absolutely bar the

government from invoking judicial processes to obtain a conviction.”  
*State v. Lively*, 130 Wn.2d 1, 19, 921 P.2d 1035 (1996) quoting *United States v. Russell*, 411 U.S. 423, 431-32, 93 S.Ct. 1637, 36 L.Ed.2d 366 (1973). Outrageous police conduct meets this test if it “shock[s] the universal sense of fairness.” *Id.* Although reported Washington decisions involve criminal matters, the doctrine of outrageous conduct is equally applicable here.

The issue of whether a State agent has engaged in outrageous conduct “is a matter of law, not a question for the jury.” *Id.* Since it is a question of law, an appellate court must review denial of such a claim under the *de novo* standard of appellate review. *In re Electric Lightwave, Inc.*, 123 Wn.2d 530, 536, 869 P.2d 1045 (1994). In reviewing a claim of outrageous government conduct, the appellate court is to evaluate the conduct based on the totality of the circumstances. *Lively*, 130 Wn.2d at 21. “Each case must be resolved on its own unique set of facts and each component of the conduct must be submitted to scrutiny bearing in mind “proper law enforcement objectives – the prevention of crime and the apprehension of violators, rather than the encouragement of a participation in sheer lawlessness.” *Id.* at 22. In particular the Supreme Court has noted that courts should consider “whether the government conduct itself amounted to criminal activity or conduct ‘repugnant to a sense of justice.’” *Id.*

In the present case, it is indisputable that SCTF escorts engaged frequently deviated from the travel log, including at least one instance of running a personal errand to an escort's residence to obtain diabetes medication for the escort. RP at 166. Cutshaw in particular violated SCTF rules regarding deviations.

In addition to the fact that the escorts were engaged in serious, continuing misconduct by deviating from the travel logs, the pattern is clear that the escorts, particularly Cutshaw, either didn't know the SCTF requirements or didn't care. Cutshaw's decision to bring a photo album containing a picture of her in a swimsuit to the SCTF and to take the album with her while performing her job as an RSS is particularly outrageous.

Under these circumstances, Ross was without recourse. When he did complain about the deviations he was told by either the SCTF manger or his CCO Linda McGrann that the staff were allowed to do certain things deemed necessary to perform their jobs. RP at 153. If an escort chose to deviate from the travel log, Ross could not simply get out of the vehicle—he was required to remain with the escort. In other instances, Ross would have no knowledge of whether a particular deviation had been preapproved by the escort. He testified that he would have no idea of whether it had been reported or not. RP at 175.

Dennis Pickett, formerly the manager of the SCTC, acknowledged that “[f]or staff to be going places without informing and approving is inappropriate, unacceptable, and I believe by 71.09 probably illegal.” RP at 254.

Moreover, Ross faced retaliation if he reported every suspected deviation. He testified that on one occasion an escort purposely drove slowly so he would miss the boat to take him off the island, apparently in relation to a complaint he had made regarding that escort. RP at 166.

The conduct of the escorts placed Ross in an untenable situation where he would have to report every single stop on the assumption that it was not preapproved by the SCTF. For someone like Ross—working full time off the island—it placed him in an impossible situation.

The *Lively* decision, although involving the conduct of a government informant in a criminal investigation, is illuminating. In that case, the *Lively* Court focused on the issue of whether the government agent had any power to control the defendant’s actions. In *Lively*, the Court found that the government informant deliberately exploited his psychological power of control that flowed from the defendant’s emotional reliance upon the agent. The agent promised to marry the defendant, and told her that he loved her. The Supreme Court found “the emotional reliance of the Defendant on the informant was an integral part

of the informant's control." *Id.* at 24. "The Defendant, an alcoholic in extreme distress, developed a relationship with the informant. As a result, she became emotionally reliant on him." *Id.* at 26.

In the present case, the RRC's power over Ross was not emotional; but far stronger.<sup>1</sup> An escort has the power to drive to places that are not approved, and failure to report by the detainee would be a violation of the LRA. On the other hand, Ross did not always know which stops or destinations were preapproved by the SCTF. Turning right or left would have the effect of triggering a violation that could result in revocation of the LRA. Cutshaw in particular had the power to deviate, and he was essentially powerless since he had to stay in the vehicle. If an escort chose to deviate, he would be placed in the difficult of position of having to 'inform' on the escort, and therefore make himself subject to retaliation. And last, during the times that Ross attempted to report a deviation, he was told that staff members could go where they wanted in the course of the jobs.

