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No. 71460-1-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

IN RE THE DETENTION OF RICHARD ALLEN RUDE

STATE OF WASHINGTON,

Respondent,

v.

RICHARD ALLEN RUDE,

Petitioner/Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR SKAGIT COUNTY

The Honorable John Meyer

BRIEF OF PETITIONER/APPELLANT

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Susan F. Wilk  
Attorney for Appellant

WASHINGTON APPELLATE PROJECT  
1511 Third Avenue, Suite 701  
Seattle, Washington 98101  
(206) 587-2711

**TABLE OF CONTENTS**

A. INTRODUCTION ..... 1

B. ASSIGNMENTS OF ERROR ..... 2

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR..... 3

D. STATEMENT OF THE CASE..... 5

E. ARGUMENT ..... 11

    1. **The State presented insufficient evidence to prove that release to an LRA was not in Mr. Rude’s best interests..... 13**

    2. **The State presented insufficient evidence to prove that adequate conditions could not be imposed to protect the community if Mr. Rude were released to his proposed LRA..... 18**

F. CONCLUSION..... 23

**TABLE OF AUTHORITIES**

**Washington Supreme Court Decisions**

In re Adams, 178 Wn.2d 417, 309 P.3d 451 (2013) ..... 20

State ex rel. T.B. v. CPC Fairfax Hospital, 129 Wn.2d 439, 918 P.2d 497  
(1996)..... 21

State v. McCuiston, 174 Wn.2d 369, 275 P.3d 1092 (2012)..... 10

**Washington Court of Appeals Decisions**

In re Detention of Bergen, 146 Wn. App. 515, 195 P.3d 539 (2008), rev. denied, 165 Wn.2d 1041 (2009) ..... 11, 17, 21

In re Detention of Jones, 149 Wn. App. 16, 201 P.3d 1066 (2009).... 12, 18

**Washington Constitutional Provisions**

Const. art. I, § 3..... 11

**United States Supreme Court Decisions**

Vitek v. Jones, 445 U.S. 480, 100 S.Ct. 1254, 63 L.Ed.2d 552 (1980) ... 11,  
21

**United States Constitutional Provisions**

U.S. Const. amend. XIV ..... 11

**Statutes**

RCW 71.09.090 ..... 1, 2, 11, 12, 13, 17, 20, 21, 22

RCW 71.09.092 ..... 12, 13, 18

**Other Authorities**

Karen Franklin, “Efficacy of Sex Offender Treatment Still Up In the Air,”  
Psychology Today (September 25, 2013)..... 16

Stephen Brake and Greig Veeder, “The Effectiveness of Treatment for  
Adult Sex Offenders,” TheWatchhouse.Org (2012)..... 16

## A. INTRODUCTION

A person committed pursuant to the provisions of Chapter 71.09 RCW has a liberty interest in his conditional release to a less restrictive alternative than secure confinement (LRA). This constitutional interest protects the expectation that statutory procedures will be strictly followed. Where a committed person has been granted a trial on a petition for an LRA pursuant to RCW 71.09.090(2)(d), the court must consider whether the LRA is in the person's best interests and adequate conditions can be imposed to protect the community without considering whether the person's condition has changed since his commitment.

In this case, the trial court found that petitioner Richard Rude's lack of participation in group sex offender treatment since his initial commitment weighed against granting his proposed LRA, and further noted that Mr. Rude had not changed since his commitment. The court's order was premised on the incorrect view that individual treatment—which Mr. Rude had requested—was less effective than the group therapy offered at the Special Commitment Center (SCC) and that Mr. Rude's preference was indicative of a desire to manipulate and control his treatment. The court accordingly weighed Mr. Rude's inability to demonstrate that his condition had changed due to treatment against him and denied the LRA. Absent the injection of these improper

considerations into the LRA trial, the State did not present sufficient evidence to prove the LRA was not in Mr. Rude's best interests and did not contain conditions that were adequate to protect the community. The order denying the LRA should be reversed.

B. ASSIGNMENTS OF ERROR

1. The trial court erred in finding that the State had proven beyond a reasonable doubt that Mr. Rude's proposed less restrictive alternative to secure confinement (LRA) was not in his best interest.

2. The trial court erred in finding that the State had proven beyond a reasonable doubt that Mr. Rude's proposed LRA did not include conditions that would adequately protect the community.

