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No. 52717-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

In re the Detention of

Damon Lee,

Appellant.

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

The Honorable Judge Susan K. Serko

Appellant's Opening Brief

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ISSUES AND ASSIGNMENTS OF ERROR

1. The trial court's conditional release order violates the constitutional separation of powers.
2. The court's order violates the statutory scheme governing conditional release.
3. The court should not have created a "transition team" and delegated to the team the authority to create or modify conditions governing Mr. Lee's LRA.
4. The court should not have delegated to the transition team the authority to define core terms of the conditional release order.

ISSUE 1: The separation of powers doctrine prohibits a judge from delegating "excessively." Did the trial court violate the separation of powers by giving the "transition team" unlimited authority to create and modify Mr. Lee's conditions of release?

ISSUE 2: The statutes governing conditional release direct the trial court to set LRA conditions, and only permit modification of those conditions following a hearing. Did the trial court violate the statutory scheme by granting the "transition team" unlimited authority to set and modify LRA conditions?

5. The LRA order is unconstitutionally vague and violates Mr. Lee's right to due process.
6. The trial court imposed unconstitutionally vague restrictions on Mr. Lee's access to material protected by the First Amendment.
7. The trial court improperly gave the transition team authority to regulate all aspects of Mr. Lee's life without providing standards governing the team's operations.
8. The court's order violates due process because it allows the transition team to deprive Mr. Lee of protected liberty interests without any procedural protections.

ISSUE 3: Due process prohibits conditions of supervision that are unconstitutionally vague. Does the court's order violate due process because it fails to notify Mr. Lee of prohibited conduct and does not include standards to ensure against arbitrary enforcement?

ISSUE 4: Restrictions on a supervisee's access to material protected by the First Amendment must be narrowly tailored and directly related to rehabilitation and protection of the public. Are the restrictions on Mr. Lee's access to media unconstitutionally vague?

ISSUE 5: The government may not deprive a person of liberty without due process. Does the trial court's order violate Mr. Lee's due process rights because it permits the transition team to deprive him of protected liberty interests without meeting the minimum requirements of due process?

9. The court's order violates Mr. Lee's right to privacy under the Fourth Amendment and Wash. Const. art. I, §7.
10. The trial court improperly granted the supervising CCO unlimited authority to search Mr. Lee's person or property.

ISSUE 6: A person who has been civilly committed retains the same privacy rights as a pretrial detainee. Did the trial court violate Mr. Lee's state and federal constitutional rights by giving his CCO unlimited discretion to search his person or property?

INTRODUCTION AND SUMMARY OF ARGUMENT

The court order releasing Damon Lee to a less restrictive alternative placement requires him to “comply with all verbal and written instructions” given by a transition team. According to the CCO who investigated Mr. Lee’s LRA proposal, there are no limits on a transition team’s power to impose conditions. The team’s directives need not relate to any conditions in the court’s order. The team may even impose requirements that the court considered and rejected.

By creating a transition team and granting it the power to set and modify conditions, the trial court violated the statutory scheme governing conditional release. The court’s delegation of authority also violated the constitutional separation of powers.

Numerous conditions outlined in the court order are unconstitutionally vague. Among these are restrictions on Mr. Lee’s access to materials protected by the First Amendment.

The court’s LRA order violates due process for other reasons as well. It grants the transition team unlimited authority, but provides no standards governing the team’s decision-making. Nor does the order outline any procedural framework to ensure the team’s actions meet minimal requirements of due process.

Finally, the LRA order violates Mr. Lee's rights under the Fourth Amendment and Wash. Const. art. I, §7. It requires him to submit to any search of his person or property, with no limitation on frequency, duration, or intensity. The CCO is granted authority to search in the absence of any suspicion, and there is no requirement that the searches serve a legitimate purpose.

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

After more than fifteen years at the Special Commitment Center (SCC), Damon Lee was found to be eligible for conditional release. CP 291. He submitted a less restrictive alternative (LRA) plan, and the court held a "final conditions" hearing under RCW 71.09.096. RP 3-121.

Over objection, the court created a "transition team" to oversee Mr. Lee's LRA. CP 48, 295. The team was comprised of Mr. Lee's treatment provider, the supervising community corrections officer (CCO), and a representative of the SCC. CP 295. The court ordered Mr. Lee to "comply with all verbal and written instructions" given by the team.¹ CP 300. The court did not place any restrictions on the team's authority. CP 300.

Prior to the hearing, Mr. Lee submitted deposition testimony outlining the operation of such teams. Marcus Miller, the CCO who

¹ In addition, the court specifically directed Mr. Lee to follow the "verbal and written instructions" of the Department of Corrections (DOC) and his treatment provider. CP 298, 299.

investigated Mr. Lee's LRA proposal, testified that transition teams are free to impose any conditions that could be justified by "community safety or the person's safety." Miller Deposition, p. 111 (Attachment 3 to Response to Motion to Continue and Reply to Petitioner's Alternative Proposed Order filed 10/3/18, Supp. CP).

According to CCO Miller, transition teams may even impose conditions that had been considered and rejected by the court. Miller Deposition, pp. 113-114 (Attachment 3 to Response to Motion to Continue and Reply to Petitioner's Alternative Proposed Order filed 10/3/18, Supp. CP). Miller believed that transition teams have the authority to impose conditions that have "no relation to anything in the court order." Miller Deposition, p. 112 (Attachment 3 to Response to Motion to Continue and Reply to Petitioner's Alternative Proposed Order filed 10/3/18, Supp. CP).