The *Lively* opinion states: "another factor relevant to a finding of outrageous conduct is whether the police motive was to prevent further crime or protect the populace." *Id.* at 26. The answer to that inquiry in the

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<sup>1</sup> It should be noted, however, that Ross stated that he did not tell anyone about his possession of Cutshaw's picture because he did not want her to get into trouble, and characterized the two of them as being "friendly," indicating some emotional control over Ross by Cutshaw. RP at 165.

present case is obvious. The deviations were not done to protect the public or prevent crime. The deviations were done for the convenience of the escort. In one case the escort—John Ringener—went to his private house to get diabetes medication. RP at 166. Ross testified that by the time of the deviation, the SCTF managers were not responding to previous complaints and Ross was told “to follow the directives of [the] escorts.” RP at 166.

In this case the governmental misconduct was not done for an investigatory purpose, but was done solely due to a pattern of willfully ignoring or flaunting the rules by the escorts, particularly Cutshaw. There was absolutely no law enforcement utility or benefit to the protection of the public to be gained by the unauthorized deviations. *See, generally State v. Emerson*, 10 Wn. App. 235, 241-42, 517 P.2d 245 (1973).

In sum, the Superior Court erred by revoking Ross’ LRA. The *Lively* factors weigh heavily in favor of finding outrageous governmental, misconduct warranting reversal of the revocation and dismissal of the petition with prejudice.

2. **ROSS WAS DENIED DUE PROCESS OF LAW WHEN THE RECORD DOES NOT SUPPORT BY A PREPONDERANCE OF THE EVIDENCE THE COURT’S FINDING THAT ROSS’ LRA ORDER SHOULD BE REVOKED.**

Due process of the law requires the Petitioner to prove each

element of its case by clear, cogent, and convincing evidence. *Dunner v. McLaughlin*, 100 Wn.2d 832, 846, 676 P.2d 444 (1984). “It is, of course, unquestioned that no person may be deprived of life, liberty, or property without due process of law.” *Detention of Hendrickson*, 140 Wn.2d 686, 694, 2 P.3d 473 (2000), citing *In Personal Restraint of Young*, 122 Wn.2d 1, 26, 857 P.2d 989 (1993); U.S Constitution, Amendments 5 and 14, and Wash. Const. art 1, § 3.

Here, the State failed to produce sufficient evidence to show that Ross willfully violated the condition of the release order that should result in his removal from the LRA.

On January 2, 2003 the court entered an Order releasing Ross to an LRA. The Order on Release imposed the conditions, including:

1. The Respondent shall be released from the SCC to a less restrictive alternative (LRA) residential placement at the Secure Community Transition Facility (SCTF) on January 6, 2003.

...

8. You shall abide by all rules and conditions imposed upon you by the SCTF.

CP at 42, 43.

The Court found that Ross admitted to stealing a photograph from RRC Cutshaw. Finding of Fact 10. Exhibit 2. Cutshaw testified that she

brought a photo album to the SCC and that was not aware that the photograph was in the album or that it was missing. RP at 259-60. She acknowledged she should have checked the album for inappropriate photos before bringing it to work. RP at 296. Ross testified that the photograph of Cutshaw fell out of the photo album at the SCTF and that he found it on the floor. RP at 142. He stated that he did not have a good way to return it, so he concealed it. RP at 143. He acknowledged that he told Lang Taylor that he stole it. RP at 143.

While possession of the photograph and failure to tell his therapist about it was inappropriate, the Appellant submits that any infraction was de minimis and does not merit revocation of the LRA. It was clearly wildly inappropriate for Cutshaw to bring the photograph onto the island. Moreover, the State contends that it was stolen and therefore a “serious violation under RCW 71.09.325. RP at 396. RCW 71.09.325 provides that a “conditionally released person who commits a serious violation of conditions shall be returned to the special commitment center, unless arrested by a law enforcement officer, and the court shall be notified immediately and shall initiate proceedings under RCW 71.09.098 to revoke or modify the less restrictive alternative placement.” The statute defines "serious violation" as (a) the commission of any criminal offense; (b) any unlawful use or possession of a controlled substance; and (c) any

violation of conditions targeted to address the person's documented pattern of offense that increases the risk to public safety. A “serious violation” is not limited to these three categories. RCW 71.09.325.

