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No. 52717-1-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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In re the Detention of

**Damon Lee,**

Appellant.

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Pierce County Superior Court Cause No. 99-2-13179-2

The Honorable Judge Susan K. Serko

**Appellant's Reply Brief**

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## ARGUMENT

### **I. IN ITS LRA ORDER, THE COURT DELEGATED TOO MUCH AUTHORITY TO A “TRANSITION TEAM.”**

The least restrictive alternative (LRA) order grants a “transition team” nearly unlimited power over Mr. Lee. The order does not include any standards to guide the team’s decisions. By statute, the authority to create and modify conditions rests with the court. The LRA order improperly delegates that authority to the transition team, in violation of the statutory scheme and the constitutional separation of powers.

A. The trial court violated the statutory scheme by unlawfully delegating its authority to set and modify Mr. Lee’s LRA conditions.

By statute, the trial court is tasked with imposing conditions governing release to a less restrictive alternative placement. RCW 71.09.096(2) and (4). Additional conditions may only be imposed following a hearing. RCW 71.09.098. At the hearing, the State bears the burden of proving facts justifying modification of the order. RCW 71.09.098.

Nothing in the statutory scheme permits the court to delegate its authority to set and modify conditions. *See* RCW 71.09.092; RCW 71.09.096; RCW 71.09.098. Nor does the statute include any reference to a “transition team” with nearly unlimited powers. *See* RCW 71.09.092; RCW 71.09.096; RCW 71.09.098.

Instead, the statutes governing conditional release clearly and unequivocally (1) direct the court to set conditions and (2) authorize modification only after a hearing conducted in accordance with procedures outlined by the legislature. RCW 71.09.096; RCW 71.09.098.

Here, the court improperly delegated its authority to set and modify conditions by requiring Mr. Lee to “comply with all verbal and written instructions” of the transition team. CP 298, 299, 300. The court placed no limits on this open-ended delegation. Team members are free to impose conditions specifically rejected by the court. CP 668.

The court should not have created a transition team with the authority to unilaterally modify the LRA conditions. The court’s order is inconsistent with the statutory framework.

1. RCW 71.09.092 and RCW 71.09.096 do not provide any basis for the court to delegate unlimited authority to a “transition team.”

Contrary to Respondent’s argument, RCW 71.09.092 does not “authorize the treatment provider and DOC to impose requirements” beyond those in the order. Brief of Respondent, p. 13. Respondent erroneously claims that the statute contains an express authorization allowing the treatment provider and CCO to add or modify conditions.<sup>1</sup> Brief of Respondent, pp. 13, 15, 16, 18 (citing RCW 71.09.092).

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<sup>1</sup> Respondent does not claim any specific statutory authority allowing a representative from the SCC to participate in supervision of the patient. Instead, Respondent suggests that the court may grant an SCC representative authority to set and modify conditions even absent any statutory language. Brief of Respondent, pp. 19-21. This argument suffers from the same flaws as the argument based on RCW 71.09.092 (the statute requiring a finding of willingness to comply).

The cited provisions—RCW 71.09.092(4) and (5)— require the court to make a finding regarding the person’s *willingness to comply* with requirements imposed by the treatment provider and DOC. RCW 71.09.092(4) and (5). It does not grant the treatment provider and DOC open-ended authority to impose requirements omitted from the order. Nor does it authorize the court to delegate such authority. *See* RCW 71.09.092.

Under the statute, a person who is unwilling to comply may be denied conditional release. RCW 71.09.092. The court must find a willingness to comply “[b]efore [it] may enter an order directing conditional release.” RCW 71.09.092.

The State is not without a remedy if a person who expresses willingness to comply later fails to do so. Under such circumstances, the prosecuting agency can request a hearing and seek to prove that the person “is in need of additional care, monitoring, supervision, or treatment.”<sup>2</sup> RCW 71.09.098(1). Pending the hearing, the person may be taken into custody or have his movement restricted. RCW 71.09.098(2).

