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NO. 52717-1

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

In re the Detention of:

DAMON LEE,

Appellant,

v.

STATE OF WASHINGTON,

Respondent.

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	COUNTERSTATEMENT OF THE ISSUES	2
III.	COUNTERSTATEMENT OF THE CASE	3
	A. Statutory Framework	3
	B. Lee’s History of Sexual Violence	5
	C. Procedural History	7
	D. Transition Teams	9
IV.	ARGUMENT	10
	A. The LRA Order Is Consistent with Both the SVP Statute and the Constitutional Separation of Powers	11
	1. RCW 71.09.092 lawfully delegates administrative authority to treatment providers and the Department of Corrections	12
	2. RCW 71.09.096 authorizes the trial court to impose additional conditions of release to community confinement	19
	3. Lee’s interpretation of the SVP statute is impractical and contrary to the legislative purpose of delegating authority to the treatment provider and DOC to oversee the LRA	22
	B. The LRA Order Satisfies Due Process Because It Provides Lee with Notice of the Conduct He Must Avoid and an Opportunity to be Heard.....	23
	1. The conditions restricting Lee’s access to media satisfy the First Amendment.....	24

2.	The conditions requiring Lee to seek the transition team’s approval before engaging in certain conduct satisfy due process.....	30
a.	The conditions restricting Lee’s conduct are not vague	32
b.	Procedural due process is satisfied.....	33
C.	The LRA Order’s Search Provisions Do Not Violate Lee’s Truncated Privacy Rights.....	35
V.	CONCLUSION	39

TABLE OF AUTHORITIES

Cases

<i>Amunrud v. Bd. of Appeals</i> , 158 Wn.2d 208, 143 P.3d 571 (2006).....	31, 34
<i>Arnzen v. Palmer</i> , 713 F.3d 369 (8th Cir. 2013)	36, 37, 38
<i>Barry & Barry, Inc. v. Dep't of Motor Vehicles</i> , 81 Wn.2d 155, 500 P.2d 540, 543 (1972).....	33
<i>City of Spokane v. Douglass</i> , 115 Wn.2d 171, 795 P.2d 693 (1990).....	23, 27
<i>In re Det. of Campbell</i> , 139 Wn.2d 341, 986 P.2d 771 (1999).....	35, 36
<i>In re Det. of Williams</i> , 163 Wn. App. 89, 264 P.3d 570 (2011).....	35
<i>In re Golden</i> , 172 Wn. App. 426, 290 P.3d 168 (2012).....	13, 14
<i>Mathews v. Eldridge</i> , 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976).....	31
<i>Morrissey v. Brewer</i> , 408 U.S. 471, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972).....	34, 35
<i>State ex re. Peninsula Neighborhood Ass'n v. Dep't of Transp.</i> , 142 Wn.2d 328, 12 P.3d 134 (2000).....	12
<i>State v. Bahl</i> , 164 Wn.2d 739, 193 P.3d 678 (2008).....	23, 24, 25, 27
<i>State v. Cornwell</i> , 190 Wn.2d 296, 412 P.3d 1265 (2018).....	36, 37

<i>State v. Halstien</i> , 122 Wn.2d 109, 857 P.2d 270 (1993).....	25
<i>State v. Massey</i> , 81 Wn. App. 198, 913 P.2d 424 (1996).....	38
<i>State v. McCormick</i> , 166 Wn.2d 689, 213 P.3d 32 (2009).....	31
<i>State v. McWilliams</i> , 177 Wn. App. 139, 311 P.3d 584 (2013).....	13
<i>State v. N.E.</i> , 70 Wn. App. 602, 854 P.2d 672 (1993).....	29
<i>State v. Olsen</i> , 189 W.2d 118, 399 P.2d 1141 (2017).....	36
<i>State v. Riles</i> , 135 Wn.2d 326, 957 P.2d 655 (1998).....	25, 28, 31, 32
<i>State v. Sansone</i> , 127 Wn. App. 630, 111 P.3d 1251 (2005).....	14, 17, 18
<i>State v. Valencia</i> , 169 Wn.2d 782, 239 P.3d 1059	38
<i>State v. Williams</i> , 97 Wn. App. 257, 983 P.2d 687 (1999).....	15
<i>United States v. Morin</i> , 832 F.3d 513 (5th Cir. 2016)	16, 17, 18

Statutes

18 U.S.C. § 3553.....	16
71.05 RCW	14
9.94A RCW.....	13, 37

RCW 13.34.069	14
RCW 3.66.068	15
RCW 71.05.240(4).....	14
RCW 71.09.010	3
RCW 71.09.020(16).....	4, 38
RCW 71.09.020(18).....	3, 4, 38
RCW 71.09.020(7).....	38
RCW 71.09.040	35
RCW 71.09.060(1).....	4, 20
RCW 71.09.090	4, 33
RCW 71.09.090(1).....	4
RCW 71.09.092	4, 10, 12, 20, 22
RCW 71.09.092(16).....	36
RCW 71.09.092(18).....	36
RCW 71.09.092(2).....	10, 18
RCW 71.09.092(4).....	passim
RCW 71.09.092(5).....	passim
RCW 71.09.096	11, 12, 19, 33, 37
RCW 71.09.096(1).....	14, 19
RCW 71.09.096(2).....	19, 20, 23
RCW 71.09.096(4).....	10, 23

RCW 71.09.098	24, 34, 35
RCW 71.09.098(1).....	20, 34
RCW 71.09.098(2).....	20, 34
RCW 71.09.098(3).....	20
RCW 71.09.098(3)(b)	34
RCW 71.09.098(5).....	34
RCW 9.94A.631(1).....	37
RCW 9.94A.704.....	13
RCW 9.94A704(2)(a)	13

Rules

CrRLJ 7.2(a)	15
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I. INTRODUCTION

Damon Lee is a sexually violent predator. He was committed to total confinement at the Special Commitment Center in 2004. When he petitioned for conditional release to a less restrictive alternative (LRA) in 2017, he agreed—as required by law—to comply with “all requirements imposed by the treatment provider” and with the “supervision requirements imposed by the department of corrections.” CP 428; RCW 71.09.092(4), (5). The trial court found that he was willing to comply with these conditions and entered an order conditionally releasing him to an LRA.

Yet Lee argues that the treatment provider and Department of Corrections (DOC) lack the authority to impose *any* requirements that were not explicitly articulated in the court’s LRA order. But because the legislature has expressly and lawfully delegated administrative authority to the treatment provider and DOC to impose restrictions on an SVP’s conduct while in community confinement, the trial court did not unlawfully delegate any judicial authority to them. The court’s conditions are consistent with the statutory framework and the constitutional separation of powers.