3. The trial court erred in entering Finding of Fact 7,<sup>1</sup> in which it determined that Mr. Rude's attitude towards treatment and performance in treatment were relevant to the issue of whether an LRA sought pursuant to RCW 71.09.090(2)(d) was in his best interest and included conditions that would adequately protect the community. CP 797.

4. The trial court erred in entering Finding of Fact 9, to the extent that the court found that Mr. Rude had "many" dynamic risk factors that could not be addressed in treatment. CP 798.

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<sup>1</sup> A copy of the Findings of Fact, Conclusions of Law, and Order denying Less Restrictive Alternative entered by the trial court on December 26, 2013, is attached as an appendix to this brief.

5. The trial court erred in entering Finding of Fact 11, drawing a negative inference from Mr. Rude's exercise of his right to counsel. CP 798.

6. In the absence of substantial evidence in the record, the trial court erred in entering Finding of Fact 12. CP 799.

7. To the extent that the trial court improperly referred to case manager John Rockwell as a "psychologist" where in fact he did not possess this qualification, the trial court erred in entering Finding of Fact 15. CP 799.

8. To the extent that the trial court incorrectly determined that Mr. Rude had refused to participate in treatment, the trial court erred in entering Finding of Fact 17. CP 799-800.

9. In the absence of substantial evidence in the record, the trial court erred in entering Finding of Fact 18. CP 800.

10. The trial court erred in entering Finding of Fact 19. CP 800.

11. The trial court erred in entering Finding of Fact 20. CP 800.

12. The trial court erred in entering Finding of Fact 21. CP 800.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. According to statute, an individual who has never sought an LRA is entitled to have his request for conditional release decided without consideration of whether his condition has changed through treatment.

The statutory mandate creates a liberty interest which is protected by the due process clause. Must the order denying Mr. Rude's proposed LRA be reversed because the trial court predicated its decision on Mr. Rude's lack of participation in sex-offender-specific treatment?

2. There is no clinical support for the view that group sex offender treatment is more effective than individual therapy, or that individual therapy poses a risk that the therapist will be manipulated by the patient. Yet the SCC utilized this theory as a rationale for refusing Mr. Rude's request for individual treatment, and the trial court adopted the proposition in its Findings of Fact determining that release to an LRA was not in Mr. Rude's best interests. Must the unsupported findings be stricken and the order denying the LRA be reversed?

3. The trial court did not identify any flaws with Mr. Rude's proposed LRA, but ruled that until he participated in group treatment, conditions could not be imposed that would be adequate to assure community safety. The pertinent statute expressly bars consideration of change through treatment, and the State did not otherwise present evidence to challenge the adequacy of the conditions of the proposed LRA. Did the State present insufficient evidence to prove the LRA did not include conditions that would adequately protect the community?

4. Mr. Rude's treatment plan at the SCC was prepared by an individual who was a psychology associate, but did not hold a doctorate. Did the trial court's Findings of Fact wrongly identify this individual as a psychologist?

5. While Mr. Rude's petition for release to an LRA was awaiting trial, Mr. Rude declined to participate in an annual review interview on the advice of counsel. Did the trial court err in drawing a negative inference from the exercise of this constitutional right?

D. STATEMENT OF THE CASE.

Following a jury trial, on June 22, 2012, Richard Rude was committed pursuant Chapter 71.09 to the custody of the Department of Social and Health Services (DSHS).<sup>2</sup> CP 232-33, 796. Slightly more than a year later, on July 24, 2013, Mr. Rude moved for a hearing on whether he could be released to an LRA. CP 44-48. Mr. Rude presented the court with a comprehensive plan regarding his housing, supervision, and sex offender treatment if released. In particular, Mr. Rude agreed to a detailed and comprehensive Community Treatment Plan (CTP) authored by Norman G. Nelson, a certified sex offender treatment provider, which was provided to the court in support of Mr. Rude's motion. CP 56-71. Mr.

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<sup>2</sup> Mr. Rude appealed from the commitment trial in cause number 69061-2-I. The commitment order was affirmed in an unpublished decision on January 27, 2014. The Supreme Court denied review on June 4, 2014, and the case was mandated on June 18, 2014.

Rude agreed to attend sex offender treatment with Mr. Nelson, to participate in and comply with any and all DOC rules and restrictions, and to comply with a sex offender treatment contract authored by Mr. Nelson. CP 58-59.