If the prosecution meets its burden, the court may “impos[e] such additional supervision conditions as the court deems appropriate.” RCW 71.09.098(7). These additional conditions can include any “requirements” of the treatment provider or CCO. However, additional “requirements” must be added to the order before they have the force of conditions imposed by the court.

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<sup>2</sup> This authority to seek modification is shared by the treatment provider, the CCO, and the secretary’s designee. RCW 71.09.092(1).

Respondent's interpretation of the statutory scheme renders these provisions useless. If Respondent were correct, the transition team could modify the terms of the order without requesting a hearing, presenting evidence, or persuading the court that the person "is in need of additional care, monitoring, supervision, or treatment." RCW 71.09.098(1).

Statutes may not be construed in a manner that renders any provision meaningless or superfluous. *Spokane Cty. v. Dep't of Fish & Wildlife*, 192 Wn.2d 453, 458, 430 P.3d 655 (2018). Respondent's interpretation of RCW 71.09.092 cannot be correct because it renders the entire modification procedure superfluous.

The plain language of the statute must be given effect. The court must find the person "willing to comply" with requirements of the treatment provider and CCO before entering an LRA order. RCW 71.09.092(4) and (5). If those requirements are explicitly incorporated into the order, the person may face a revocation hearing for violating conditions of the order. RCW 71.09.098(1)(a).

If they are not explicitly incorporated into the order, failure to comply will not result in revocation; however, the person may be arrested or have their movements restricted pending a modification hearing. RCW 71.09.098(2). At the modification hearing, the State will bear the burden of proving the need to incorporate into the court's order any additional terms recommended by the treatment provider or the supervising CCO. RCW 71.09.098(1)(b).

This does not mean the court must micro-manage the LRA. It only means that revocation cannot stem from a failure to follow “requirements” that aren’t contained in the order. In most cases, the patient will comply with such requirements rather than risk arrest pending a modification hearing. However, if the requirements are wholly unreasonable, the burden should be on the prosecuting authority to prove to the court that they are necessary under RCW 71.09.098.

Respondent incorrectly suggests that the statute contains an “explicit grant of authority” to the treatment provider and CCO. Brief of Respondent, p. 13 (quoting *In re Golden*, 172 Wn. App. 426, 434, 290 P.3d 168 (2012)). Respondent’s argument lacks merit.

The statute does not contain an explicit grant of authority. This distinguishes RCW 71.09.092 from RCW 9.94A.704 (the community custody statute at issue in *Golden*). Under the community custody statute, DOC “*may establish and modify additional conditions of community custody.*” RCW 9.94A.704(2) (emphasis added).

RCW 71.09.092 does not include similar language. There is nothing in that statute or the other provisions governing conditional release that permits DOC, the treatment provider, or the SCC to “establish and modify additional conditions” of release. *Compare* RCW 71.09.092; RCW 71.09.096; RCW 71.09.098 *with* RCW 9.94A.704(2).

Instead, the language relied on by Respondent requires a finding of “willing[ness] to comply” as a precondition to granting an LRA. RCW 71.09.092(4) and (5). Given the absence of language explicitly outlining

authority to “establish and modify additional conditions,” the cases cited by Respondent are inapplicable. Brief of Respondent, pp. 13-14 (citing *Golden, State v. Sansone*, 127 Wn. App. 630, 111 P.3d 1251 (2005), and *State v. McWilliams*, 177 Wn. App. 139, 311 P.3d 584 (2013)).

Nor is there any language in RCW 71.09.096(2) that supports Respondent’s position. *See* Brief of Respondent, p. 19. Citing that provision, Respondent claims that “[t]he legislature... has delegated equal authority to the treatment provider, the DOC, *and* the trial court to impose conditional release requirements.” Brief of Respondent, p. 19 (emphasis in original).

This is simply not true. The provision cited by Respondent directs “[t]he court [to] impose any additional conditions.” RCW 71.09.096(2). Conditions imposed by the court would be included in the order and would be subject to modification under the procedure outlined in RCW 71.09.098.

The statute does allow DOC to “*recommend* any additional conditions to the court.” RCW 71.09.096(4) (emphasis added). Respondent’s interpretation would make this provision meaningless and superfluous. *See Spokane Cty.*, 192 Wn.2d at 458.