Additionally, the order adequately notifies Lee of proscribed conduct and allows for a hearing on contested requirements, satisfying due process. The order is clear that before Lee can engage in conduct that would require an exercise of judgment, Lee must seek permission from the

“transition team”—a group comprised of the treatment provider, the DOC community corrections officer, and a representative from the Special Commitment Center—which oversees Lee’s release. If Lee disagrees with any of the transition team’s decisions, the trial court retained “jurisdiction and authority to modify th[e] order on the motion or either party.” CP 310.

Moreover, the condition authorizing a search of Lee and his property and possessions at the community corrections officer’s discretion does not violate his privacy rights. As a sexually violent predatory confined to a secure facility in the community, Lee’s truncated privacy rights are outweighed by the need to protect the community from his likelihood to reoffend. The Court should affirm the LRA order.

II. COUNTERSTATEMENT OF THE ISSUES

1. Where the legislature has delegated administrative authority to treatment providers and the Department of Corrections to implement and oversee an SVP’s community confinement, did the trial court permissibly condition Lee’s release on his compliance with the transition team’s requirements?

2. Lee concedes that the conditions outlining certain specific conduct that requires transition team approval provide him with fair notice. Where Lee can petition the trial court to modify any of the conditions, and Lee would be entitled to a hearing where the State bears the burden or proof if a

transition team member petitioned to revoke the LRA, does the LRA order satisfy due process?

3. Does the statutory requirement that conditions be in Lee's best interests and ensure that the public is protected provide "ascertainable standards" to guide the transition team's decision-making, thus satisfying due process?

4. As a sexually violent predator who is confined to a secure facility, Lee has minimal privacy rights. Do the legitimate demands of his supervision necessitate searches of his property and possessions at the discretion of the community corrections officer? And even if reasonable suspicion is required for a search, is Lee's challenge not ripe until a search is actually conducted?

III. COUNTERSTATEMENT OF THE CASE

A. Statutory Framework

Sexually violent predators (SVPs) are a very limited subset of the persons convicted or charged with crimes of sexual violence. This "small but extremely dangerous group" suffers from mental abnormalities or personality disorders that make them "likely to engage in predatory acts of sexual violence if not confined in a secure facility." RCW 71.09.010, .020(18).

Sexually violent predators are committed for control and treatment in a “secure facility.” RCW 71.09.060(1). This may be a total confinement facility, a secure community transition facility, or any sufficiently secure residence used as a court-ordered placement. RCW 71.09.020(16). Following an annual mental health evaluation, a person committed to total confinement can petition for unconditional discharge or conditional release to a secure facility in the community. RCW 71.09.090. Unconditional discharge can occur only if the person no longer meets the definition of an SVP. RCW 71.09.060(1); *see also* RCW 71.09.090.

Confinement in a less restrictive alternative is an option for those who continue to be “likely to engage in predatory acts of sexual violence if not confined in a secure facility.” RCW 71.09.020(18), RCW 71.09.090(1). However, a court may order a less restrictive alternative only if it is in the person’s best interests, conditions can be imposed to adequately protect the public, and the court ensures that mental health treatment and supervision requirements are met. RCW 71.09.092, .096(1). To this end, the treatment provider must inform the court of treatment compliance and report violations to the court, the prosecutor, and a community corrections officer. RCW 71.09.092(2), .096(6). And the SVP must agree to comply with all treatment requirements and the supervision conditions imposed by DOC. RCW 71.09.092(4), (5).

B. Lee's History of Sexual Violence

Lee's history of sexual violence spans from 1973 to 1990, when he was last arrested and confined. CP 460. His victims are girls and women ranging in age from six to 39 years old. *Id.* At least two victims were strangers, and his offenses employed surprise, weapons, physical restraints, and threats of death. *Id.*

When Lee was 15 years old, a 14-year-old girl reported that he sexually assaulted her in the woods. CP 485. His first arrest for a sexual offense occurred in 1973, when he was 17 years old. CP 489. A 6-year-old girl reported that while she was on her way to school, Lee picked her up and carried her into some brush. *Id.* He placed a knife against her neck and threatened to cut her if she did not stop crying, then unzipped his pants, took out his penis, and put it in her mouth. *Id.* Lee admitted to this offense, only disputing that he had a "piece of metal," not a knife. *Id.* Upon arrest, he also admitted to three armed robberies. *Id.* He was sentenced to not more than 20 years in prison.¹ *Id.*

In 1982, Lee escaped from prison. *Id.* Nine days later, he committed an armed robbery in California. *Id.* He served two and a half years in prison

¹ While on parole in 1979, Lee committed two non-sexual assaults, and his parole was revoked. He was returned to DOC custody to serve the remainder of his 20-year prison term. CP 489-99.

in California, after which he was returned to Washington to serve out the remainder of his prior sentence. *Id.*

While on parole in 1990, Lee picked up a woman who was hitchhiking in the Tacoma area. *Id.* At some point, Lee stopped behind a building, pointed a gun at the woman, and directed her to perform oral sex. *Id.* Lee then drove to an alley, directed the woman into an open garage, and raped her. CP 490-91. Following Lee's arrest, a search of his apartment revealed a significant number of guns and knives, a supply of cord, a set of chrome handcuffs, news articles about two rape investigations, and an album labeled "Conquest Book," which contained photos of men and women engaged in sexual activities. CP 492.

Lee was initially charged with Rape in the First Degree while armed with a deadly weapon and Robbery in the First Degree while armed with a deadly weapon. CP 491. But in exchange for Lee's guilty plea to Rape in the First Degree, the State agreed to dismiss the robbery count and deadly weapon enhancement. *Id.* He was sentenced to 96 months in prison. *Id.*

Lee was identified as a suspect in at least six other rape cases that occurred in the Tacoma area while he was on parole between 1988-1990, which bore similarities to the rape for which he was convicted. CP 491. All of the victims were accosted by a man with a gun or a knife; taken to open garages, vacant houses, or abandoned buildings; and raped. CP 492. All but

one had her hands cuffed or tied behind her while assaulted. *Id.* Lee himself reported forcing approximately 55 women to engage in sexual activity between 1988 and 1990. CP 498. However, Lee was not charged in any of these additional cases because, as part of his 1990 plea agreement, prosecutors agreed not to charge Lee with any further sexual offenses. *Id.*

C. Procedural History

In May 2004, a jury found Lee to be a sexually violent predator. CP 291. He was committed to the custody of the Department of Social and Health Services at the Special Commitment Center.² *Id.*

In May 2017, the Department of Social and Health Services submitted an annual review of Lee's mental condition, which opined that while Lee continues to meet the criteria of an SVP, conditional release to a less restrictive alternative was in his best interest, and conditions could be imposed to adequately protect the community. CP 171, 291. The Chief Executive Officer of the Special Commitment Center authorized Lee to petition for an LRA. CP 291, 454.