With regard to placement, Mr. Rude proposed that he reside in a private home owned by Alice and Walt Renk, Seventh Day Adventists who have been active in prison ministries for over twenty years.<sup>3</sup> CP 73. As part of their ministry, the Renks have provided transitional housing for close to twenty men released from the Monroe Correctional Complex, many of whom were registered sex offenders.<sup>4</sup> CP 95. The property on which Mr. Rude would live is a converted farmhouse on twenty acres of land. CP 59, 95. At the time of Mr. Rude's application to the court, the Renks had one other tenant on the property, an individual whom the Renks anticipated would soon be leaving under positive circumstances. CP 95. Although another resident at the Special Commitment Center (SCC) had expressed interest in living on the property, the Renks understood that DOC would have to approve the other resident before he could live there. Id.

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<sup>3</sup> Mr. Rude also is a Seventh Day Adventist, and credits his religion with providing him insight into his offending behavior and the tools to process stressors. CP 84.

<sup>4</sup> Counsel for Mr. Rude advised the court that nineteen sex offenders had been released to the Renks's residence. RP 62.

A caretaker resided on the property. Id. The caretaker had met with Mr. Nelson and agreed to take responsibility to monitor Mr. Rude at all times. CP 96. Likewise, the Renks understood that Mr. Rude would have to strictly comply with the CTP. CP 60. The Renks specifically agreed to provide “the level of security requested by the Courts,” and to notify Mr. Rude’s supervising community corrections officer (CCO), Mr. Nelson, the court, the attorney general, and the superintendent of the SCC of any violation of conditions of release. CP 96.

Mr. Nelson visited the proposed placement, interviewed the Renks, and met with the caretaker. CP 62. He stated that the proposed placement appeared “healthy and stress-free.” CP 66.

Mr. Nelson noted that despite a history of antisocial and criminal behavior and associations,

[A]pproximately 10 years ago there became [sic] a change in attitude and [Mr. Rude] began to seek out persons and groups with more pro-social, spiritual, philosophical perspectives. He is now getting encouragement and support from family members and volunteers and church members of the Seventh Day Adventists. He has resolved long-standing relational problems with his parents, bonded with his daughter Heather, and formed a small group of supporters to help his transition to the community. Helping Mr. Rude to maintain, strengthen, and expand a healthy positive Support Network will continue to be a life-long treatment goal.

CP 63.

Mr. Nelson observed that in the time that Mr. Rude had been confined to the SCC, he had a healthy daily routine and sought general self-improvement. CP 65. Reports authored by treatment providers and personnel within the SCC indicated that Mr. Rude comported himself well there. He exercised regularly, received positive job reports, and treated staff and other residents with respect. CP 243-44. Sharon Merkle, a supervisor at the SCC, confirmed that Mr. Rude had always behaved appropriately with staff and other residents, and communicated with her comfortably. She said that Mr. Rude had expressed remorse for his crimes, and she believed him to be sincere. CP 77. She said that “if they were forming a line of residents to be released Rick would be one of the first ones she would pick.” *Id.*

The State agreed that Mr. Rude had presented a prima facie case for a trial on whether he should be released to an LRA. CP 797. The parties stipulated to a trial on documentary evidence, to include materials designated by the parties as well as testimony and exhibits from the initial commitment trial. CP 116-21. The stipulated evidence also included Mr. Rude’s annual review, which covered the time period between June 2012 and June 2013, and was submitted to the court the day before the trial. CP 98-111, 118, 744-54.

Steven Marquez, the evaluator who performed the annual review, noted that Mr. Rude had not participated in group treatment while at the SCC, and believed that for this reason he still met the statutory definition of a sexually violent predator. 108. Mr. Rude, however, had requested individual treatment, CP 256-57, but this request was denied, as were his requests to participate in the Barriers group.<sup>5</sup> CP 258, 262. The justification offered for denying Mr. Rude individual sex-offense-specific therapy was that “the individual session modality is seen as less effective because of the likelihood of therapist being manipulated and absence of peer feedback.” CP 262. Mr. Rude continued to meet with John Rockwell, a psychology associate and Mr. Rude’s case manager following his commitment, and explained that he did not want to participate in group sex offender treatment “because ‘they used my SOTP information I disclosed against me.’”<sup>6</sup> CP 264. Mr. Rockwell indicated that he and Mr. Rude discussed peer relations and thoughts about treatment, and that “Mr. Rude uses his time with this writer appropriately, asking specific questions and receiving critical feedback without argumentativeness.” CP 264.