If the CCO were permitted to unilaterally impose conditions, there would be no need for DOC to recommend that such conditions be incorporated into the court’s order. To give effect to this language, the statute must be interpreted to grant the court sole authority to set conditions, including those recommended by DOC.

2. The legislature’s decision granting the court sole authority to set and modify conditions of release is not “impractical.”

Respondent makes unsupported claims to bolster its argument that it would be “impracticable” for the court to have sole authority to set and modify conditions of supervision.<sup>3</sup> Brief of Respondent, pp. 22-23.

Respondent suggests that a patient would have to petition the court for approval of nearly every day-to-day activity. Brief of Respondent, pp. 22-23. This is simply wrong, for three reasons.

First, under the statute, the burden is not on Mr. Lee to petition the court for modification of “requirements” that are not included in the court’s order. Rather, under the statutory scheme, the burden is on the prosecuting authority<sup>4</sup> to “petition the court for an immediate hearing” and to prove that the patient “is in need of additional care, monitoring, supervision, or treatment.” RCW 71.09.098(1).

Second (as Respondent points out), the court’s LRA order “contains 14 pages of detailed conditions.” Brief of Respondent, p. 17. Before an LRA order is entered, the prosecuting authority, the CCO, and the treatment provider are free to recommend additional “detailed

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<sup>3</sup> In making this argument, Respondent again asserts that RCW 71.09.092 “requires the SVP to comply with the requirements of the treatment provider and DOC.” Brief of Respondent, p. 22. This is incorrect. The statute does not include an express authorization such as that contained in the community custody statute, RCW 9.94A.704. The court must find the patient willing to comply with those requirements before entering a conditional release order; however, failure to comply cannot lead to revocation unless they are incorporated into the LRA order.

<sup>4</sup> Or the other parties listed in RCW 71.09.098(1).

conditions” covering other day-to-day activities, accompanied by standards to ensure proper notice of what is expected.<sup>5</sup>

Third, the treatment provider and CCO are free to set day-to-day “requirements” not covered by the order, and (where appropriate) to restrict Mr. Lee’s movements or place him in custody pending a hearing if he chooses not to submit to those additional requirements. RCW 71.09.098(2). In practice, most patients will comply with reasonable requirements rather than risk arrest (or restrictions on movement) pending a modification hearing.

Further incentive for compliance with reasonable “requirements” stems from the patient’s desire for unconditional release in future. A patient who constantly resists the treatment provider and CCO will likely face numerous modification hearings, delaying final resolution of the case. Additionally, it is unlikely that a treatment provider or supervising CCO will support unconditional release if the patient is wholly unwilling to comply with reasonable requests.

The statutory scheme adopted by the legislature is not impractical. Even if it were, the judiciary would be powerless absent a finding that the statute is “entirely meaningless.” *State v. Delgado*, 148 Wn.2d 723, 731, 63 P.3d 792 (2003); *see also In re Detention of Martin*, 163 Wn.2d 501,

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<sup>5</sup> The inclusion of appropriate definitions would cure at least some of the problems with the LRA order. The court defined certain key terms by incorporating definitions outlined in provisions of Chapters 9.68 and 9.68A RCW. CP 302. Instead of leaving the meaning of other important phrases to the discretion of the transition team, the court could easily have included similar definitions in its order.

509, 182 P.3d 951 (2008). The statute vests the court with sole authority to set and modify conditions.

3. The Court of Appeals should invalidate portions of the LRA order.

The statutes governing conditional release make clear that the court bears sole authority to set conditions of release. RCW 71.09.096. Conditions set by the court can only be modified by the court; the statute does not permit anyone else to add or modify conditions.<sup>6</sup>

Before ordering conditional release, the court must find that the patient is “willing to comply” with requirements of the treatment provider and CCO, and the court can later incorporate any such requirements into the order in accordance with the modification. However, “requirements” that are not set forth in the order cannot lead to revocation.