Miller described cases in which the transition team ordered patients confined to their residences. Miller Deposition, pp. 113-114 (Attachment 3 to Response to Motion to Continue and Reply to Petitioner's Alternative Proposed Order filed 10/3/18, Supp. CP). In one case, a person was barred from leaving his house for 30 days. Miller Deposition, pp. 113-114 (Attachment 3 to Response to Motion to Continue and Reply to Petitioner's Alternative Proposed Order filed 10/3/18, Supp. CP).

The court explicitly granted the transition team authority to require Mr. Lee to engage in “any other treatment^[2] or therapy, as recommended by the Transition Team and approved by DSHS/SCC.” CP 299. The court did not impose any standards to guide the team’s decision on this subject. CP 299. Nor did the court limit the kind of treatment or therapy that could be required. CP 299.

The court also restricted Mr. Lee’s access to broad categories of media. Instead of defining the terms outlining these restrictions, the court allowed members of the transition team to apply their own definitions.³ CP 302-303, 307. Among the terms left undefined were provisions barring Mr. Lee from possessing or viewing materials depicting “consensual sex,” “sexual themes, children’s themes, or excessive violence.” CP 302-303. He was not permitted to have “images of children” or “media directed toward or focused on children.”⁴ CP 307.

CCO Miller believed these prohibitions could prohibit Mr. Lee from viewing a DSHS pamphlet entitled “Eating Well for Less,” oil paintings that might be found in a museum or art history textbook, and

² In addition to sex offender treatment. CP 299.

³ The court gave the transition team authority to define terms in other provisions as well. Among these were a condition barring Mr. Lee from “establishments that cater primarily to minors.” CP 301.

⁴ The court referenced statutory definitions for other media restrictions contained in the order; these included “sexually explicit material as defined by RCW 9.68.130, erotic materials as defined by RCW 9.68.050, or any material depicting any person engaged in sexually explicit conduct as defined by RCW 9.68A.011(4).” CP 302.

movies such as *Titanic*, in which sexual activity is implied but not shown. Miller Deposition, pp. 130-133 and Deposition Exhibits 10-11 (Attachment 3 to Response to Motion to Continue and Reply to Petitioner's Alternative Proposed Order filed 10/3/18, Supp. CP).

The team was given broad powers to regulate many aspects of Mr. Lee's life. However, the court did not provide any standards governing the team's decisions. CP 295, 298, 300, 301, 307, 308. For example, transition team members were given authority over Mr. Lee's contact with other people. CP 300, 301. The court didn't tell the team what to consider when approving or rejecting requests for contact with others. CP 300, 301. Similarly, the court gave no guidance for decisions on Mr. Lee's requests to give gifts to friends or family, to leave his house and travel in the community, to seek employment or educational opportunities, to volunteer, or to have a romantic relationship. CP 295, 298, 300, 301, 307, 308.

Mr. Lee is required to travel with a chaperone when he leaves his house. CP 296. He bears the responsibility of finding suitable escorts. CP 296. The team has the power to approve, reject, or revoke permission for specific chaperones. CP 296. The court did not set any standards for approving chaperones, other than to require that they undergo training once accepted by the team. CP 296.

The court did not outline any procedural framework governing the team's operations. CP 290-310. In practice, transition teams meet in private to make decisions about a person's LRA conditions.⁵ Typically, teams do not produce any record of the information considered or how any decision was made. They may decline to consider input from the patient or anyone else prior to deciding an issue.⁶ Bowie Deposition pp. 46-47 (Attachment 3 to Response to Motion to Continue and Reply to Petitioner's Alternative Proposed Order filed 10/3/18, Supp. CP); Miller Deposition, p. 102-110 (Attachment 3 to Response to Motion to Continue and Reply to Petitioner's Alternative Proposed Order filed 10/3/18, Supp. CP).

Although the LRA order requires Mr. Lee to seek approval for many activities, it does not obligate the transition team to address his requests. Some transition teams limit a person to three requests each month. Miller Deposition, pp. 100-101 (Attachment 3 to Response to Motion to Continue and Reply to Petitioner's Alternative Proposed Order filed 10/3/18, Supp. CP); Bowie Deposition p. 47 (Attachment 3 to

⁵ According to CCO Miller, each member has the power to unilaterally reject any request made by Mr. Lee. Miller Deposition, pp. 98-99 (Attachment 3 to Response to Motion to Continue and Reply to Petitioner's Alternative Proposed Order filed 10/3/18, Supp. CP).

⁶ According to CCO Miller, the patient may have input after the decisions have been made. Miller Deposition, p. 102-110 (Attachment 3 to Response to Motion to Continue and Reply to Petitioner's Alternative Proposed Order filed 10/3/18, Supp. CP).

Response to Motion to Continue and Reply to Petitioner’s Alternative Proposed Order filed 10/3/18, Supp. CP).

The court also required Mr. Lee to “submit to searches of his person, computer, cellphone, residence, or property at the discretion of the supervising CCO.” CP 297. The order recites that Mr. Lee must comply with search requests “[t]o maintain compliance with the conditions of the LRA Court Order.” CP 297. The court did not impose any constraints on the CCO’s discretion. CP 297. Nor did the court require that searches be tied to any legitimate purpose. CP 297.