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<sup>5</sup> The Barriers group is a sex-offender-specific group therapy program. CP 258.

<sup>6</sup> Dr. Marquez speculated that Mr. Rude’s “negative attitude surrounding transparent disclosure in a group format would likely have posed a significant obstacle to successful participation.” CP 99. Dr. Marquez’s report omits mention of the many positive notes and comments from Mr. Rockwell regarding his interactions with Mr. Rude.

Mr. Rude also participated in Counselor-Assisted Self Help (CASH), a group for persons with issues relating to substance abuse, which addresses “maintenance-stage tasks and challenges affecting abstinence from substance use.” CP 273. He was described as being an “active and appropriate participant” during the sessions. CP 273-78.

Mr. Rude waived his right to have a jury determine whether he should be released to an LRA, and the matter was tried before the Honorable John Meyer. CP 97. At the trial, the State stressed the fact that Mr. Rude had not engaged in treatment, even though participation in sex offender treatment and change through treatment are not required for an initial request for release to an LRA. RP 18, 30-36.<sup>7</sup> The State referenced the Washington Supreme Court’s decision in State v. McCuiston, 174 Wn.2d 369, 275 P.3d 1092 (2012), and argued, “[h]e needs to get into treatment and do the work and then progress towards a less restrictive alternative.” RP 42.

The court took the matter under advisement, and ultimately issued an order that denied the LRA and found in pertinent part:

While the Court is sympathetic to the Respondent’s situation, it appears that he wishes to manipulate and control his environment so that his treatment will be done on his terms rather than how the experts believe it should

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<sup>7</sup> Argument on the request for an LRA was held on October 9, 2013. Citations to the transcript of that proceeding appear in this brief as “RP” followed by page number. No other motions were heard on the record.

be done. Until the Respondent wholeheartedly and successfully participates in treatment, the Court is satisfied beyond a reasonable doubt that it is neither in Respondent's nor the public's best interests for him to be released on an LRA. No evidence was presented to suggest any changes since trial.

CP 743.

Mr. Rude moved for reconsideration of the court's order, arguing that the court's emphasis on treatment was contrary to the Legislature's intent in enacting RCW 71.09.090(2)(d). CP 755-60. In response, the State proposed formal written findings of fact and conclusions of law, which the court entered, at the same time denying Mr. Rude's motion for reconsideration. CP 796-801. Mr. Rude appeals. CP 802.

#### E. ARGUMENT

An individual who has been committed to the custody of the SCC pursuant to Chapter 71.09 RCW has a liberty interest in his conditional release that is protected by the due process clause. In re Detention of Bergen, 146 Wn. App. 515, 527, 195 P.3d 539 (2008), rev. denied, 165 Wn.2d 1041 (2009); Vitek v. Jones, 445 U.S. 480, 488, 100 S.Ct. 1254, 63 L.Ed.2d 552 (1980) ("We have repeatedly held that state statutes may create liberty interests that are entitled to the procedural protections of the Due Process Clause of the Fourteenth Amendment"); Const. art. I, § 3; U.S. Const. amend. XIV. Where a committed person has been granted a

hearing on the question whether he should be conditionally released to a less restrictive alternative,<sup>8</sup> he is entitled to “the benefit of all constitutional protections that were afforded to the person at the initial commitment proceeding.” RCW 71.09.090(3)(a). The State bears the burden of proving beyond a reasonable doubt that conditional release to any proposed less restrictive alternative either (1) is not in the best interest of the committed person; or (2) does not include conditions that would adequately protect the community. RCW 71.09.090(3)(d).

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<sup>8</sup> To qualify for such a hearing, the committed person must propose an LRA that satisfies five criteria enumerated in RCW 71.09.092. That statute provides:

Before the court may enter an order directing conditional release to a less restrictive alternative, it must find the following: (1) The person will be treated by a treatment provider who is qualified to provide such treatment in the state of Washington under chapter 18.155 RCW; (2) the treatment provider has presented a specific course of treatment and has agreed to assume responsibility for such treatment and will report progress to the court on a regular basis, and will report violations immediately to the court, the prosecutor, the supervising community corrections officer, and the superintendent of the special commitment center; (3) housing exists in Washington that is sufficiently secure to protect the community, and the person or agency providing housing to the conditionally released person has agreed in writing to accept the person, to provide the level of security required by the court, and immediately to report to the court, the prosecutor, the supervising community corrections officer, and the superintendent of the special commitment center if the person leaves the housing to which he or she has been assigned without authorization; (4) the person is willing to comply with the treatment provider and all requirements imposed by the treatment provider and by the court; and (5) 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; see In re Detention of Jones, 149 Wn. App. 16, 25-26, 201 P.3d 1066 (2009).