Because the LRA order conflicts with the statutory scheme (as set forth in RCW 71.09.092, RCW 71.09.096, and RCW 71.09.098), it cannot stand as written. The Court of Appeals should strike the improper language from the order and remand the case for further proceedings.

- B. The court’s improper delegation violates the constitutional separation of powers.
  1. The requirement to comply with transition team “instructions” violates the separation of powers.

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<sup>6</sup> As noted elsewhere, the CCO believes the transition team can adopt conditions that had been considered and rejected by the court. CP 669.

The authority to set release conditions “is a core judicial function” that “cannot be delegated.” *State v. Williams*, 97 Wn.App. 257, 264, 983 P.2d 687 (1999) (addressing probation conditions). Respondent attempts to distinguish *Williams* by pointing out that the applicable statute in that case “allowed only the court of limited jurisdiction to impose terms of probation.” Brief of Respondent, p. 15.

Rather than supporting Respondent’s position, this strengthens Mr. Lee’s argument. Like the statute at issue in *Williams*, the provisions governing conditional release in this case allow “only the court”<sup>7</sup> to set or modify conditions of release. RCW 71.09.096.

Respondent’s argument regarding *Williams* rests on the flawed premise that “the Legislature has specifically delegated the authority to set conditions to the treatment provider, DOC, and the trial court.” Brief of Respondent, p. 15 (emphasis in original). As outlined above, the legislature has *not* made any such delegation.<sup>8</sup> *Cf.* RCW 9.94A.704(2).

Respondent repeats this error in its discussion of *United States v. Morin*, 832 F.3d 513 (5th Cir. 2016). Brief of Respondent, pp. 16-17. Respondent points out that the federal sentencing statute at issue in *Morin* “also authorized only the court to impose sentences.” Brief of Respondent, p. 16.

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<sup>7</sup> Brief of Respondent, p. 15.

<sup>8</sup> Presumably, Respondent’s claim rests on RCW 71.09.092, the statute which requires the court to make a finding regarding the patient’s willingness to comply. As outlined above, the statute does not include the delegation of authority claimed by Respondent.

This is a similarity, not a distinction. As in *Morin*, the statutes at issue in this case “authorize[ ] only the court to impose [conditions].” Brief of Respondent, p. 16. Respondent’s claim that “specific statutory authority” contained in RCW 71.09.092 grants the CCO and treatment provider authority to set conditions is incorrect. Brief of Respondent, p. 16.

There is no “specific” grant of “statutory authority” contained in that provision. RCW 71.09.092. Instead, the statute requires a finding of the patient’s “willing[ness] to comply” before the court enters an LRA order. This is a directive to the court, not a grant of authority to the CCO and treatment provider. As outlined above, the CCO and treatment provider may articulate “requirements,” but these requirements do not have the force of conditions adopted by the court unless they are specifically incorporated into the order.<sup>9</sup> See RCW 71.09.098(1)(a) and (6).

Likewise incorrect is Respondent’s assertion that “the transition team... [may] determine the manner and means of treatment and community supervision, pursuant to their [sic] statutory authority.” Brief of Respondent, p. 16 (citing *Morin*). “Transition teams” have no statutory authority—they are not mentioned anywhere in Chapter 71.09 RCW.

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<sup>9</sup> Disobedience of requirements not contained in the order cannot result in revocation. RCW 71.09.098. At most, such disobedience could have consequences (such as arrest) pending a modification hearing. RCW 71.09.098(2).

Furthermore, this court’s directive requiring Mr. Lee to “comply with all verbal and written instructions” of the treatment team<sup>10</sup> goes far beyond an order granting a therapist authority to “determine... the manner and means of therapy during a treatment program,” which is the scope of permissible delegation recognized by the *Morin* court in *dicta*.<sup>11</sup> *Morin*, 832 F.3d at 516-517.

Respondent’s claim that *Morin* is “factually distinguishable” also supports Mr. Lee’s argument. Respondent points out the *Morin* court’s determination that “requiring the defendant to comply with all ‘lifestyle restrictions’ imposed by the treatment provider” amounted to an impermissible delegation. Brief of Respondent, pp. 16-17. The *Morin* court’s invalidation of the “lifestyle restrictions” term favors reversal in this case.