Ross stated that he found the photo of Cutshaw while at the SCTF. RP at 142. He stated that he did tell Lang Taylor that he had the picture. RP at 168. Cutshaw did not report it as stolen. RP at 259-60. The record is far from clear that Ross’ possession of the photograph, although a violation of the conditions of the LRA, was obtained by stealing it and therefore a “serious violation.”

The court found that Ross did not tell his treatment provider about the photograph. Finding of Fact 12. Again, this constitutes at best a *de minimis* violation, particularly in light of Cutshaw’s negligence in bringing the photo into the facility.

The court found that Ross deviated from the travel plans approved by his treatment team and that he did not report all of the reported deviations from the travel log. Findings of Fact 13 and 14. As argued in § 1, *supra*, many of the reported deviations were part of a pattern of willful rule-breaking by the escorts that placed Ross in an impossible situation where he had reported perceived violations and had been told it was within the discretion of the RRC to deviate from the travel log.

Lang Taylor stated that he is not willing to provide community

based treatment to Ross, and the SCTF was not willing to provide housing for Ross. Findings of Fact 15 and 16. The testimony presented by the State, however, failed to demonstrate that Ross failed to comply with the treatment conditions other than the possession of the photograph, and the deviations largely fostered by the escorts. The result of the possession of the photograph and the acts of the DSHS to engage in repeated violations of the travel log resulted in Ross' termination from his treatment provider and the refusal of SCTF to provide housing. Ross submits that but for the government misconduct, the SCTF would still be willing to provide housing to him and Taylor would still be willing to provide offender treatment.

Moreover, Dr. Whitehill's testimony was not equivocal regarding future community-based treatment of Ross, as Judge Tollefson found. Dr. Whitehill stated that Ross was still amenable to treatment in the community, but that he would have to review the issues to consult with Ross to determine precisely what happened. RP at 346, 364. Dr. Whitehill did not state that he would be unwilling to provide treatment to Ross.

The evidence presented simply did not reveal a factual basis for concluding that Ross violated the conditions of the LRA willfully or in any significant way. Consequently, it was error to revoke Ross' LRA and to commit him to the SCC.

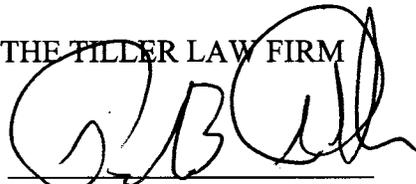
**E. CONCLUSION**

For the foregoing reasons, Casper Ross respectfully requests this Court reverse the order revoking his conditional release to an LRA and dismiss the petition as a sanction for outrageous governmental conduct.

DATED this 23rd day of March, 2009.

Respectfully submitted,

THE TILLER LAW FIRM

A handwritten signature in black ink, appearing to read 'P. B. Tiller', written over a horizontal line.

PETER B. TILLER

WSBA No. 20835

Attorneys for Casper Ross

P.O. Box 58

Centralia, WA 98531

## APPENDIX A

### STATUTES

#### **RCW 71.09.020**

##### Definitions.

Unless the context clearly requires otherwise, the definitions in this section apply throughout this chapter.

- (1) "Department" means the department of social and health services.
- (2) "Health care facility" means any hospital, hospice care center, licensed or certified health care facility, health maintenance organization regulated under chapter 48.46 RCW, federally qualified health maintenance organization, federally approved renal dialysis center or facility, or federally approved blood bank.
- (3) "Health care practitioner" means an individual or firm licensed or certified to engage actively in a regulated health profession.
- (4) "Health care services" means those services provided by health professionals licensed pursuant to RCW 18.120.020(4).
- (5) "Health profession" means those licensed or regulated professions set forth in RCW 18.120.020(4).
- (6) "Less restrictive alternative" means court-ordered treatment in a setting less restrictive than total confinement which satisfies the conditions set forth in RCW 71.09.092. A less restrictive alternative may not include placement in the community protection program as pursuant to RCW 71A.12.230.
- (7) "Likely to engage in predatory acts of sexual violence if not confined in a secure facility" means that the person more probably than not will engage in such acts if released unconditionally from detention on the sexually violent predator petition. Such likelihood must be evidenced

by a recent overt act if the person is not totally confined at the time the petition is filed under RCW 71.09.030.