Following argument over the terms of Mr. Lee’s LRA, the court entered an Order on Release to Less Restrictive Alternative. CP 290. Mr. Lee appealed. CP 430.

ARGUMENT

I. MR. LEE’S LRA ORDER VIOLATES THE CONSTITUTIONAL SEPARATION OF POWERS AND THE STATUTORY SCHEME GOVERNING CONDITIONAL RELEASE.

The trial court authorized the transition team to set or modify conditions governing Mr. Lee’s LRA and to make decisions affecting every aspect of his life. The court did not set any standards or procedural requirements governing the team’s operation. By allowing the team to create and modify conditions of Mr. Lee’s LRA, the court improperly delegated authority specifically reserved to the court. The court violated

the separation of powers and the statutory scheme governing conditional release.

- A. The trial court violated Chapter 71.09 RCW by creating a transition team vested with unconstrained authority to set and modify conditions governing Mr. Lee's LRA.

The court bears the responsibility for setting conditions governing LRA placements. RCW 71.09.096. The court must impose conditions "necessary to ensure compliance with treatment and to protect the community."⁷ RCW 71.09.096(2). The statutes governing conditional release make no reference to a "transition team." *See* RCW 71.09.092; RCW 71.09.096; RCW 71.09.098.

Once the LRA order is entered, the court may not impose additional conditions absent a hearing. RCW 71.09.098. The court may modify (or revoke) its conditional release order based on a violation of the "terms and conditions" of the order or on a need for "additional care, monitoring, supervision, or treatment." RCW 71.09.098. At a modification (or revocation) hearing, the State bears the burden of proving facts justifying the modification (or revocation). RCW 71.09.098.

⁷ The statute reiterates that "the court shall impose such conditions upon the person as are necessary to ensure the safety of the community." RCW 71.09.096(4). It also references "any other conditions that the court determines are in the best interest of the person or others." RCW 71.09.096(4). Presumably, the court may impose such conditions, even though the reference appears in a directive requiring the court to "order the department of corrections to investigate the less restrictive alternative and recommend any additional conditions to the court [including] any other conditions that the court determines are in the best interest of the person or others." RCW 71.09.096(4).

RCW 71.09.098 does not authorize modification or revocation on other grounds. Although the person under supervision must agree to comply with “requirements” imposed by the treatment provider and DOC,⁸ failure to comply with such “requirements” is not by itself a basis for revocation or modification under RCW 71.09.098. Under the terms of that statute, only violation of the order itself may result in modification or revocation. RCW 71.09.098.

Thus, under the statutory scheme, the court sets “terms and conditions” which the person must follow to avoid revocation or modification. RCW 71.09.096; RCW 71.09.098. The treatment provider and the Department of Corrections may impose additional “requirements,” but these requirements do not have the same effect as the “terms and conditions” set by the court. RCW 71.09.092; RCW 71.09.098. Any requirements set by the provider or DOC may be added to the order—but only by the court—following a modification hearing at which the State proves (a) a violation of the existing order or (b) a need for “additional care, monitoring, supervision, or treatment.” RCW 71.09.098.

Here, the court entered an order inconsistent with these provisions. The court created a “transition team” consisting of the treatment provider,

⁸ See RCW 71.09.092. Absent from this provision is any suggestion that the patient must comply with requests made by Special Commitment Center staff.

the supervising CCO, and a representative of the Special Commitment Center.⁹ CP 295.

The court directed Mr. Lee to “comply with all verbal and written instructions” of the transition team members.¹⁰ CP 300. This directive amounts to an open-ended delegation of authority to the transition team to create its own conditions governing the LRA.

As the DOC investigator (CCO Miller) explained, there are almost no limits on conditions the team can set for a patient.¹¹ Miller Deposition, p. 111 (Attachment 3 to Response to Motion to Continue and Reply to Petitioner’s Alternative Proposed Order filed 10/3/18, Supp. CP).

According to Miller, the transition team even has the authority to impose conditions rejected by the court.¹² Miller Deposition, p. 111 (Attachment 3

⁹ Unlike the CCO and the treatment provider, the SCC does not have any statutory authority to impose requirements when a patient is released to a community LRA. *See* RCW 71.09.092.

¹⁰ In addition to the quoted language, the order directs Mr. Lee to comply with “all DOC verbal and written instructions” (CP 298) and to comply with the treatment provider’s “verbal and written instructions.” CP 299.

¹¹ Miller believed that any condition was permitted as long as it was “in the interest of community safety or the person’s safety.” Miller Deposition, p. 111 (Attachment 3 to Response to Motion to Continue and Reply to Petitioner’s Alternative Proposed Order filed 10/3/18, Supp. CP).

¹² Miller’s view is consistent with a provision allowing the team to supersede conditions set by the court. Where there is a conflict between conditions set by the court and those imposed by the transition team, the order directs members of the team to “consult with one another to resolve the conflict.” CP 306. Only if the team proves unable to “resolve” the conflict will the court “determine the matter.” CP 306. Pending such a determination, Mr. Lee must “follow the strictest rule applicable.” CP 306.

to Response to Motion to Continue and Reply to Petitioner’s Alternative Proposed Order filed 10/3/18, Supp. CP).