The directive to “comply with all verbal and written instructions”<sup>12</sup> is a far broader delegation of authority than an order allowing a patient’s therapist to impose “lifestyle restrictions.” *See Morin*, 832 F.3d at 516-517. The LRA order does more than authorize a therapist to set conditions of treatment: it gives non-therapists authority over Mr. Lee’s life, and it

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<sup>10</sup> CP 298, 299, 300.

<sup>11</sup> Similar *dicta* appears in *Sansone*, where the court theorized that a sentencing judge might make an appropriate delegation “to the *therapist* to decide what types of materials [the offender] could have.” *Sansone*, 127 Wn. App. at 643 (emphasis added). The delegation here is broader than that mentioned in *Sansone’s dicta*: it gives authority to non-therapists (as well as the treatment provider), and it allows transition team members to issue binding “written and verbal instructions” of any type. CP 298, 299, 300.

<sup>12</sup> CP 298, 299, 300.

permits the transition team members to give any instructions whatsoever, whether or not they can be characterized as “lifestyle restrictions.”<sup>13</sup>

Respondent speculates that treatment providers would eschew participation in LRAs “if every treatment decision required approval from the court.” Brief of Respondent, pp. 18. This reflects a misunderstanding of Mr. Lee’s argument.

Mr. Lee has not challenged conditions regarding treatment. He is required to “comply with Ms. Sheridan’s Treatment Program and Treatment Plan.” CP 299. He is also required to “participate in... sex offender treatment,” and will be “immediately taken into custody” if he is “terminated from treatment with Ms. Sheridan due to non-compliance or lack of progress.” CP 299.

If Mr. Lee prevails, these conditions will remain intact, and the treatment provider will retain authority to make decisions regarding his treatment. There will be no need for “approval from the court”<sup>14</sup> for treatment decisions. But Mr. Lee should not have to face revocation for violating “verbal or written instructions” that are not part of treatment.

The trial court violated the separation of powers by delegating the authority to set and modify conditions. CP 298-300; *Id.*; *see also Morin*, 832 F.3d at 517. By requiring Mr. Lee to comply with the treatment team’s “verbal and written instructions,” the court improperly allowed the

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<sup>13</sup> The fact that the court specifically ordered certain conditions that Respondent characterizes as “lifestyle restrictions” does not narrow the provision requiring compliance “with all verbal and written instructions.” *See* Brief of Respondent, p. 17.

<sup>14</sup> Brief of Respondent, pp. 18.

team to impose “independent conditions of supervised release... [which] could serve as the basis for violations of the terms of supervised release.” *Morin*, 832 F.3d at 517.

The provisions requiring compliance with such “instructions” should be stricken from the order.

2. Respondent fails to address Mr. Lee’s other separation of powers arguments.

Mr. Lee argued that the court’s other improper delegations give rise to additional separation of powers violations. *See* Appellant’s Opening Brief, pp. 17-20.

First, the court should not have delegated the power to define critical terms in the order.<sup>15</sup> *See* CP 301-303, 307. By granting the team the power to define key terms, the court authorized the team to prohibit Mr. Lee from possessing nearly any work of literature, art, or popular culture. *See* CP 673-674, 735-752. This delegation violates the separation of powers. *See Sansone*, 127 Wn. App. at 642-643 (addressing authorization to define “pornography”).

Second, the court improperly granted the transition team unfettered authority to require Mr. Lee to engage in any treatment or therapy, beyond the sex-offender treatment required under the order. CP 299. This, too, violated the separation of powers. *See, e.g., United States v. Kent*, 209 F.3d 1073, 1079 (8th Cir. 2000); *United States v. Peterson*, 248 F.3d 79, 85 (2d Cir. 2001).

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<sup>15</sup> The court did properly define some terms by referencing statutory definitions. *See* CP 302.