Instead, Lee petitioned for unconditional release, which resulted in two mistrials. *Id.* Following the mistrials, the State agreed to stipulate that Lee was eligible for conditional release to a less restrictive alternative. CP

² The Special Commitment Center is a "total confinement facility" on McNeil Island that is operated by the Department of Social and Health Services.

207. However, the parties disagreed on a number of the release conditions. Relevant here, the State proposed that the order include a “transition team”—comprised of the sex offender treatment provider, the assigned community corrections officer, and a designated representative of the Special Commitment Center—to oversee and implement the order. CP 214-34. The State’s proposed order required Lee comply with the verbal and written instructions of the transition team and its members. CP 298-300.³ It also required Lee to seek the transition team’s approval before participating in employment or educational opportunities (CP 300), accessing the internet (CP 303), obtaining a driver’s license or driving (CP 304), or “possess images of children or view media directed toward or focused on children” (CP 307), among other things. It also specifically prohibited Lee from possessing a firearm (CP 302), entering any adult entertainment establishment where nudity or erotic entertainment or literature are for sale (CP 303), consume alcohol or controlled substances (CP 303), access “chat lines” (CP 308), and more.⁴

Lee objected to all of the conditions that involved decision-making by the transition team. CP 62-66. Lee also objected to a condition requiring

³ Here, the State cites to the order the court adopted for ease of reference.

⁴ The LRA order contains 14 pages of conditions. Lee does not identify with specificity each of the conditions he challenges.

him to submit to searches of his person or property at the discretion of the community corrections officer. CP 47-48, 297.

Following a hearing on the contested LRA conditions, the court entered an order adopting the state's proposed conditions. CP 290-310. The court also added a provision stating that it retained jurisdiction to modify the order on the motion of either party. CP 310.

D. Transition Teams

“Transition teams” have become an essential tool for monitoring SVPs on conditional release, ensuring they both make progress in treatment and do not pose a threat to the public. The Community Programs Administrator for the Department of Social and Health Services—who has held that position since 2009—stated that in every single conditional release plan in Washington that she is aware of, the court has established a transition team, typically comprised of the sex-offender treatment provider, the community corrections officer, and a representative of the Special Commitment Center. CP 163-64, 726-27. Transition teams help manage the day-to-day logistics of a person's conditional release. CP 164. They make decision regarding the person's day-to-day activities, such as reviewing trip plans; approving or restricting contact with victims, minors, and others; approving or restricting access to certain media; and considering chaperone

requests. CP 165. The team members generally meet monthly to review and discuss the person's status and treatment progress. CP 164.

As a member of the transition team, the community corrections officer is responsible for supervising Lee while he is housed in the community, monitoring his compliance with court ordered restrictions and treatment requirements, and communicating with the sex offender treatment provider and a representative of the Special Commitment Center. CP 726-27. Additionally, while Lee is conditionally released to a less restrictive alternative, he must continue sex offender treatment therapy. RCW 71.09.092(1), (2); RCW 71.09.096(4). The treatment provider's role is thus to work with the transition team to ensure that Lee continues to progress in treatment and to provide regular updates on that progress to the court, prosecutor, and others. RCW 71.09.092(2). Indeed, before the court can conditionally release an SVP, it must find that a treatment provider "has agreed to assume responsibility for such treatment" *Id.*

IV. ARGUMENT

The Court should affirm the LRA order because authorizing a transition team to impose conditions on Lee's community confinement is consistent with the statutory delegation of authority to the treatment provider and DOC to impose release requirements that Lee comply with

under RCW 71.09.092(4) and (5). For the same reason, the conditions are consistent with the constitutional separation of powers.

Additionally, the conditions requiring Lee to comply with all “verbal and written requirements” of the transition team, and that he seek the team’s permission before engaging in certain conduct, are consistent with due process, because the transition team’s decision-making is guided by the purposes of the statute. Importantly, Lee can seek modification of the order by filing a motion with the court.

Finally, the condition requiring Lee to submit to a search of his person or property at the community correction officer’s discretion does not violate his truncated privacy rights as an SVP who is housed in a secure facility. The Court should affirm the challenged provisions of the LRA order.

A. The LRA Order Is Consistent with Both the SVP Statute and the Constitutional Separation of Powers

The provisions of the LRA order that require Lee to comply with all verbal and written instructions of the treatment provider and DOC are entirely appropriate. The authority to order an LRA placement lies with the court. RCW 71.09.096. In ordering the State to move Lee into a secure facility in the community, the court also has the authority to direct Lee to comply with conditions imposed by the treatment provider and the

Department of Corrections, pursuant to the provider and agency's statutory authority to impose treatment and supervision requirements under RCW 71.09.092(4) and (5). An unconstitutional delegation of authority does not occur when the Legislature has statutorily determined the administrative role of the treatment provider and the agencies responsible for supervising the community confinement. The Court should uphold the conditions.

1. RCW 71.09.092 lawfully delegates administrative authority to treatment providers and the Department of Corrections

It is the function of the judicial branch to determine whether an SVP can be conditionally released to community confinement. But the Legislature also has the authority to delegate administrative power. *State ex re. Peninsula Neighborhood Ass'n v. Dep't of Transp.*, 142 Wn.2d 328, 138, 12 P.3d, 134 (2000). Here, while the legislature vested in the judiciary the authority to order a less restrictive alternative under RCW 71.09.096, it also vested the treatment provider and DOC with the administrative authority to oversee the community confinement under RCW 71.09.092.

Before the court can enter an LRA order, it must find, among other things, that the SVP "is willing to comply with the treatment provider and all requirements imposed by the treatment provider and by the courts; and

[that] the person will be under the supervision of the department of corrections and is willing to comply with supervision requirements imposed by the department of corrections.” RCW 71.09.092(4), (5). By their plain language, these provisions authorize the treatment provider and DOC to impose requirements with which Lee must comply while in a secure facility in the community. This “explicit grant of authority to” the treatment provider and DOC “could not be clearer.” *In re Golden*, 172 Wn. App. 426, 434, 290 P.3d 168 (2012) (interpreting RCW 9.94A.704, which authorizes DOC to “establish and modify additional conditions of community custody based on the risk to community safety.”).