Where the court has not previously considered the issue of release to an LRA, “the court shall consider whether release to a less restrictive alternative would be in the best interests of the person and conditions can be imposed that would adequately protect the community, without considering whether the person’s condition has changed.” RCW 71.09.090(2)(d) (emphasis added).

Mr. Rude’s petition for release to an LRA was brought pursuant to RCW 71.09.090(2)(d). At the trial on whether Mr. Rude should be released to an LRA, the State nevertheless injected arguments and evidence concerning Mr. Rude’s lack of participation in treatment since his commitment, and the trial court improperly weighed these in finding that the State had met its burden of proving two elements: that the LRA was not in Mr. Rude’s best interest and that conditions could not be imposed that could protect the community. Contrary to the trial court’s ruling, the State did not meet its heavy burden of proving either statutory element, and the court’s order should be reversed.

**1. The State presented insufficient evidence to prove that release to an LRA was not in Mr. Rude’s best interests.**

The State conceded that Mr. Rude met his initial burden of proposing an LRA that met each of the stringent statutory criteria set forth in RCW 71.09.092. This concession was appropriate. Mr. Rude presented

the court with an extraordinarily detailed treatment plan that clearly set forth the expectations of treatment, as well as the consequences of failing to comply with any of the treatment aspects. As the State also acknowledged, Mr. Nelson had a contract with DSHS to provide treatment to sex offenders within the community, and had previously treated a sexually violent predator who had been released on an LRA. CP 280.

It is a verity that Mr. Rude was reluctant to engage in group sex offender treatment. He was forthright and transparent with his case manager regarding the reasons for his hesitation, stating, “they used my SOTP information I disclosed against me.” CP 264.<sup>9</sup> It is incorrect, as Dr. Marquez suggested and the trial court found, that Mr. Rude had a negative attitude toward treatment per se. See CP 99, 797-800 (Findings of Fact 7, 11, 17, 18, 19, 20).

The day after the jury’s verdict finding Mr. Rude was an SVP, he submitted a written request to Mr. Rockwell<sup>10</sup> for one-on-one treatment, stating, “I feel it would be a benefit to me to keep working on some

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<sup>9</sup> Mr. Rude had a damaging experience when he was in group treatment at Western State Hospital at the age of eighteen. Following accusations that he had sexually assaulted another young man, he was grilled in a closed room by nineteen older sex offenders for three days straight without a therapist present, and was not permitted to leave until he admitted to the assault. See 6/19/12 RP 90-92. The verbatim report of proceedings from Mr. Rude’s commitment trial comprised part of the documentary evidence submitted to the court at trial.

<sup>10</sup> The trial court’s Findings of Fact and Conclusions of Law erroneously refer to Mr. Rockwell as “a psychologist.” CP 799 (Finding of Fact 15). Mr. Rockwell in fact was a psychology associate, with a masters degree in social work.

offending related issues and to work on self-betterment issues.” CP 256. He requested a meeting so they could “discuss a positive way to proceed.” Id. Mr. Rockwell, to his credit, after advising Mr. Rude that the customary treatment model was Cohort Group participation, referred him to a specialist for individual therapy and participation in the Barriers Group treatment program. CP 257.

Notwithstanding Mr. Rude’s request and the referral, the Clinical Director Designee at the SCC did not afford Mr. Rude an opportunity to participate in one-on-one treatment. He instead indicated, “the primary treatment modality is the sex offense specific cohort groups and this treatment is not provided on an individual basis.” CP 258. He similarly refused to afford Mr. Rude access to the Barriers group program, stating the program was only available to “people who have been in treatment for some time and can benefit from an added class aimed at examining specific barriers to their progress.” Id. Even in the face of this refusal, Mr. Rude continued to express his interest in engaging in individual sex-offender-specific therapy. CP 262.