(8) "Mental abnormality" means a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to the commission of criminal sexual acts in a degree constituting such person a menace to the health and safety of others.

(9) "Predatory" means acts directed towards: (a) Strangers; (b) individuals with whom a relationship has been established or promoted for the primary purpose of victimization; or (c) persons of casual acquaintance with whom no substantial personal relationship exists.

(10) "Recent overt act" means any act or threat that has either caused harm of a sexually violent nature or creates a reasonable apprehension of such harm in the mind of an objective person who knows of the history and mental condition of the person engaging in the act.

(11) "Risk potential activity" or "risk potential facility" means an activity or facility that provides a higher incidence of risk to the public from persons conditionally released from the special commitment center. Risk potential activities and facilities include: Public and private schools, school bus stops, licensed day care and licensed preschool facilities, public parks, publicly dedicated trails, sports fields, playgrounds, recreational and community centers, churches, synagogues, temples, mosques, public libraries, public and private youth camps, and others identified by the department following the hearings on a potential site required in RCW 71.09.315. For purposes of this chapter, "school bus stops" does not include bus stops established primarily for public transit.

(12) "Secretary" means the secretary of social and health services or the secretary's designee.

(13) "Secure facility" means a residential facility for persons civilly confined under the provisions of this chapter that includes security measures sufficient to protect the community. Such facilities include total confinement facilities, secure community transition facilities, and any residence used as a court-ordered placement under RCW 71.09.096.

(14) "Secure community transition facility" means a residential facility for persons civilly committed and conditionally released to a less

restrictive alternative under this chapter. A secure community transition facility has supervision and security, and either provides or ensures the provision of sex offender treatment services. Secure community transition facilities include but are not limited to the facility established pursuant to RCW 71.09.250(1)(a)(i) and any community-based facilities established under this chapter and operated by the secretary or under contract with the secretary.

(15) "Sexually violent offense" means an act committed on, before, or after July 1, 1990, that is: (a) An act defined in Title 9A RCW as rape in the first degree, rape in the second degree by forcible compulsion, rape of a child in the first or second degree, statutory rape in the first or second degree, indecent liberties by forcible compulsion, indecent liberties against a child under age fourteen, incest against a child under age fourteen, or child molestation in the first or second degree; (b) a felony offense in effect at any time prior to July 1, 1990, that is comparable to a sexually violent offense as defined in (a) of this subsection, or any federal or out-of-state conviction for a felony offense that under the laws of this state would be a sexually violent offense as defined in this subsection; (c) an act of murder in the first or second degree, assault in the first or second degree, assault of a child in the first or second degree, kidnapping in the first or second degree, burglary in the first degree, residential burglary, or unlawful imprisonment, which act, either at the time of sentencing for the offense or subsequently during civil commitment proceedings pursuant to this chapter, has been determined beyond a reasonable doubt to have been sexually motivated, as that term is defined in RCW 9.94A.030; or (d) an act as described in chapter 9A.28 RCW, that is an attempt, criminal solicitation, or criminal conspiracy to commit one of the felonies designated in (a), (b), or (c) of this subsection.

(16) "Sexually violent predator" means any person who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility.

(17) "Total confinement facility" means a secure facility that provides supervision and sex offender treatment services in a total confinement setting. Total confinement facilities include the special commitment center and any similar facility designated as a total confinement facility by the secretary.

[2006 c 303 § 10. Prior: 2003 c 216 § 2; 2003 c 50 § 1; 2002 c 68 § 4; 2002 c 58 § 2; 2001 2nd sp.s. c 12 § 102; 2001 c 286 § 4; 1995 c 216 § 1; 1992 c 145 § 17; 1990 1st ex.s. c 12 § 2; 1990 c 3 § 1002.]