Lee’s contention that the day-to-day administration of the community placement must be micromanaged by the trial court has already been rejected by the courts. This Court considered a similar challenge to DOC’s authority to impose community custody conditions under the Sentencing Reform Act, chapter 9.94A RCW.⁵ *State v. McWilliams*, 177 Wn. App. 139, 311 P.3d 584 (2013). In *McWilliams*, the Court held that it is appropriate for a trial court to direct DOC to establish additional community custody conditions based on the risk to the community. *Id.* at 154. The Court explained that while it is the function of the courts to decide

⁵ Like *In re Golden*, *McWilliams* considered RCW 9.94A704(2)(a), which expressly authorizes DOC to “establish and modify additional conditions of community custody based on the risk to community safety.” *McWilliams*, 177 Wn. App. at 154.

whether to impose a sentence, the various decisions that need to be made in executing the sentence and reforming the offender “are administrative in character and are properly exercised by an administrative body, according to the manner prescribed by the Legislature.” *Id.* (quoting *State v. Sansone*, 127 Wn. App. 630, 642, 111 P.3d 1251 (2005) (internal citation omitted)); *see also In re Golden*, 172 Wn. App. 426, 290 P.3d 168 (2012) (upholding an order directing the Department of Corrections to carry out its statutory authority by “perform[ing] a risk assessment and then impos[ing] ‘additional conditions of the offender’s community custody based upon the risk to community safety.’”).

Although the confinement of sexually violent predators is civil, rather than criminal, the analysis is equally applicable.⁶ The court alone has authority to determine whether Lee may be confined in the community. RCW 71.09.096(1). But because the execution of that decision is administrative in nature, the court has authority to direct Lee to comply with the therapeutic treatment and specific supervision conditions imposed by

⁶ Indeed, courts require individuals to comply with mental health treatment providers and agency decisions in a variety of civil contexts. For example, in cases involving involuntary civil commitment under chapter 71.05 RCW, the court may order a less restrictive alternative treatment, naming the mental health provider responsible for determining the services the individual must receive, and directing the individual to “cooperate with the service planned by the mental health service provider.” RCW 71.05.240(4). And in child dependency cases, courts have statutory authority to direct the Department of Children, Youth, and Families or another supervising agency to make day-to-day education and health care decisions for the child. RCW 13.34.069.

the treatment provider and the Department of Corrections, in accordance with their statutory authority. RCW 71.09.092(4), (5). Because the conditions requiring Lee to comply with the treatment provider and DOC's instructions are consistent with the SVP statute and the constitutional separation of powers, the Court should uphold the conditions.

Lee's reliance on *State v. Williams*, 97 Wn. App. 257, 264, 983 P.2d 687 (1999), to suggest that the "precise delineation" of release conditions "is a core judicial function," is misplaced Appellant's Opening Br. 15. *Williams* was a misdemeanor criminal case dealing with the terms of a defendant's probation. *Williams*, 97 Wn. App. at 259. There, the applicable statute, RCW 3.66.068, allowed only the court of limited jurisdiction to impose terms of probation. *Id.* at 691. Additionally, CrRLJ 7.2(a) specifically requires a court of limited jurisdiction to "state the precise terms of the [misdemeanor] sentence."⁷ It was in that context that the Court stated that the precise delineation of *probation terms* is a core judicial function that cannot be delegated. *Id.* at 264. In contrast in the SVP statute, the Legislature has specifically delegated the authority to set conditions to the treatment provider, DOC, and the trial court. Setting the terms and

⁷ In *Williams*, the Court declined to consider the argument the defendant raised for the first time in his reply brief that CrRLJ 7.2(a) required the court include precise terms and conditions of probation in a sentencing order. *Williams*, 97 Wn. App. at 266.

conditions of an SVP's community confinement thus is not "core" or inherent to the judiciary.

Lee's reliance on *United States v. Morin*, 832 F.3d 513 (5th Cir. 2016), is similarly misplaced. There, too, the challenged condition was one of supervised release imposed as part of a criminal sentence for failing to register as a sex offender. *U.S. v. Morin*, 832 F.3d at 514. The federal sentencing statute also authorized only the court to impose sentences. *See* 18 U.S.C. § 3553. Accordingly, the court noted that the judiciary has "exclusive authority to impose sentences." *Id.* at 518. In contrast here, the treatment provider and community corrections officer have specific statutory authority to impose treatment and supervision requirements that is independent from the trial court's authority to order the LRA and impose its own conditions. RCW 71.09.092(4), (5). The *Morin* court even agreed with the Government that "the court may determine that the manner and means of therapy during a treatment program may be devised by therapists rather than the court." *Id.* at 516-17. That is what the transition team does here—determine the manner and means of treatment and community supervision, pursuant to their statutory authority.

Morin is also factually distinguishable. There, the court found the condition requiring the defendant to comply with all "lifestyle restrictions" imposed by the treatment provider to impermissibly delegate sentencing

authority to the treatment provider. *Morin*, 832 F.3d at 517. But here, the court specifically articulated in the LRA order certain “lifestyle restrictions” with which Lee must comply. Indeed, the order contains 14 pages of detailed conditions. CP 295-308. For example, Lee may not possess a firearm (CP 302), enter into any adult entertainment establishment where nudity or erotic entertainment or literature are for sale (CP 303), consume alcohol or controlled substances (CP 303), access “chat lines” (CP 308), and may not, without approval of the transition team, have intentional direct or indirect contact with minors (CP 300), frequent establishments that cater primarily to minors (CP 301), have access to the internet (CP 303), drive (CP 304), and more. On these latter conditions, the court left the specific details of which locations are appropriate to visit, which times or reasons Lee may access the internet, and if or when Lee can drive, to the transition team. These details are more akin to the “manner and means” of treatment and supervision, which the *Morin* court stated was appropriate. *Id.*

Finally, *State v. Sansone* does not support Lee because there, the Court merely held that “the term ‘pornography’ is unconstitutionally vague,” and that the trial court improperly delegated to the probation officer the authority to define the term. *State v. Sansone*, 127 Wn. App. 630, 111 P.3d 1251 (2005). However, the Court explained that “delegation to the

probation officer or treatment provider to define a term in a community placement condition may be permissible” if the offender were in treatment:

We note that our holding is limited to the circumstances at hand. A 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 [the offender] could have. In such a circumstance, the prohibition is not necessarily static—it is a prohibition that that might change as the probationer’s treatment progressed, and is thus best left to the discretion of the therapist.

Id. at 634, 643.