Respondent does not address these arguments and fails to even mention the numerous cases cited by Mr. Lee<sup>16</sup> regarding these other improper delegations. *See* Appellant’s Opening Brief, pp. 17-20. This failure may be treated as a concession. *See In re Pullman*, 167 Wn.2d 205, 212 n. 4, 218 P.3d 913 (2009).

Because the trial court’s improper delegation of authority violates the separation of powers, the Court of Appeals must remand the case with instructions to strike the offending terms. *Sansone*, 127 Wn. App. at 642. These include the provision allowing the team to create and modify the conditions of supervision, the grant of authority to define critical terms in the LRA order, and the delegation of power allowing the team to require any form of treatment or therapy. *Id.*

**II. MR. LEE’S LRA ORDER VIOLATES DUE PROCESS BECAUSE IT IS UNCONSTITUTIONALLY VAGUE AND INCLUDES NO PROCEDURAL FRAMEWORK GOVERNING THE TRANSITION TEAM’S OPERATIONS.**

A. The order is unconstitutionally vague because it allows the transition team to restrict Mr. Lee’s access to media based on undefined terms that allow for arbitrary enforcement.

To comport with due process, a court order must include sufficient standards to enable a reasonable person to “understand what conduct is prohibited.”<sup>17</sup> *State v. Casimiro*, 8 Wn.App.2d 245, 438 P.3d 137, *review denied*, 445 P.3d 561 (2019). It must also include “ascertainable standards that prevent arbitrary enforcement.” *Id.*

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<sup>16</sup> Apart from *Sansone*, *supra*.

<sup>17</sup> Court orders are not entitled to any presumption of validity. *State v. Bahl*, 164 Wn.2d 739, 753, 193 P.3d 678 (2008).

The need for clarity is especially strong in the First Amendment context. *Bahl*, 164 Wn.2d at 753. Conditions must be narrowly tailored and directly related to rehabilitation and protecting the public. *United States v. Loy*, 237 F.3d 251, 264 (3d Cir. 2001).

A few provisions in the court’s LRA order do not meet these heightened standards. Without providing any guidance, the order gives transition team members unfettered discretion to define terms that are insufficiently specific to provide notice and prevent arbitrary enforcement.<sup>18</sup>

Specifically, the court provided no standards to determine if media depicts “consensual sex,” “sexual themes, children’s themes... excessive violence,” “images of children” or “media directed toward or focused on children.” CP 302-303, 307. The CCO interpreted this language broadly enough to cover nearly every work of literature, art, or popular culture. CP 673-674, 735-752.

Respondent suggests that the terms “are ‘sufficiently definite’ to provide fair notice” when viewed in context. Brief of Respondent, p. 27 (quoting *City of Spokane v. Douglass*, 115 Wn.2d 171, 179, 795 P.2d 693 (1990)). According to Respondent, the terms are not vague because Mr. Lee only violates the restriction if he “intentionally or negligently” accesses material “for the purpose of causing or enhancing sexual arousal.” CP 302; Brief of Respondent, p. 27.

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<sup>18</sup> In addition to vagueness problems, these delegations violate the separation of powers, as argued elsewhere.

Although this limits the scope of Mr. Lee’s liability, it does not cure the vagueness problem. For example, a person in Mr. Lee’s position would do best to avoid all movies. R-rated movies might be impermissible because they include implied references to consensual sex or excessive violence;<sup>19</sup> PG-13 movies might be considered “directed toward... children.” CP 302.

The treatment team could seek revocation or unilaterally confine Mr. Lee to his apartment for a 30-day period<sup>20</sup> if it believed he improperly possessed a movie that fell within the list of prohibited items. Mr. Lee would have no way to prove an innocent “purpose” for possessing the movie, other than denying an improper motivation.

Nor is the “list of approved media” and the approval process outlined in the order sufficient to cure the vagueness issue. CP 307; *see* Brief of Respondent, p. 27. Among other problems, the court granted the team discretion to approve or disapprove items on the list, but provided no guidance on how it should exercise that authority. CP 307; *see* Brief of Respondent, p. 28.