As written, the court’s order allows the transition team to unilaterally modify the LRA conditions without a hearing. Under the order, modifications in the form of “verbal and written instructions” need not rest on proof that Mr. Lee violated the existing order. *Cf.* RCW 71.09.098. Nor is there any obligation to establish a need for “additional care, monitoring, supervision, or treatment.” RCW 71.09.098.

Under similar grants of authority, transition teams in other cases have barred residents from leaving home for up to 30 days at a time. Miller Deposition, pp. 113-114 (Attachment 3 to Response to Motion to Continue and Reply to Petitioner’s Alternative Proposed Order filed 10/3/18, Supp. CP). They have prohibited patients from carrying more than \$50 in cash, even where the prohibition “had no relation to anything in the court order.” Miller Deposition, p. 112 (Attachment 3 to Response to Motion to Continue and Reply to Petitioner’s Alternative Proposed Order filed 10/3/18, Supp. CP).

The court’s order is inconsistent with the statutory scheme. The legislature vested in the court the authority to set conditions governing the LRA. RCW 71.09.096. It created a procedure for modification of those conditions. RCW 71.09.098. Under the statutory modification procedure, the court must hold a hearing at which the State bears the burden of

proving a violation of the existing order or a need for “additional care, monitoring, supervision, or treatment.” RCW 71.09.098.

Had the legislature intended a “transition team” to set and modify the conditions governing LRA placements, it would not have enacted RCW 71.09.096 and RCW 71.09.098. There would be no requirement for the court to hold a hearing or hear evidence prior to modifying an existing order.

As written, the statute places the responsibility for setting and modifying LRA conditions on the court. It outlines the procedures to be followed before a modification can be ordered. It does not contemplate a transition team with the unlimited authority to set or modify conditions that are not included in the court’s order.

The court’s order violates RCW 71.09.096 and RCW 71.09.098. The provisions requiring Mr. Lee to comply with the verbal and written instructions of transition team members must be stricken.¹³

¹³ These provisions include the directive to comply with “all DOC verbal and written instructions” (CP 298), the directive to comply with the treatment provider’s “verbal and written instructions” (CP 299), and the requirement that Mr. Lee “comply with all verbal and written instructions of...[the treatment provider], Department of Corrections, and SCC representatives.” CP 300.

- B. The court violated the constitutional separation of powers by improperly delegating to the transition team the authority to set and modify Mr. Lee's conditions of release.

The separation of powers doctrine is derived from the constitution's distribution of governmental authority into three branches. *State v. Moreno*, 147 Wn.2d 500, 505, 58 P.3d 265 (2002). The doctrine serves to ensure that the "fundamental functions" of each branch remain inviolate. *Carrick v. Locke*, 125 Wn.2d 129, 134-135, 882 P.2d 173 (1994). Washington courts rely on federal principles regarding the separation of powers doctrine. *Id.*

The state constitution vests the judicial power in the judiciary. Wash. Const. art. IV, §1. No state court has determined whether setting LRA conditions is a core judicial function. However, such conditions are analogous to supervision conditions imposed in criminal cases. This is especially true given that the Department of Corrections supervises patients on conditional release from the Special Commitment Center. RCW 71.09.092(5); RCW 71.09.096(4).

The "precise delineation" of release conditions "is a core judicial function." *State v. Williams*, 97 Wn.App. 257, 264, 983 P.2d 687 (1999) (addressing probation conditions). It "cannot be delegated to a probation officer, treatment provider or other agency."¹⁴ *Id.* Courts violate the

¹⁴ There is no improper delegation if "the court ratifies the terms recommended by the probation officer or treatment agency and adopts them as its own." *Id.*, at 265. The *Williams*

separation of powers doctrine by delegating “excessively” when setting supervision conditions. *State v. Sansone*, 127 Wn. App. 630, 642, 111 P.3d 1251 (2005) (addressing community placement conditions).

Here, the court delegated excessively by allowing the members of the transition team to set the conditions of supervision. As outlined above, the court permitted transition team members to issue “verbal and written instructions” and required Mr. Lee to comply with those instructions. CP 298-300. The court did not impose any limitation on the team’s authority.

This amounted to an excessive delegation of judicial authority. *Id.* It is akin to the delegation in *United States v. Morin*, 832 F.3d 513 (5th Cir. 2016). In *Morin*, the court granted a sex offender treatment provider the power to impose “lifestyle restrictions” on the offender. *Id.*, at 515. The court found that this improperly permitted the therapist to impose “independent conditions of supervised release... [which] could serve as the basis for violations of the terms of supervised release separate and apart from non-compliance with the treatment program.” *Id.*, at 517.

Similarly, the requirement that Mr. Lee comply with “verbal and written instructions”¹⁵ permits the transition team to create “independent conditions” that are “separate and apart” from the conditions imposed by

court suggests that no formal order is required incorporating such recommendations; however, it appears that the court must explicitly ratify the proposed condition. *Id.*

¹⁵ CP 298-300.

the court. *Id.* For example, the transition team could order Mr. Lee confined to his residence for a 30-day period, as happened in another case. Miller Deposition, pp. 113-114 (Attachment 3 to Response to Motion to Continue and Reply to Petitioner’s Alternative Proposed Order filed 10/3/18, Supp. CP).