Here, in addition to the fact that the legislature has authorized the treatment provider and community corrections officer to impose release requirements, Lee remains in treatment. Indeed, before the court can conditionally release an SVP, it must find that a treatment provider “has agreed to assume responsibility for such treatment” RCW 71.09.092(2). A treatment provider likely would not agree to “assume responsibility” for an SVP’s treatment if every treatment decision required approval from the court. It is best left to the professional judgment of the treatment provider to determine the manner and means of treatment, and to the professional discretion of the community corrections officer to determine the manner and means of supervision, as Lee’s treatment and time in the community progresses. *See id.; Morin*, 832 F.3d at 516-17. The

delegation was not excessive; it was authorized by statute. The Court should uphold the challenged conditions.

2. RCW 71.09.096 authorizes the trial court to impose additional conditions of release to community confinement

As discussed, before the court can enter an LRA order, it must find, among other things, that the SVP “is willing to comply with the treatment provider and all requirements imposed by the treatment provider and by the courts; and [that] the person will be under the supervision of the department of corrections and is willing to comply with supervision requirements imposed by the department of corrections.” RCW 71.09.092(4), (5). Once the court has determined that these “minimum conditions . . . are met” and “enter[s] judgment and direct[s] a conditional release,” RCW 71.09.096(1), the court is then authorized to impose “any *additional* conditions necessary to ensure compliance with treatment and to protect the community.” RCW 71.09.096(2) (emphasis added). The legislature thus has delegated equal authority to the treatment provider, the DOC, *and* the trial court to impose conditional release requirements.

Although the legislature has not specifically delegated to a Special Commitment Center representative the authority to impose release requirements, that does not preclude the court from including that person in the day-to-day decision-making with other members of the transition team.

The court is authorized to “impose any additional conditions necessary to ensure compliance with treatment and to protect the community.” RCW 71.09.096(2). Thus if the Court deems it necessary to include an SCC representative in the day-to-day oversight to ensure treatment compliance and community protection, it can do so.

And it makes sense to include an SCC representative in overseeing the LRA, because the SCC has been involved in Lee’s treatment since 2004, when he was committed as an SVP.⁸ It has the most knowledge about Lee’s condition and treatment history. Moreover, a Department of Social and Health Services representative—in addition to the treatment provider and community corrections officer—can petition the court to revoke or modify the terms of the person’s LRA if they believe the person has violated the conditions or is in need of additional care, monitoring, supervision, or treatment. RCW 71.09.098(1). And both DOC and the Department of Social and Health Services are authorized to take the person into custody pending a hearing on the petition. RCW 71.09.098(2), (3). Without the SCC representative’s involvement in the day-to-day implementation and

⁸ See RCW 71.09.060(1) (“If the court or jury determines that the person is a sexually violent predator, *the person shall be committed to the custody of the department of social and health services for placement in a secure facility operated by the department of social and health services for control, care, and treatment until such time as:* (a) The person's condition has so changed that the person no longer meets the definition of a sexually violent predator; or (b) *conditional release to a less restrictive alternative* as set forth in RCW 71.09.092 is in the best interest of the person and conditions can be imposed that would adequately protect the community.”) (emphasis added).

oversight of the LRA, the treatment team would be unable to form a belief about whether the person has violated a condition of release. The statutory framework thus specifically delegates the authority to the treatment provider and community corrections officer to impose release requirements and contemplates that an SCC representative will be involved with implementing and overseeing the LRA in conjunction with the treatment provider and community corrections officer.

Accordingly, the superior court was authorized to impose conditions requiring Lee to seek approval of the “transition team” before, for example, applying for a job (CP 300), contacting any minor children (CP 300), accessing the internet (CP 303), or leaving Pierce County (CP 304). Each of these circumstances poses an obvious risk of potential community harm. The Court was similarly authorized to condition Lee’s release on his compliance with the treatment and supervision requirements of the treatment provider and DOC, including their verbal in written instructions. CP 298-300. These conditions are consistent with the statutory scheme, and the Court should uphold them.

3. Lee's interpretation of the SVP statute is impractical and contrary to the legislative purpose of delegating authority to the treatment provider and DOC to oversee the LRA

Requiring the trial court to approve every aspect of the day-to-day management of a person's conditional release, as Lee requests, would be impracticable and contrary to the purpose of RCW 71.09.092, which requires the SVP to comply with requirements of the treatment provider and DOC. It would also work to the detriment of sexually violent predators who receive flexibility and certain freedoms from their transition teams.

Under Lee's theory of the sexually violent predator statute, every time a person wanted to meet with a family member or friend, he would have to petition the court for approval. Every time he wanted to apply for a job, or access the internet, or seek approval for a new chaperone, the court would have to hold a hearing. And every time the treatment provider, the community corrections officer, or the SVP wanted to amend a list of approved movies to watch, or parks he can visit, or appointments he can attend, all parties and the trial judge would have to convene in court. Such a process would be overly burdensome for all involved. More importantly, it is not the process the legislature envisioned when it required SVPs—in order to be conditionally released to an LRA—to agree to comply with all

requirements imposed by the treatment provider and DOC. RCW 71.09.092(4), (5).

Because RCW 71.09.092(4) and (5) require Lee to comply with all requirements imposed by the treatment provider and DOC, and RCW 71.09.096(2) and (4) authorize the trial court to impose any additional conditions it deems necessary to ensure treatment compliance and community safety, the court lawfully authorized the “transition team” members to impose release requirements with which Lee must comply.

B. The LRA Order Satisfies Due Process Because It Provides Lee with Notice of the Conduct He Must Avoid and an Opportunity To Be Heard

“[T]he due process vagueness doctrine under the Fourteenth Amendment and article I, section 3 of the state constitution requires that citizens have fair warning of proscribed conduct.” *State v. Bahl*, 164 Wn.2d 739, 752, 193 P.3d 678 (2008). Its purpose is to provide citizens with fair warning of what conduct they must avoid and to protect them from arbitrary enforcement. *Id.* at 752-53. But if a person “of ordinary intelligence can understand what the [condition] proscribes, notwithstanding some possible areas of disagreement, the [condition] is sufficiently definite.” *City of Spokane v. Douglass*, 115 Wn.2d 171, 179, 795 P.2d 693 (1990). Conditions of release are reviewed for abuse of discretion and will be reversed only if they are manifestly unreasonable.

See Bahl, 164 Wn.2d at 753 (standard of review for conditions of community custody).