Accordingly, there is nothing in the order to prevent arbitrary enforcement of the condition.<sup>21</sup> *Casimiro*, 8 Wn.App.2d at \_\_\_\_\_. As written, the order gives the transition team unlimited power to decide what

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<sup>19</sup> CCO Miller opined that implied references are sufficient to trigger the condition’s language, even if nothing appears on-screen. CP 673-674, 735-752.

<sup>20</sup> *See* CP 669.

<sup>21</sup> Furthermore, a transition team may arbitrarily limit a patient to three requests per month. CP 665-666, 775. Thus Mr. Lee might receive permission to visit a bookstore but be unable to seek approval to purchase a book, if he has used up his three requests for the month.

Mr. Lee can view, read, or listen to, and provides no standards guiding the team's decisions.

As part of its vagueness argument, Respondent erroneously relies on its interpretation of RCW 71.09.092 to suggest that "members of the team are authorized to impose release requirements." Brief of Respondent, p. 28. As argued earlier in this brief, that interpretation of the statute is incorrect. The provision does not authorize the transition team to impose requirements that are not included in the court's order.

The terms restricting Mr. Lee's access to media are unconstitutionally vague.<sup>22</sup> They must be stricken from the court's order. *Bahl*, 164 Wn.2d at 753.

B. The order is unconstitutionally vague because it does not provide standards governing the transition team's authority to approve or disapprove Mr. Lee's daily activities.

Under the LRA order, Mr. Lee must obtain permission from the transition team for almost any activity. CP 295, 296, 298, 299, 300, 301, 307, 308. The order does not provide any standards governing the team's decisions. CP 296, 299. This violates due process because the order "lacks ascertainable standards that prevent arbitrary enforcement." *Casimiro*, 8 Wn.App.2d at \_\_\_\_.

Respondent argues that "the transition team's decisions regarding specific requests are constrained by the purpose of the statute." Brief of Respondent, p. 32. Thus, according to Respondent, the team is to make

<sup>22</sup> The exceptions are those terms defined with reference to specific statutory definitions. See CP 302.

decisions based on Mr. Lee's best interests and on the need to protect the community. Brief of Respondent, pp. 32-33.

The order does not include this limitation. In fact, CCO Miller testified that transition teams have authority to impose conditions that have "no relation to anything in the court order," including conditions that have been considered and rejected by the court. CP 668-669. Nothing in the order constrains the transition team's decisions.<sup>23</sup>

The order does not provide "ascertainable standards" guiding the transition team's decisions. *Casimiro*, 8 Wn.App.2d at \_\_\_\_\_. The Court of Appeals should strike all provisions granting the transition team authority to make decisions about Mr. Lee's activities. *Id.* In the alternative, the case must be remanded so the trial court can create standards that protect Mr. Lee's due process rights.

C. The court failed to outline any procedures governing the transition team's operation.

The LRA order grants the transition team nearly unlimited authority over Mr. Lee. It does not outline any procedures governing the team's exercise of that authority. CP 290-310. This violates Mr. Lee's right to procedural due process.

Respondent is correct that the procedures outlined in RCW 71.09.098 protect Mr. Lee's rights should the State petition to revoke or modify his conditional release. *See* Brief of Respondent, pp. 33-34. If

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<sup>23</sup> Furthermore, a provision specifically allowing the transition team to make decisions based on Mr. Lee's best interests would likely be insufficiently definite to withstand a due process challenge.

revocation or modification is sought under the statute, due process is satisfied, consistent with *Morrissey v. Brewer*, 408 U.S. 471, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972). *See* Brief of Respondent, pp. 34-35 (noting that “the SVP statute already provides for a hearing before an LRA can be revoked.”)

However, the statute does not govern the many other deprivations of liberty the transition team is empowered to inflict. These may include substantial restrictions on Mr. Lee’s physical liberty. Respondent does not address the team’s unlimited power to unilaterally modify conditions or deprive Mr. Lee of liberty in the absence of a formal petition to modify or revoke.