As in *Morin*, the court’s delegation here is improper. *Id.* The provisions requiring Mr. Lee to comply with “verbal and written instructions” must be stricken from the order. *Id.*

The court also delegated excessively when it gave the transition team the authority to define terms restricting Mr. Lee’s access to media. The court barred him from possessing materials depicting “consensual sex,” “sexual themes, children’s themes, or excessive violence.” CP 302-303. It barred him from possessing “images of children” or “media directed toward or focused on children.” CP 307. The court improperly left it to members of the transition team to define these terms and determine what materials fall within each category.¹⁶ CP 302-303, 307.

According to CCO Miller, such materials could include (a) movies (such as *Titanic*) in which sexual activity is implied, (b) brochures such as the DSHS-issued pamphlet “Eating Well for Less,” or (c) paintings that

¹⁶ The court properly defined other similar terms with reference to statutory definitions. These included “sexually explicit material as defined by RCW 9.68.130, erotic materials as defined by RCW 9.68.050, or any material depicting any person engaged in sexually explicit conduct as defined by RCW 9.68A.011(4).” CP 302.

might be found in a museum or art history textbook. Miller Deposition, pp. 130-133 and Deposition Exhibits 10-11 (Attachment 3 to Response to Motion to Continue and Reply to Petitioner’s Alternative Proposed Order filed 10/3/18, Supp. CP).

Similar delegations have been found to violate the separation of powers.¹⁷ In *Sansone*, the court improperly delegated to the offender’s CCO the authority to define “pornography.” *Sansone*, 127 Wn. App. at 642. The appellate court reversed, finding that the definition was “not an administrative detail that could be properly delegated to the CCO.”¹⁸ *Id.*, at 643; *see also United States v. Wagner*, 872 F.3d 535, 543 (7th Cir. 2017).

Here, as in *Sansone*, the court should not have allowed transition team members to define important terms such as those describing material Mr. Lee is barred from possessing.¹⁹ The delegation was excessive.

¹⁷ The provisions are also unconstitutionally vague, as discussed elsewhere in this brief.

¹⁸ According to the *Sansone* court, a similar delegation “would not necessarily be improper if Sansone were in treatment and the sentencing court had delegated to the therapist to decide what types of materials Sansone could have.” *Id.*, at 643; *see State v. Besola*, 181 Wn. App. 1013 (2014) (unpublished), *rev’d*, on other grounds 184 Wn.2d 605, 359 P.3d 799 (2015). Here, the trial court authorized the transition team members, including the CCO and the SCC representative (who might be an administrator rather than a therapist) to define the terms. CP 303, 307.

¹⁹ The court also barred Mr. Lee from “establishments that cater primarily to minors,” and improperly delegated to the transition team the authority to define that term. CP 301; *Sansone*, 127 Wn. App. at 642. The phrase is unconstitutionally vague. *See State v. Irwin*, 191 Wn. App. 644, 655, 364 P.3d 830 (2015) (addressing the phrase “where children are known to congregate”); *State v. Wallmuller*, --- Wn.App.2d ---, ___, 423 P.3d 282 (2018), *review granted*, 192 Wn.2d 1009, 432 P.3d 794 (2019) (addressing the phrase

Sansone, 127 Wn. App. at 642. The prohibitions must be stricken from the court’s order.

The court also delegated to the transition team unfettered discretion to require Mr. Lee to engage in “any other treatment^[20] or therapy, as recommended by the Transition Team and approved by DSHS/SCC.” CP 299. This, too, was improper.

Federal courts have found that such delegations violate the separation of powers. *United States v. Kent*, 209 F.3d 1073, 1079 (8th Cir. 2000).²¹ Where a person “is required to participate in [treatment] only if directed to do so by his probation officer,” the court has made “an impermissible delegation of judicial authority to the probation officer.” *United States v. Peterson*, 248 F.3d 79, 85 (2d Cir. 2001).

Here, as in the cited cases, the court should not have granted the transition team discretion to require additional forms of treatment. *Id.* The delegation was improper and must be stricken from the order. *Id.*

“where children congregate.”) The court should not have delegated to the transition team the power to define this phrase.

²⁰ In addition to the sex offender treatment explicitly required as part of the LRA plan. CP 299.

²¹ See also *United States v. Barber*, 865 F.3d 837, 840 (5th Cir. 2017); *United States v. Matta*, 777 F.3d 116, 123 (2d Cir. 2015); *United States v. Esparza*, 552 F.3d 1088, 1091 (9th Cir. 2009); *United States v. Pruden*, 398 F.3d 241, 250-251 (3d Cir. 2005); *United States v. Melendez-Santana*, 353 F.3d 93, 100–01 (1st Cir. 2003), *overruled in part on other grounds* by *United States v. Padilla*, 415 F.3d 211 (1st Cir. 2005).

The trial court inappropriately delegated authority to the transition team. The improper delegations include the unlimited power to issue “verbal and written instructions,” the power to define important terms of supervision, and the power to require participation in other kinds of treatment. These provisions must be stricken from the order. *Sansone*, 127 Wn. App. at 642.

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.