The conditions Lee complains of—including those restricting his access to specific types of media and those requiring transition team approval before he engages in specific conduct—are sufficiently definite to notify Lee of what types of media he must avoid and for what types of activities he must seek approval. Due to the collaborative nature of the LRA process, where Lee can seek *permission* to view certain media or literature, visit people, apply for work, or access the internet, there is little likelihood that the conditions will be arbitrarily enforced in a way that would result in the revocation of the LRA. Importantly here, if Lee disagrees with an administrative decision, the LRA order allows him to seek the trial court's review of the decision. CP 310. And even if a transition team member petitions to revoke or modify the LRA based on an alleged violation, Lee would be entitled to a hearing where the State bears the burden of proof. RCW 71.09.098. Because the conditions satisfy due process, they are, therefore, not manifestly unreasonable.

1. The conditions restricting Lee's access to media satisfy the First Amendment

The conditions in the LRA order restricting Lee's access to certain media are neither unconstitutionally vague nor an infringement on Lee's

First Amendment rights.⁹ People of ordinary intelligence can understand what the conditions proscribe.

The First Amendment prevents government from prohibiting protected speech or expressive conduct. *State v. Riles*, 135 Wn.2d 326, 346, 957 P.2d 655 (1998). “When considering whether a term is unconstitutionally vague, the terms are not considered in a ‘vacuum,’ rather, they are considered in the context in which they are used.” *State v. Bahl*, 164 Wn.2d 739, 754, 193 P.3d 678 (2008). Additionally, “the constitution does not require ‘impossible standards of specificity’ or ‘mathematical certainty’ because some degree of vagueness is inherent in the use of our language.” *Riles*, 135 Wn.2d at 348 (quoting *State v. Halstien*, 122 Wn.2d 109, 118, 857 P.2d 270 (1993)). A condition is not unconstitutionally vague “merely because a person cannot predict with certainty the exact point at which conduct would be prohibited.” *Id.* at 348.

Lee complains that the prohibition on his access to media depicting “consensual sex,” “sexual themes,” “children’s themes,” “excessive violence,” “images of children,” or “media directed toward or focused on children” are unconstitutionally vague. Appellant’s Opening Br. 22. They are not.

⁹ Lee makes no argument about whether the conditions violate article I, section 5 of the Washington Constitution.

The challenged conditions actually state:

11. Mr. Lee shall not intentionally or negligently purchase, possess [sic], play or view movies, television programming, printed materials, or video games for the purpose of causing or enhancing sexual arousal. This prohibition includes, but is not limited to, materials depicting consensual sex, sex with violence or force, sex with non-consenting adults, or sexual activity with children. Mr. Lee shall follow the procedure established by his Transition /team [sic] if he inadvertently views, possesses, or interacts with media or material that could arguably violate this condition. . . .

12. Mr. Lee shall not purchase, possess, view, or play any R-rated movies or M-rated video games. Mr. Lee shall not intentionally or negligently purchase, possess, play, or view movies, television shows, printed materials, or video games depicting sexual themes, children's themes, or excessive violence. The Transition Team may make exceptions to specifically identified games, shows, movies, or printed materials. The Transition Team will resolve any questions as to what constitutes sexual themes, children's themes, or excessive violence. Mr. Lee shall follow the procedure established by his Transition team if he inadvertently views or possesses media or material that could arguably be depicting sexual themes, children's themes, or excessive violence.

CP 302-03.

2. Mr. Lee shall not possess images of children or view media directed toward or focused on children without the prior consent of his Transition Team. Possession of visual depictions of semi-clad or naked children is prohibited. The Transition Team shall define in writing what "directed towards or focused on" means.

CP 307.

Lee is concerned that the language regarding prohibited media “is broad enough to cover a movie such as *Titanic*, the Department of Social and Health Services pamphlet ‘Eating Well for Less,’ and artwork created in previous centuries.” Appellant’s Opening Br. 22. But he ignores the language that states that he only violates the condition if he “intentionally or negligently” views the material. CP 302. He also ignores language that requires the viewing of the materials to be “for the purpose of causing or enhancing sexual arousal.” *Id.* These are important qualifiers. If the access is inadvertent, or not for the purpose of sexual arousal, it does not amount to a violation. Viewing the terms “in the context in which they are used,” *Bahl*, 164 Wn.2d at 754, they are “sufficiently definite” to provide fair notice. *City of Spokane*, 115 Wn.2d at 179.

In addition, another provision puts Lee on clear notice of what materials *are* approved: “Prior to Mr. Lee’s release from total confinement, the SCC shall provide a list of all approved media (books, movies, video games, CDs, etc.) to the assigned community corrections officer. The Transition Team may approve or disapprove any of the items on the list.” CP 307. If media Lee wishes to access is not identified on the list, then the material “must be preapproved by the Transition Team prior to purchase, rental, and/or possession.” *Id.* Accordingly, Lee has received specific notice of the media he is entitled to possess and view. Although a condition is not

unconstitutionally vague “merely because a person cannot predict with certainty the exact point at which conduct would be prohibited,” *Riles*, 135 Wn.2d at 348, Lee does not have to engage in any predictions. If there is media he wishes to access that it is not on the pre-approved list, he can assume it is proscribed or seek approval from the transition team. If approval is denied, the media is proscribed. Thus the terms restricting Lee’s access to media are not unconstitutionally vague because Lee has notice of the media that is prohibited. There is little chance Lee will unknowingly violate this condition and risk the revocation of his conditional release. The condition, therefore, satisfies due process.

As for the condition that Lee not “possess images of children or view media directed toward or focused on children without the prior consent of his Transition Team,” and directing the transition team to define “what ‘directed towards or focused on’ means,” this delegation was lawful because members of the transition team are authorized to impose release requirements. RCW 71.09.092(4), (5); *see* Section IV.A.1, *supra*. Moreover, the condition does not completely prohibit Lee from possessing all images of children or media directed towards children. Rather, it merely requires him to seek approval of the transition team before possessing it, because the transition team is in the best position to know what will be in Lee’s best treatment interests.

In footnotes, Lee also challenges as unconstitutionally vague the condition that requires him to “not frequent or loiter outside of establishments that cater primarily to minors without the express written permission of the Transition Team.”¹⁰ Appellant’s Opening Br. 18 n.19, 22 n.24. He claims the trial court should not have allowed the transition team to define the phrase. *Id.* But the court did not allow the transition team to define the phrase. Rather, the court included a list of “establishments that cater primarily to minors,” putting Lee on notice of the locations he must avoid. CP 301. That list includes “elementary schools, junior high or middle schools, high schools, daycares, parks, recreation areas, playgrounds, school bus stops, swimming pools, zoos, and arcades.”¹¹ *Id.* The court then permitted the transition team to *modify* the condition if it finds that a “specific proposed establishment does not cater primarily to minors and is an appropriate location for Mr. Lee to visit.” *Id.* The transition team is thus authorized to approve *specific locations* within the categories of establishments listed in the order. The list provides Lee with sufficient notice of the types of locations he must avoid and gives the transition team the administrative discretion to consider specific locations, thus satisfying

¹⁰ Arguments raised solely in footnotes need not be considered by the Court. *State v. N.E.*, 70 Wn. App. 602, 606 n.3, 854 P.2d 672 (1993).