The decision to deny Mr. Rude the opportunity to participate in sex-offender-specific treatment derived from an apparent institutional belief that (1) group therapy is more effective than individual therapy, and (2) in individual treatment there is a possibility of the therapist being

manipulated and an absence of peer feedback. CP 262. However the notion that a group modality is more effective than individual treatment at treating sex offenders lacks support.

Recent studies suggest that the efficacy of group treatment is marginal at best, and that in some instances, such treatment may do more harm than good, for example by exposing low-risk offenders to high-risk offenders, or “cement[ing] deviance through its obsessional fixation on sex.” See Karen Franklin, “Efficacy of Sex Offender Treatment Still Up In the Air,” Psychology Today (September 25, 2013).<sup>11</sup> Some meta-analyses have found a reduction in recidivism for offenders who have participated in some form of treatment, but there is little evidence to back the claim that these outcomes differ depending on whether treatment is offered in a group or individual setting. See Stephen Brake and Greig Veeder, “The Effectiveness of Treatment for Adult Sex Offenders,” The Watchhouse.Org (2012).<sup>12</sup> To the contrary, the data is inconclusive, and, to the extent that conclusions may be drawn, treatment appears to be most effective when it occurs in conjunction with some form of intense supervision. Id.

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<sup>11</sup> Available at <http://www.psychologytoday.com/blog/witness/201309/efficacy-sex-offender-treatment-still-in-the-air>, last visited June 26, 2014.

<sup>12</sup> Available at <http://www.thewatchhouse.org/treatment.pdf>, last visited June 26, 2014.

In construing the statutory “best interests” language in RCW

71.09.090, this Court stated:

the “best interests” standard accounts for the inherent dangerousness of SVPs and their unique, extended treatment needs: it relates to the SVP’s successful treatment, ensuring that the LRA does not remove “incentive for successful treatment participation” or “distract[ ] committed persons from fully engaging in sex offender treatment” and is the “appropriate next step in the person’s treatment.”

Bergen, 146 Wn. App. at 529 (alterations in original).

Consistent with these objectives, Mr. Rude presented the court with a comprehensive treatment plan as part of his LRA that provided for intensive individual therapy, to occur in conjunction with substance abuse treatment and intensive supervision on a daily basis. In concluding that Mr. Rude’s proposed LRA was not in his best interests, the trial court appears to have accepted without question the State’s assertion that in individual therapy the therapist can be manipulated. As shown, there is no evidence to support this claim. Further, even assuming this general proposition has some evidentiary or clinically-established foundation, the State failed to show that Mr. Rude specifically would be likely to manipulate a therapist, or that Mr. Nelson would be susceptible to such manipulation.

The State's position can be summed up as follows: if Mr. Rude is unwilling to participate in group treatment, then he should have no treatment.<sup>13</sup> It is hard to defend such a stance as being in Mr. Rude's best interests. Mr. Rude's proposed LRA would have enabled him to engage in individual sex-offender-specific treatment with a provider who had a contract with DSHS to provide sex-offender treatment in the community and experience in treating individuals committed pursuant to Chapter 71.09. The State failed to prove the LRA was not in Mr. Rude's best interests, and the trial court erred in so finding.

**2. The State presented insufficient evidence to prove that adequate conditions could not be imposed to protect the community if Mr. Rude were released to his proposed LRA.**

RCW 71.09.092 sets forth rigorous criteria that must be met before an LRA may be approved. Jones, 149 Wn. App. at 25-26. Mr. Rude's proposed LRA met all of these conditions.

His proposed residence was at the home of individuals who had twenty years of experience ministering to and housing sex offenders.

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<sup>13</sup> As a corollary to this viewpoint, the State's experts and representative at the trial appear to have implicitly believed that Mr. Rude's request for individual therapy was not made in good faith. Again, there is no evidence to support this assumption. Presumably when Mr. Rude made the request, he believed that individual therapy was available at the SCC. And, since the State did not offer individual therapy to Mr. Rude, the State had no basis to conclude that he could not benefit from it.

There, he would have been under constant supervision, and allowed to leave only if chaperoned.