The court’s order grants transition team members broad authority to regulate all aspects of Mr. Lee’s life. The order includes conditions that are unconstitutionally vague. It provides no standards to guide the team’s decisions and lacks any procedural framework to ensure fairness. The order violates Mr. Lee’s Fourteenth Amendment right to due process.²²

A court order is unconstitutionally vague if “a reasonable person would not understand what conduct is prohibited.”²³ *State v. Casimiro*, --- Wn.App.2d ---, ___, 438 P.3d 137 (2019) (addressing community custody conditions). A provision is also vague if it “lacks ascertainable standards that prevent arbitrary enforcement.” *Id.*

²² In addition, allowing transition team members to interpret and enforce vague conditions violates the separation of powers doctrine, as outlined above. *Sansone*, 127 Wn. App. at 642; see also *Wagner*, 872 F.3d at 543.

²³ Court orders are not entitled to any presumption of validity. *State v. Bahl*, 164 Wn.2d 739, 753, 193 P.3d 678 (2008).

Caselaw addressing vague conditions of supervision in criminal proceedings should apply to orders governing conditional release. The vagueness doctrine serves the same purpose in both contexts – ensuring proper notice to the person under supervision and adequate protection against arbitrary enforcement. *See Casimiro*, ---Wn.App.2d at ___.

The interests at stake in both contexts – protection of the public and rehabilitation of the supervisee – are the same. The specific risks and needs of each individual offender or patient will affect the balance to be struck in each case; however, these specific risks and needs should not affect the applicable legal standards. Accordingly, cases addressing offender supervision control the issues raised here.

In this case, many of the conditions imposed by the court are unconstitutionally vague. *Id.* They do not provide fair warning of prohibited conduct, and do not include standards to prevent arbitrary enforcement. *Id.* In addition, the LRA order violates Mr. Lee’s right to due process because the court allowed the transition team to restrict Mr. Lee’s liberty interest without setting any procedural requirements governing the team’s actions.

- A. The court imposed unconstitutionally vague restrictions on Mr. Lee’s possession of material protected by the First Amendment.

Vagueness concerns are more acute when conditions implicate the First Amendment. *Bahl*, 164 Wn.2d at 753. Such conditions require a

stricter standard of definiteness. *Id.* They must be narrowly tailored and directly related to the goals of protecting the public and promoting rehabilitation. *United States v. Loy*, 237 F.3d 251, 264 (3d Cir. 2001). Thus, for example, a condition prohibiting possession of all “pornography” is unconstitutionally vague. *Id.*, at 265; *Bahl*, 164 Wn.2d at 753.

Several provisions restricting Mr. Lee’s access to media are unconstitutionally vague. These include restrictions on media depicting “consensual sex,” “sexual themes, children’s themes... excessive violence,” “images of children” or “media directed toward or focused on children.”²⁴ CP 302-303, 307.

Under any standard, these provisions do not provide fair notice of the conduct prohibited; nor do they provide criteria to prevent arbitrary enforcement. As CCO Miller indicated, the language is broad enough to cover a movie such as *Titanic*, the DSHS pamphlet “Eating Well for Less,” and artwork created in previous centuries. Miller Deposition, pp. 130-133 and Deposition Exhibits 10-11 (Attachment 3 to Response to Motion to Continue and Reply to Petitioner’s Alternative Proposed Order filed 10/3/18, Supp. CP).

²⁴ Although not governed by the same First Amendment considerations, the rule barring Mr. Lee from “establishments that cater primarily to minors” is also unconstitutionally vague. CP 301; *see Irwin*, 191 Wn. App. at 655; *Wallmuller*, --- Wn.App.2d at _____. The transition team should not have been allowed to define the phrase.

Furthermore, the list of prohibited material is neither narrowly tailored nor directly related to community protection or Mr. Lee's treatment needs. *See Loy*, 237 F.3d at 264. In addition to the specific examples addressed by CCO Miller, the language can be interpreted to cover nearly every work of literature, art, or popular culture.

Thus, for example, Mr. Lee must request permission before reading *War and Peace* (excessive violence), *Lord of the Flies* (media focused on children), or *The Great Gatsby* (sexual themes).²⁵ Nothing in the record suggests that community protection or Mr. Lee's treatment needs requires him to be completely cut off in this way.

The provisions restricting Mr. Lee's possession or use of media are unconstitutionally vague. *Id.* Except for those terms referring to specific statutory definitions,²⁶ all provisions relating to Mr. Lee's access to media are unconstitutionally vague. *Bahl*, 164 Wn.2d at 753. They must be stricken from the court's order. *Id.*

²⁵ If he were denied permission, he might have to wait a month before making another request, as transition teams often limit a person to three requests per month. Miller Deposition, pp. 100-101 (Attachment 3 to Response to Motion to Continue and Reply to Petitioner's Alternative Proposed Order filed 10/3/18, Supp. CP); Bowie Deposition p. 47 (Attachment 3 to Response to Motion to Continue and Reply to Petitioner's Alternative Proposed Order filed 10/3/18, Supp. CP).

²⁶ *See* CP 302.

- B. The court improperly gave the transition team unlimited authority to regulate all aspects of Mr. Lee’s life without providing any standards governing exercise of that authority.

The court’s order requires Mr. Lee to obtain permission from the transition team for almost all daily activities. The order does not provide any standards guiding the team’s decisions.

Among other things, Mr. Lee must get approval before speaking to anyone (whether in person, by telephone, or through text), giving gifts to friends or family members, going anywhere, seeking employment or education, volunteering for any organization, or entering a romantic relationship.²⁷ CP 295, 298, 300, 301, 307, 308. The transition team also has the power to approve or reject chaperones, to modify his treatment plan, or to require “other treatment or therapy” beyond sex offender treatment.²⁸ CP 296, 299.