¹¹ The condition also allows the transition team to “modify this condition if the Transition Team determines that a specific proposed establishment does not cater primarily to minors and is in an appropriate location for Mr. Lee to visit.” CP 301.

due process. If Lee wants to propose a specific location to visit, the transition team can consider it. The Court should affirm the conditions.

2. The conditions requiring Lee to seek the transition team's approval before engaging in certain conduct satisfy due process

Next, Lee asks the Court to strike *all* of the conditions that allow the transition team to make decisions as violations of both the due process vagueness doctrine and procedural due process.¹² Appellant's Opening Br. 24-28. But the conditions are not vague because they put Lee on notice of the precise conduct for which he must seek approval. Moreover, the SVP statute provides the "ascertainable standards" that guide the transition team's decisions: they must be in the person's best interest and designed to protect the community. Finally, the conditions satisfy due process because, even if Lee were alleged to have violated a condition, he is entitled to a hearing before his LRA can be revoked.

Under the Fourteenth Amendment to the U.S. Constitution, government may not deprive an individual of "life, liberty, or property without due process of law." U.S. CONST. amend. XIV, § 1. "Washington's due process clause does not afford broader protection than that given by the Fourteenth Amendment to the United States Constitution."

¹² Lee neglects to identify each challenged condition with specificity.

State v. McCormick, 166 Wn.2d 689, 699, 213 P.3d 32 (2009). As discussed, the due process vagueness doctrine is intended to provide adequate notice of proscribed conduct and protect from arbitrary enforcement. *Riles*, 135 Wn.2d at 348. Procedural due process requires notice of a proposed deprivation and an opportunity to be heard at a meaningful time and in a meaningful manner, appropriate to the case. *Amunrud v. Bd. of Appeals*, 158 Wn.2d 208, 216, 143 P.3d 571 (2006) (citing *Mathews v. Eldridge*, 424 U.S. 319, 348, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976)). Determining what process is due in a given case depends on the balancing of (1) the private interest affected by the government action, (2) the risk of erroneous deprivation of that interest under existing procedural standards, and (3) the countervailing government interest, including the function involved and the fiscal and administrative burdens additional procedures would entail. *Mathews*, 424 U.S. at 335.

Lee concedes that he “has received fair notice” of the conduct he must seek the transition team’s permission to engage in, satisfying the first elements of the vagueness and procedural due process requirements. Appellant’s Opening Br. 24. Indeed, he does not have to predict what conduct he must seek approval to pursue, because it is specifically outlined in the LRA order.

a. The conditions restricting Lee's conduct are not vague

Lee is concerned that the conditions are so vague that the transition team members will arbitrarily deny his requests. But Lee is merely required to seek approval before he can, among other things, travel in the community (CP 295), have visitors in his residence (CP 297), get a job (CP 300), have contact with children (CP 300), and access the internet (CP 303). Lee thus has notice of the precise conduct for which he must seek approval. He does not have to “predict with certainty the exact point at which conduct would be prohibited.” *Riles*, 135 Wn.2d at 348. And the order explicitly provides that if Lee “is unsure whether his behavior is prohibited, he shall refrain from engaging in the behavior until he obtains approval from the Transition Team.” CP 295. Only if Lee fails to seek permission before engaging in these activities, or if he engages in the activities despite the transition team’s denial, will Lee have violated a condition, potentially jeopardizing his release.

Moreover, the transition team’s decisions regarding specific requests are constrained by the purpose of the statute. The SVP statute itself places limits on the transition team’s decision-making, because of the statutory need for the less restrictive alternative to be in Lee’s best interest and for there to be conditions that adequately protect the public from the

risk of sexual violence. RCW 71.09.090, .096. The standards that guide the transition team's decision-making do not need to be more precise than that. "[R]equiring the legislature to lay down exact and precise standards for the exercise of administrative authority destroys needed flexibility." *Barry & Barry, Inc. v. Dep't of Motor Vehicles*, 81 Wn.2d 155, 160, 500 P.2d 540, 543 (1972). These standards—and the court's detailed, 14-pages of conditions—satisfy due process while affording the transition team the necessary flexibility to perform the day-to-day management of Lee's community supervision.

Lee simply assumes that permission to engage in certain conduct will be arbitrarily granted or denied. But given the statutory standards, the conditions in the order are not vague on their face.

b. Procedural due process is satisfied

Lee's procedural due process interests also are protected. Importantly in this case, if the transition team makes a decision with which Lee disagrees, he can seek review of the decision from the trial court, because the court retained "jurisdiction and authority to modify th[e] order on the motion or either party." CP 310. Lee thus cannot show a risk of erroneous deprivation.

The SVP statute itself also ensures that for any proposed revocation of the LRA, Lee will be heard at a meaningful time and in a meaningful

manner. *Amunrud*, 158 Wn.2d at 216. Even if Lee were alleged to have violated a condition of his release, he has a right to a prompt hearing before his LRA can be revoked or modified. Under RCW 71.09.098, if any member of the transition team believes a violation has occurred, he or she “may petition the court for an immediate hearing for the purpose of revoking or modifying the terms of the person’s conditional release to a less restrictive alternative.” RCW 71.09.098(1) (allowing the treatment provider, the community corrections officer, the prosecuting agency, or the secretary’s designee to petition for revocation or modification). At the hearing, it is the state’s burden to prove that the person has violated the conditions of release. RCW 71.09.098(5). Although Lee’s movement may be restricted or he may be taken into custody pending a hearing, RCW 71.09.098(2), the court must “promptly schedule a hearing” on the petition if he is taken into custody. RCW 71.09.098(3)(b). And restricting his movement or taking him into custody pending the hearing is appropriate to a case in which an SVP is alleged to have violated a condition of release. *Amunrud*, 158 Wn.2d at 216.

Lee’s reliance on *Morrissey v. Brewer*, 408 U.S. 471, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972), is thus misplaced, because that case involved the revocation of a criminal defendant’s parole *without* a hearing. The Court held that due process requires an informal hearing before parole can be

revoked. *Morrissey*, 408 U.S. at 487-88. Here, the SVP statute already provides for a hearing before an LRA can be revoked. RCW 71.09.098. Procedural due process is satisfied.