His proposed sex offender treatment was with a DSHS-approved provider who was aware of Mr. Rude's prior offenses, incarceration and treatment history, diagnoses, and commitment status, and who had personally visited and approved the proposed residence. The CTP that Mr. Rude entered with Mr. Nelson specified that while Mr. Rude retained the right to refuse to participate in certain treatment aspects, "[his] refusal may be interpreted as a failure to make adequate progress, subjecting [him] to legal consequences including being terminated from treatment." CP 58. Even a minor violation of the conditions of his LRA would assuredly have resulted in his return to the SCC, a fact which Mr. Rude understood and acknowledged. CP 50-53, 70.

The trial court did not express reservations about the proposed placement or suggest additional conditions that would need to be followed to ensure the community's safety. Instead, its determination that no conditions could be imposed to adequately protect the community stemmed from its misperception that Mr. Rude's lack of participation in group sex-offender-specific treatment was germane to whether an LRA should be granted. This was erroneous.

As Mr. Rude argued in his motion to reconsider the court's initial order, consideration of an offender's participation and progress in treatment renders RCW 71.09.090(2)(d) superfluous, and injects irrelevant and improper matters regarding whether the offender's condition has changed. CP 759-60. The statute specifically bars the court from factoring a change in an offender's condition into its assessment of the propriety of an LRA request brought pursuant to RCW 71.09.090(2)(d).

Statutory interpretation begins with the plain language and meaning of the statute, viewed in the context of the larger statutory scheme. Where the plain meaning of a statute is unambiguous, legislative intent is apparent, and [courts] will not construe the statute otherwise.

In re Adams, 178 Wn.2d 417, 430, 309 P.3d 451 (2013).<sup>14</sup>

In addition to contravening an explicit statutory directive, consideration of whether a committed person who has petitioned for an LRA pursuant to RCW 71.09.090(2)(d) has changed through treatment promotes arbitrary results. If Mr. Rude had filed the same petition for an LRA immediately following the jury's verdict committing him as an SVP, the irrelevant and speculative arguments regarding Mr. Rude's reluctance to engage in group sex offender treatment would not have been before the

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<sup>14</sup> The Court in Adams also notes that aids to statutory construction, such as policy or legislative history, is proper only if a statute remains ambiguous after the plain meaning inquiry. Adams, 178 Wn.2d at 430. Thus any effort by the State to assert that the statement of legislative intent in Laws 2005 ch. 344 should factor into the analysis would be misplaced, and should be disregarded.

court. Instead, these claims were the primary basis for the court's determination that adequate conditions could not be imposed to protect the community.<sup>15</sup> CP 743, 798-800.

As this Court stated in Bergen,

[T]he 'adequate community safety' determination necessarily assumes that Bergen is likely to reoffend and the question then becomes whether the proposed LRA will prevent an otherwise-likely offense if he is released. The focus of this determination is therefore on the plan, not the person[.]

Bergen, 146 Wn. App. at 533.

While the trial court asserted that it understood it had the power to grant an LRA regardless of whether Mr. Rude availed himself of the group treatment offered at the SCC, CP 800, it is plain from the court's initial order that the court believed that lack of participation in treatment was a reason to deny an LRA as a matter of law. The court specifically stated in that order, "[n]o evidence was presented to suggest any changes since trial." CP 743.

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<sup>15</sup> The court also cited Mr. Rude's decision not to participate in the annual review interview as a factor weighing against granting the LRA, while noting that this was based on the advice of counsel. CP 798 (Finding of Fact 11). This was plainly improper: Mr. Rude had a statutory right to counsel while his petition for release to an LRA was pending. RCW 71.09.090(2)(b). See State ex rel. T.B. v. CPC Fairfax Hospital, 129 Wn.2d 439, 452-53, 918 P.2d 497 (1996) (noting, "'due process protections are necessary to insure [a] state-created right is not arbitrarily abrogated'" in civil commitment context) (internal quotation marks omitted); Vitek v. Jones, 445 U.S. at 489. Because Mr. Rude had the right to the assistance of counsel, the court should not have drawn a negative inference from the exercise of that right.

Under RCW 71.09.090(2)(d), the court must consider whether an LRA is in a person's best interests and whether proposed conditions will be adequate to protect the community "without considering whether the person's condition has changed." RCW 71.09.090(2)(d). The court's use of Mr. Rude's lack of participation in sex-offender-specific treatment to fuel its decision that adequate conditions could not be imposed to protect the community was improper. Mr. Rude's structured LRA addressed all factors that could contribute to Mr. Rude's risk of reoffense. Barring the inappropriate injection of change through treatment into the LRA trial, the State did not prove beyond a reasonable doubt that adequate conditions could not be imposed to protect the community. The order denying the LRA must be reversed.