The court did not provide any criteria governing the transition team’s decisions. CP 290-310. Because of this, all conditions involving transition team participation are unconstitutionally vague.

Arguably, Mr. Lee has received fair notice of prohibited conduct: he may not do anything without transition team permission. But the order fails the other component of the vagueness doctrine: it “lacks ascertainable

²⁷ These specific terms supplement the directive that he follow all “verbal and written instructions.” CP 298-300. The court provided no standards governing that provision.

²⁸ As noted in the preceding section, the team also holds authority over any media in Mr. Lee’s possession. The court set no standards for the exercise of this authority.

standards that prevent arbitrary enforcement.” *Casimiro*, ---Wn.App.2d at ____.

Under the court’s order, the transition team may deny any of Mr. Lee’s requests for no reason at all. Indeed, given the veto power described by CCO Miller, any individual member of the transition team may refuse permission for reasons that have nothing to do with community protection, treatment progress, or Mr. Lee’s best interests.²⁹ Miller Deposition, pp. 98-99 (Attachment 3 to Response to Motion to Continue and Reply to Petitioner’s Alternative Proposed Order filed 10/3/18, Supp. CP).

The same is true regarding the other authority afforded members of the transition team. Under the order, team members need not have any basis for refusing to approve a proposed chaperone, for modifying Mr. Lee’s treatment plan, or for requiring Mr. Lee to participate in “other treatment or therapy.” CP 296, 299.

In the absence of “ascertainable standards,” the court’s order is unconstitutionally vague. *Id.* The order does not outline any criteria guiding transition team decisions. All provisions granting the transition team authority to make decisions must be stricken. *Id.*

²⁹ Indeed, nothing prohibits a decision based on racism or other kinds of bias and prejudice.

C. The court's standardless delegation of authority to the transition team was unaccompanied by any procedural protections.

In addition to its failure to provide standards governing transition team decision, the court failed to set forth any procedures for the team to follow. CP 290-310. Because the team has the authority to severely restrict Mr. Lee's liberty interests, the absence of any procedural framework violates due process.

The federal and state constitutions prohibit the deprivation of liberty or property without due process. U.S. Const. Amend. XIV; Wash. Const. art. I §3. Courts determine the constitutional requirements of procedural due process by balancing three factors: "[f]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976).

Here, all three factors weigh in favor of strong procedural protections. The transition team has been given unlimited authority over Mr. Lee's life – it can confine him to his residence, prohibit him from speaking with anyone, and censor his consumption of media of all types.

The private interests at stake are of the highest significance.

Under the court's order, there are no "procedures used" to reduce the risk of erroneous deprivation. *Id.* The transition team may meet privately, produce no record of the information considered in reaching a decision, and decide any matter without input from the patient.³⁰ Bowie Deposition pp. 46-47 (Attachment 3 to Response to Motion to Continue and Reply to Petitioner's Alternative Proposed Order filed 10/3/18, Supp. CP); Miller Deposition, p. 102-110 (Attachment 3 to Response to Motion to Continue and Reply to Petitioner's Alternative Proposed Order filed 10/3/18, Supp. CP).

The addition of any "procedural safeguards" would be an improvement on the current system. *Id.* A transition team with the power to order 30 days of house arrest (as described by CCO Miller) must, at the very least, satisfy the "minimum requirements of due process." *Morrissey v. Brewer*, 408 U.S. 471, 489, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972).

Finally, the State has no strong countervailing interest. According to CCO Miller, some transition teams already provide some procedural protections.

³⁰ Although CCO Miller described an informal process allowing the patient input after the decision had been made by the team, SCC Deputy CEO Bowie testified that the team first makes its decisions in private, and then "the person is invited in for a check-in, and then to advise him of decisions the team has made." Bowie Deposition pp. 46-47 (Attachment 3 to Response to Motion to Continue and Reply to Petitioner's Alternative Proposed Order filed 10/3/18, Supp. CP).

These include notice of the issues to be discussed, an opportunity to be heard or to ask questions, a right to bring “witnesses” to the meeting, and the right to a written decision. Miller Deposition, pp. 101-111 (Attachment 3 to Response to Motion to Continue and Reply to Petitioner’s Alternative Proposed Order filed 10/3/18, Supp. CP). Some team members may even produce a written record (in the form of personal notes) outlining the information considered and how each team member decided a particular issue. Miller Deposition, pp. 101-111 (Attachment 3 to Response to Motion to Continue and Reply to Petitioner’s Alternative Proposed Order filed 10/3/18, Supp. CP).

There should be no objection to formalizing these practices in the court’s order. Given the significant decisions made by the transition team, the court should have created a procedural framework governing the team’s work. *Id.*

Due process requires some procedural protections, to ensure that any restrictions on Mr. Lee – including the possibility that he may be confined to his residence for a month—are not arbitrarily imposed. *Id.*; *Mathews*, 424 U.S. at 335. The case must be remanded with to the trial court with instructions to amend the order to include at least the minimal due process protections outlined in *Morrissey*, 408 U.S. at 489.

III. THE COURT’S ORDER VIOLATES THE FOURTH AMENDMENT AND WASH. CONST. ART. I, §7 BECAUSE IT GRANTS MR. LEE’S CCO UNLIMITED DISCRETION TO SEARCH HIS PERSON AND PROPERTY.