C. The LRA Order's Search Provisions Do Not Violate Lee's Truncated Privacy Rights

Finally, Lee challenges the conditions that require him to “submit to searches of his person, computer, cellphone, residence, or property at the discretion of the supervising CCO,” in order to “maintain compliance with the conditions of the LRA Court Order.” CP 297; Appellant’s Opening Br. 29-31. He argues that the failure to impose any limitations on the search provision violates his privacy rights under the Fourth Amendment and article 1, section 7 of the Washington Constitution. He is wrong.

Although the Washington constitution places greater emphasis on privacy than the federal constitution, the State can reasonably regulate privacy rights to protect the public. *In re Det. of Williams*, 163 Wn. App. 89, 97, 264 P.3d 570 (2011) (SVP evaluation under former RCW 71.09.040 did not violate appellant’s constitutional privacy rights under article I, section 7). Sex offenders, including those later adjudicated as SVPs, have reduced privacy interests because of the threat they pose to public safety. *Id.*; *In re Det. of Campbell*, 139 Wn.2d 341, 355-56, 986 P.2d 771 (1999). And individuals’ privacy interests can be reduced to the extent

“necessitated by the legitimate demands of the [community supervision] process.” *State v. Cornwell*, 190 Wn.2d 296, 303-04, 412 P.3d 1265 (2018) (quoting *State v. Olsen*, 189 Wn.2d 118, 125, 399 P.2d 1141 (2017)).

Here, the “legitimate demands” of the LRA supervision process necessitate random searches. Sexually violent predators, by definition, are “likely to engage in predatory acts of sexual violence if not confined in a secure facility.” RCW 71.09.092(18). This is no less true simply because the person has been conditionally released to an LRA. Because he is still considered to be an SVP, Lee is still mentally ill and dangerous and likely to reoffend as a matter of law. *Id.* In order to adequately protect the public from a possible sexual offense, the community corrections officer must be able to search Lee and his possessions at any time. These “[g]rave public safety interests . . . outweigh[] the truncated privacy interests of the convicted sex offender.” *Campbell*, 139 Wn.2d at 356.

Contrary to his argument, Lee is not like a person on probation or a pre-trial detainee. Appellant’s Opening Br. 29-31 (citing *Cornwell*, 190 Wn.2d at 303; *Arnzen v. Palmer*, 713 F.3d 369 (8th Cir. 2013)). Rather, he is a civilly committed, sexually violent predator who is confined to a secure facility. RCW 71.09.092(18) (“sexually violent predator” is one who is “likely to engage predatory acts of sexual violence if not confined in a secure facility”); RCW 71.09.092(16) (“secure facility” includes both “total

confinement facilities” and “any residence used as a court-ordered placement under RCW 71.09.096”). In order to ensure that Lee’s residence used as a “court-ordered placement under RCW 71.09.096” remains secure, the community corrections officer supervising Lee’s conditional release must have the same search authority that someone supervising Lee at the SCC (a “total confinement facility”) would have.

Both *Cornwell* and *Arnzen* are factually distinguishable, too. *Cornwell* involved a person on probation under the Sentencing Reform Act, chapter 9.94A RCW. *Cornwell*, 190 Wn.2d at 302. That act expressly requires there to be “reasonable cause to believe that an offender has violated a condition or requirement of the sentence” before the community corrections officer can search the offender. *Id.*; RCW 9.94A.631(1). There is no similar requirement in the sexually violent predator statute. And *Arnzen* involved the placement of cameras in a commitment center’s single-use and “dormitory style” bathrooms. *Arnzen*, 713 F.3d at 372. There, the court upheld a preliminary injunction prohibiting the cameras in the single-use bathrooms and the *denial* of a preliminary injunction seeking to prevent the use of such cameras in the “dormitory style” bathrooms. *Id.* at 371. The LRA order here does not require cameras anywhere in Lee’s residence.

Even in *Arnzen*, the Court acknowledged that involuntarily civilly committed persons “do not have a reasonable expectation of privacy in their

jail cells.” *Arnzen*, 713 F.3d at 372. Similarly here, Lee does not have a reasonable expectation of privacy in his residence or possessions. He is a civilly committed sexually violent predator who is confined to a secure facility and who is likely to engage in predatory acts of sexual violence if not so confined. RCW 71.09.020(7), (16), (18). Allowing for searches in order to “maintain compliance with the conditions of the LRA Court Order,” CP 297, is a legitimate demand of supervision, is in Lee’s best interests, and is necessary to protect the public. The Court should uphold the condition.

Finally, if a search in this context must be supported by reasonable suspicion, then Lee’s challenge to the condition is not ripe for review. In *State v. Massey*, 81 Wn. App. 198, 200-01, 913 P.2d 424 (1996), the Court held that a challenge to a community custody condition subjecting the defendant to searches by the community corrections officer, even without language requiring the search to be based on reasonable suspicion, was premature until the defendant was actually subjected to a search. “Such conditions are not ripe for review until the State attempts to enforce them because their validity depends on the particular circumstances of the attempted enforcement.” *State v. Valencia*, 169 Wn.2d 782, 789, 239 P.3d 1059. The facts of any particular search are essential in assessing its validity. *Id.* If suspicion is required, then Lee must wait until he has actually

been subjected to an arguably suspicionless search before he can challenge the condition.

V. CONCLUSION

The challenged conditions are consistent with the SVP statute, the constitutional separation of powers, the First and Fourth Amendments, and due process. The Court should affirm the LRA order.

In the event the Court strikes any of the conditions of release as void for vagueness, the Court should remand to the trial court to more precisely define the relevant conditions.

RESPECTFULLY SUBMITTED this 23rd day of August, 2019.

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NO. 52717-1-II

WASHINGTON STATE COURT OF APPEALS, DIVISION II

In re the Detention of:

Damon Lee,

Appellant.

DECLARATION OF
SERVICE

I, Malia Anfinson, declare as follows:

On August 23, 2019, I sent via electronic mail, per service agreement, a true and correct copy of Brief of Respondent and Declaration of Service, addressed as follows:

Jodi Backlund
Backlund & Mistry
backlundmistry@gmail.com

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

DATED this 23rd day of August, 2019, at Seattle, Washington.



MALIA ANFINSON

WASHINGTON STATE ATTORNEY GENERAL'S OFFICE - CRIMINAL JUSTICE DIVISION

August 23, 2019 - 11:11 AM

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