**RCW 71.09.098**

Conditional release to less restrictive alternative -- Hearing on revocation or modification -- Authority to apprehend conditionally released person.

(1) 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.

(2) If the prosecuting attorney, the supervising community corrections officer, or the court, based upon information received by them, reasonably believes that a conditionally released person is not complying with the terms and conditions of his or her conditional release to a less restrictive alternative, the court or community corrections officer may order that the conditionally released person be apprehended and taken into custody until such time as a hearing can be scheduled to determine the facts and whether or not the person's conditional release should be revoked or modified. A law enforcement officer, who has responded to a request for assistance from a department employee, may apprehend and take into custody the conditionally released person if the law enforcement officer reasonably believes that the conditionally released person is not complying with the terms and conditions of his or her conditional release to a less restrictive alternative. The conditionally released person may be detained in the county jail or returned to the secure community transition facility. The court shall be notified before the close of the next judicial day of the person's apprehension. Both the prosecuting attorney and the conditionally released person shall have the right to request an immediate mental examination of the conditionally released person. If the conditionally released person is indigent, the court shall, upon request, assist him or her in obtaining a qualified expert or professional person to conduct the examination.

(3) The court, upon receiving notification of the person's apprehension, shall promptly schedule a hearing. The issue to be determined is 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. Hearsay evidence is admissible if the court finds it otherwise reliable. At the hearing, 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.

[2006 c 282 § 1; 2001 c 286 § 13; 1995 c 216 § 13.]

#### **RCW 71.09.325**

Transition facilities — Conditional release — Reports — Violations.

(1) The secretary shall adopt a violation reporting policy for persons conditionally released to less restrictive alternative placements. The policy shall require written documentation by the department and service providers of all violations of conditions set by the department, the department of corrections, or the court and establish criteria for returning a violator to the special commitment center or a secure community transition facility with a higher degree of security. Any conditionally released person who commits a serious violation of conditions shall be returned to the special commitment center, unless arrested by a law enforcement officer, and the court shall be notified immediately and shall initiate proceedings under RCW 71.09.098 to revoke or modify the less restrictive alternative placement. Nothing in this section limits the authority of the department to return a person to the special commitment center based on a violation that is not a serious violation as defined in this section. For the purposes of this section, "serious violation" includes but is not limited to:

- (a) The commission of any criminal offense;
- (b) Any unlawful use or possession of a controlled substance; and

(c) Any violation of conditions targeted to address the person's documented pattern of offense that increases the risk to public safety.

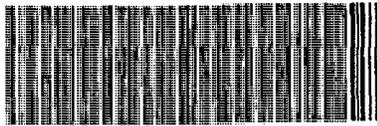
(2) When a person is conditionally released to a less restrictive alternative under this chapter and is under the supervision of the department of corrections, notice of any violation of the person's conditions of release must also be made to the department of corrections.

(3) Whenever the secretary contracts with a service provider to operate a secure community transition facility, the contract shall include a requirement that the service provider must report to the department of social and health services any known violation of conditions committed by any resident of the secure community transition facility.

(4) The secretary shall document in writing all violations, penalties, actions by the department of social and health services to remove persons from a secure community transition facility, and contract terminations. The secretary shall compile this information and submit it to the appropriate committees of the legislature on an annual basis. The secretary shall give great weight to a service provider's record of violations, penalties, actions by the department of social and health services or the department of corrections to remove persons from a secure community transition facility, and contract terminations in determining whether to execute, renew, or renegotiate a contract with a service provider.

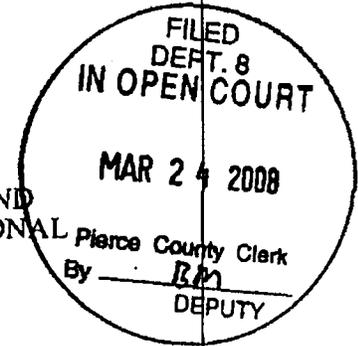
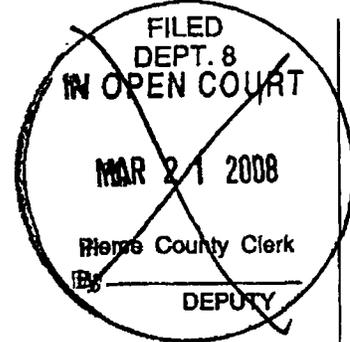
[2001 2nd sp.s. c 12 § 221.]