For example, under the court’s order the team may confine Mr. Lee to his apartment for a 30-day period. CP 669. It need not provide him notice or an opportunity to be heard before doing so. Nor, under the order, are there any standards governing the imposition of such a sanction.<sup>24</sup>

The availability of judicial review does not provide adequate protection. *See* Brief of Respondent, p. 33. If Mr. Lee is arbitrarily confined to his apartment for reasons that would not satisfy the judge, Mr. Lee should not be required to wait for a court hearing to advocate for his release. Nor should he be required to petition the court every time the transition team unfairly refuses him permission to go on an outing, read a particular book, host a friend who wishes to visit, or give a family member a gift.

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<sup>24</sup> *Cf.* RCW 71.09.098(2).

The procedural due process problem would be resolved by including simple language in the order. At a minimum, Mr. Lee should be afforded notice and an opportunity to be heard before the transition team makes decisions affecting his liberty interests. When the transition team intends to restrict his physical liberty (for example by confining him to his apartment for thirty days), additional procedural protections must be ensured.

The order contains no procedural guidelines governing the transition team's decisions. The case must be remanded with instructions to add basic procedural protections sufficient to ensure Mr. Lee's due process rights.

**III. THE COURT'S LRA ORDER SHOULD CONTAIN AT LEAST MINIMAL CONSTRAINTS ON THE CCO'S DISCRETION TO SEARCH MR. LEE AND HIS PROPERTY.**

The LRA order places no conditions on the CCO's authority to search Mr. Lee and his property. CP 297. Unless this court decides that Mr. Lee's privacy rights are reduced to zero by virtue of his status, the absence of any constraint violates the Fourth Amendment and Wash. Const. art. I, §7.

As written, the order permits the CCO to conduct racially motivated body-cavity searches solely for the purpose of harassing Mr. Lee. This cannot be consistent with constitutional requirements, even if Mr. Lee has only minimal rights.

Respondent argues that “random searches” are necessary because of the danger Mr. Lee poses to the public. Brief of Respondent, p. 36. Even if Respondent is correct, it is not difficult to articulate minimal standards consistent with this need.

At a minimum, the order should require a legitimate purpose related to the two foundations of the conditional release scheme: Mr. Lee’s best interests and the need to protect the community. *See* RCW 71.09.094(2). The court’s order does not even include this most basic principle.

The search provision is not consistent with the Fourth Amendment and Wash. Const. art. I, §7. It must be vacated.

## CONCLUSION

When a patient is released to a less restrictive alternative placement, the trial court has the sole responsibility for setting conditions of release. The trial court in this case delegated much of its authority to a “transition team” by requiring Mr. Lee to “comply with all verbal and written instructions” of the team and its members.

The order permits the team to create and modify conditions; members of the team are even empowered to set conditions considered and rejected by the judge. This circumvents the statutory scheme, which requires the court to set conditions and permits modification only after a hearing at which the State bears the burden of proof.

The legislature tasked the court with setting and modifying conditions and specified the procedure to be followed. By granting the transition team the authority to set and modify conditions, the court violated the constitutional separation of powers.

The court’s order also violates due process. It is unconstitutionally vague because it does not outline any standards governing the transition team’s exercise of its authority over Mr. Lee. The problem is especially acute regarding the team’s authority to restrict Mr. Lee’s access to materials protected by the First Amendment.

An additional due process violation stems from the lack of any procedural safeguards governing the transition team’s activity. As written, the order does not require the team to provide Mr. Lee notice or an opportunity to be heard before it infringes protected liberty interests. Most

significantly, the team may restrict Mr. Lee to his apartment for a significant period without explaining why or giving him the chance to argue against the restriction.

For all these reasons, the court's LRA order cannot be upheld as written. The offending portions must be stricken, and the case remanded with instructions to revise the order so it is consistent with the statutory scheme, the separation of powers doctrine, and Mr. Lee's right to due process.

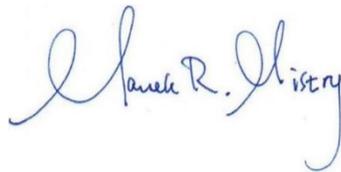
Respectfully submitted on September 23, 2019,

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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Reply Brief, postage prepaid, to:

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With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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I filed the Appellant's Reply Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on September 23, 2019.



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