The court’s LRA order directs that “Mr. Lee shall submit to searches of his person, computer, cellphone, residence, or property at the discretion of the supervising CCO.” CP 297. Mr. Lee must submit to such searches “[t]o maintain compliance with the conditions of the LRA Court Order.”³¹ CP 297.

The order places no limitations on the duration, frequency, or intensity of such searches. CP 297. Nor does it require that a search be supported by any degree of suspicion. CP 297. Nothing in the order mandates that such searches serve any legitimate purpose. CP 297. The supervising CCO need not consult with the treatment provider and may conduct daily searches even if doing so would hamper Mr. Lee’s progress.³² CP 297.

The court’s failure to impose any limitations on the search provision violates Mr. Lee’s rights under the Fourth Amendment and Wash. Const. art. I, §7. Those with reduced expectations of privacy “do not forfeit all expectations of privacy in exchange for their release into the community.” *State v. Cornwell*, 190 Wn.2d 296, 303, 412 P.3d 1265

³¹ Mr. Lee is also required to provide his cell phone to any member of the transition team “for the purpose of conducting a compliance search.” CP 308.

³² Indeed, the order does not prevent the CCO from conducting strip searches or even body cavity searches without any basis for doing so. CP 297.

(2018) (addressing privacy rights of probationers). Instead, even where the State is empowered to “closely supervise [someone]... its authority is limited” by the constitution. *Id.*

A person’s privacy interests “can be reduced only to the extent necessitated by the legitimate demands” of the supervision process. *Id.*, at 303-304 (internal quotation marks and citations omitted). Thus, in *Cornwell*, the Supreme Court invalidated the search of an offender’s vehicle, requiring “a nexus between the property searched and the suspected probation violation.” *Id.*, at 297.

The state constitution provides greater privacy protections than does the Fourth Amendment. *Blomstrom v. Tripp*, 189 Wn.2d 379, 399, 402 P.3d 831 (2017). Even under the federal constitution, people who have been civilly committed retain Fourth Amendment protections analogous to the rights of pretrial detainees. *Arnzen v. Palmer*, 713 F.3d 369, 372 (8th Cir. 2013).

The *Arnzen* court upheld a preliminary injunction prohibiting the use of cameras to monitor detainees who were using single-person bathrooms within a civil commitment facility. *Id.*, at 372-373. The court noted that images were captured even absent any “immediate indication that [the bathroom was] being used for purposes other than those ordinarily associated with bathroom facilities.” *Id.* The court found the intrusion violated the patients’ reasonable expectation of privacy. *Id.*

Mr. Lee is under close supervision. However, he retains privacy rights analogous to those of a pretrial detainee. *Id.* His privacy interests “can be reduced only to the extent necessitated by the legitimate demands” of the LRA supervision process. *Cornwell*, 190 Wn.2d at 303-304.

Here, the court’s order reduces Mr. Lee’s privacy interests to zero. It requires Mr. Lee to “submit to searches [conducted]... at the discretion of [his] supervising CCO.” CP 297. The CCO need not have any suspicion that Mr. Lee violated the terms of his LRA. CP 207. Nor is there any requirement that the searches relate to community safety, Mr. Lee’s compliance with treatment rules, or any other valid purpose. CP 297.

Whatever the “legitimate demands” of the LRA supervision process, the court’s order here leaves too much to the discretion of the CCO. *Id.* A proper order would have set some conditions limiting the CCO’s discretion.³³ As it stands, the order permits searches untethered to any justification. This is constitutionally impermissible.

³³ These could include a requirement that searches rest on reasonable suspicion that Mr. Lee violated the terms of the LRA order. The court could also direct the CCO to consult with Mr. Lee’s treatment provider before conducting a search. It could limit the duration, frequency, and intensity of searches.

The court's order placed no constraints on the CCO. The search provision violates Mr. Lee's rights under the Fourth Amendment and Wash. Const. art. I, §7.³⁴ *Id.*

CONCLUSION

The trial court improperly created a transition team and granted it unlimited authority over all aspects of Mr. Lee's life. The court set no standards governing the team's activities and established no procedural safeguards to ensure fair treatment.

The court's order includes conditions that are unconstitutionally vague and delegates to the transition team the authority to define those terms. Among these are provisions restricting Mr. Lee's access to materials protected by the First Amendment.

The court's order violates due process, the separation of powers, and the statutory scheme governing conditional release. It also violates Mr. Lee's rights under the Fourth Amendment and Wash. Const. art. I, §7, because it allows the CCO unlimited discretion to search Mr. Lee and his property.

The case must be remanded to the trial court with instructions to amend the order, striking those provisions that violate due process, the

³⁴ For the reasons outlined above, the search provision is also unconstitutionally vague and involves an excessive delegation of authority. It therefore violates due process and the constitutional separation of powers.

separation of powers, the statutory scheme governing conditional release, and Mr. Lee's state constitutional right to privacy. The Court Appeals should also direct the trial court to revise those conditions that are unconstitutionally vague, to ensure that Mr. Lee has fair warning of prohibited conduct and to guard against arbitrary enforcement.

Respectfully submitted on May 31, 2019,

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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening 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 Opening 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 May 31, 2019.



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