## APPENDIX B



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**STATE OF WASHINGTON  
PIERCE COUNTY SUPERIOR COURT**

In re the Detention of:  
  
CASPER ROSS,  
  
Respondent.

NO. 98-2-03520-5  
  
FINDINGS OF FACT,  
CONCLUSIONS OF LAW, AND  
ORDER RE: 2003 CONDITIONAL  
RELEASE ORDER

THIS MATTER came before the Court on January 17, 2008, on the Petitioner's motion to revoke this Court's order releasing Respondent Casper Ross to a less restrictive alternative placement (LRA). The Petitioner, State of Washington, was represented by Assistant Attorney General Jana R. Franklin. The Respondent was present in person at the proceedings and was represented by his counsel, James Schoenberger and Ann Stenberg. In determining this matter, the Court considered the pleadings filed by the parties, the testimony of the witnesses at the revocation hearing, exhibits admitted at the hearing, and the argument of counsel. Based upon this, the Court enters the following findings of fact, conclusions of law, and order.

**I. FINDINGS OF FACT**

1. The Respondent, Casper Ross, is involuntary civilly committed as a sexual violent predator (SVP), as that term is defined in RCW 71.09.020(16).
2. On January 2, 2003, this Court entered an order (hereafter, release order) releasing the Respondent from total confinement at the Special Commitment Center (SCC) to a less

1 restrictive alternative placement (LRA) at the Secure Community Transition Facility (SCTF)  
2 located in Pierce County. Page 3, ¶ 12.

3 3. The Respondent was provided with a copy of the release order and the appendices  
4 thereto. Page 4, ¶ 20.

5 4. The Respondent read and understood all of the conditions imposed by the Court.  
6 Page 4, ¶ 20.

7 5. The release order requires the Respondent to comply with the requirements  
8 imposed on him in the release order. Page 3, ¶ 16.

9 6. The release order requires the Respondent to be treated in the community by Lang  
10 Taylor, M.A., a certified sex offender treatment provider. Mr. Taylor is the only treatment  
11 provider approved by the Court in its release order. Page 2, ¶ 7.

12 7. The release order requires the Respondent to remain in treatment and to comply  
13 with the requirements imposed on him by Mr. Taylor. Page 3, ¶ 15.

14 8. The release order requires the Respondent to abide by all rules and conditions  
15 imposed upon him by the SCTF. Page 5, ¶ 8.

16 9. The SCTF rules require that Mr. Ross obtain SCTF approval prior to receiving or  
17 possessing any still photographs.

18 10. The Respondent admitted to stealing a photograph of DSHS escort Nora Cutshaw.  
19 The photograph depicts Ms. Cutshaw wearing a bathing suit. The Respondent concealed the  
20 photograph of Ms. Cutshaw in his room, behind a photograph of his daughter.

21 11. The Respondent did not tell his treatment provider, Mr. Taylor, or any member of  
22 his treatment team or SCTF staff that he had a photograph of Ms. Cutshaw in his possession, nor  
23 did he seek permission from the Mr. Taylor, any treatment team member or the SCTF to possess  
24 the photograph of Ms. Cutshaw.

1 12. Prior to off-island trips the Respondent was required to submit proposed travel  
2 plans to his treatment team for approval, a requirement of Respondent's treatment team and SCTF  
3 rules.

4 13. On multiple occasions while on off-island trips, the Respondent deviated from the  
5 travel plans approved by his treatment team. Some of those deviations occurred without the  
6 permission of any member of his treatment team.

7 14. The Respondent did not report to his treatment team all of the repeated deviations  
8 from the travel log.

9 15. The SCC and SCTF are no longer willing to provide housing for the Respondent  
10 at the SCTF.

11 16. Lang Taylor is currently not willing to provide community based treatment to the  
12 Respondent.

13 17. The allegations relating to April 1, 2007 were dismissed by agreement of the  
14 parties.

## 15 II. CONCLUSIONS OF LAW

16 1. The Court has subject matter and personal jurisdiction in this matter.

17 2. The evidence presented demonstrates by a preponderance of the evidence that the  
18 Respondent violated this Court's release order by:

19 a. Failing to comply with all SCTF regulations, treatment plans and treatment  
20 rules by:

21 i. Deviating from his approved travel logs;

22 ii. Stealing and possessing a photograph of his DSHS escort, Nora  
23 Cutshaw.

24 b. Being terminated from treatment by Lang Taylor, the only treatment provider  
25 approved by the Court in its release order;

26

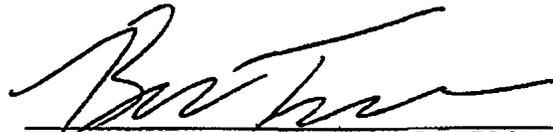
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c. Failing to have approved housing at the SCTF, the only residential placement approved by the Court in its release order.

III. ORDER

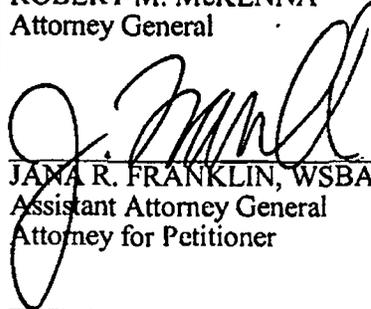
IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Respondent shall be held at the Special Commitment Center (SCC) on McNeil Island until further order of the court.

DATED this 24<sup>th</sup> day of March, 2008

  
\_\_\_\_\_  
THE HONORABLE BRIAN TOLLEFSON  
Judge of the Superior Court

Presented by:

ROBERT M. McKENNA  
Attorney General

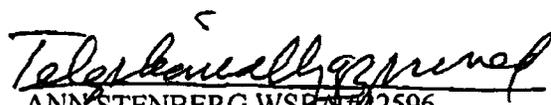
  
\_\_\_\_\_  
JANA R. FRANKLIN, WSBA #35524  
Assistant Attorney General  
Attorney for Petitioner

FILED  
DEPT. 8  
IN OPEN COURT  
MAR 24 2008  
Pierce County Clerk  
By BR  
DEPUTY

FILED  
DEPT. 8  
IN OPEN COURT  
MAR 21 2008  
Pierce County Clerk  
By \_\_\_\_\_  
DEPUTY

Approved as to form:

  
\_\_\_\_\_  
JAMES SCHOENBERGER, WSBA #33603  
Attorney for Respondent

  
\_\_\_\_\_  
ANN STENBERG, WSBA #22596  
Attorney for Respondent

COURT OF APPEALS  
DIVISION II

09 MAR 23 PM 3:37

STATE OF WASHINGTON

BY \_\_\_\_\_  
DEPUTY

IN THE COURT OF APPEALS  
STATE OF WASHINGTON  
DIVISION II

In re the Detention of:

CASPER ROSS,

Appellant.

COURT OF APPEALS NO.  
37618-1-II

PIERCE COUNTY NO.  
98-2-03520-5

CERTIFICATE OF HAND  
DELIVERY AND MAILING

The undersigned attorney for the Appellant hereby certifies that one original and one copy of the Opening Brief of Appellant was hand delivered by first class mail to the Court of Appeals, Division 2, and copies were mailed by first class mail to Casper Ross, Appellant, and Sarah Sappington, Senior Counsel, by first class mail, postage pre-paid on March 23, 2009, at the Centralia, Washington post office addressed as follows:

Ms. Sarah Sappington  
Senior Counsel  
Attorney General's Office  
Criminal Justice Division  
800 Fifth Avenue, Ste. 2000  
Seattle, WA 98104-3188

Mr. David Ponzoha  
Clerk of the Court  
Court of Appeals  
950 Broadway, Ste.300  
Tacoma, WA 98402-4454

CERTIFICATE OF HAND  
DELIVERY AND MAILING

1

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Mr. Casper Ross  
S.C.C.  
P.O. Box 88600  
Steilacoom, WA 98388

Dated: March 23, 2009.

THE TILLER LAW FIRM



---

PETER B. TILLER – WSBA #20835  
Of Attorneys for Appellant

CERTIFICATE OF HAND  
DELIVERY AND MAILING

2

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