F. CONCLUSION.

This Court should conclude that the State did not meet its burden of proving that Mr. Rude's proposed LRA was not in his best interests and that adequate conditions could not be imposed to protect the community. The trial court's order denying the LRA should be reversed, and this matter remanded so that Mr. Rude may be conditionally released.

DATED this 30<sup>th</sup> day of June, 2014.

Respectfully submitted:



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SUSAN F. WIER (WSBA 28250)  
Washington Appellate Project (91052)  
Attorneys for Appellant

In re the Detention of Rude, No. 71460-1-I  
Appendix

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**STATE OF WASHINGTON  
SKAGIT COUNTY SUPERIOR COURT**

In re the Detention of:

NO. 10-2-01534-8

RICHARD A. RUDE, JR.,

Respondent.

FINDINGS OF FACT,  
CONCLUSIONS OF LAW, AND  
ORDER DENYING LESS  
RESTRICTIVE ALTERNATIVE

THIS MATTER came before the Court on October 9, 2013, for a trial regarding a less restrictive alternative (LRA). The Petitioner, State of Washington, was represented by Assistant Attorney General Kristie Barham. The Respondent was present at trial and was represented by his counsel, Kelli Armstrong-Smith. In determining this matter, the Court considered the pleadings filed in the matter, the evidence presented by the parties, and the argument of counsel. The evidence at trial consisted of the Stipulation of the Parties for Less Restrictive Alternative Trial on the Record and the attached 32 exhibits as well as the transcripts and exhibits from the June 2012 initial commitment trial. The Court is fully advised and hereby enters the following:

**I. FINDINGS OF FACT**

1. The Respondent, Richard A. Rude Jr., was born on August 1, 1963 and is currently fifty years old.

2. On June 22, 2012, a jury found beyond a reasonable doubt that Mr. Rude is a sexually violent predator. The Court entered an order committing Mr. Rude to the custody of the

1 Department of Social and Health Services (DSHS) for control, care, and treatment until such time  
2 as his mental abnormality and/or personality disorder has so changed that he is safe to be  
3 conditionally released to an LRA or unconditionally discharged.

4 3. In July 2013, Mr. Rude petitioned the Court for a trial on the issue of whether he  
5 should be released to an LRA. The State agreed that Mr. Rude had presented a prima facie case  
6 under RCW 71.09.090(2)(d) and RCW 71.09.092 for an LRA trial. The parties agreed to a  
7 stipulated facts trial on the LRA issue. The Court set the trial for October 9, 2013. The Court  
8 heard oral argument from the parties at the October 9, 2013 trial.

9 4. It is a verity that Mr. Rude is a sexually violent predator. Mr. Rude was convicted  
10 of a crime of sexual violence. The jury determined that he suffered from a mental abnormality  
11 and/or personality disorder which made him likely to engage in predatory acts of sexual violence  
12 if not confined in a secure facility.

13 5. Mr. Rude has been convicted of multiple sexually violent offenses. In 1981, he  
14 was convicted of rape in the second degree by forcible compulsion. In 1982, he was convicted of  
15 attempted rape in the second degree by forcible compulsion. In 1995, he was convicted of rape in  
16 the first degree. Mr. Rude also has a history of committing other sexual assaults.

17 6. According to the October 8, 2013 annual review submitted by DSHS, Mr. Rude is  
18 currently diagnosed by Dr. Marquez with the following disorders: Paraphilia Not Otherwise  
19 Specified (nonconsent with sadistic features); Alcohol Dependence, in institutional remission;  
20 Cocaine dependence, in institutional remission, tentative; and Antisocial Personality Disorder.

21 7. Mr. Rude's attitude toward treatment, as well as his performance in treatment, is  
22 relevant to the issue of whether an LRA is in his best interest and includes conditions that would  
23 adequately protect the community.

24 8. Mr. Rude participated in the Sex Offender Treatment Program (SOTP) in prison  
25 from February 2007 through March 2008. SOTP required six to eight hours of group treatment  
26

1 each week and individual sessions with the treatment provider approximately two to four times  
2 each month.

3 9. Shandra Carter was Mr. Rude's treatment provider for the first five months of  
4 treatment. Mr. Rude's trust and participation level was slow, but he appeared sincere. Mr. Rude  
5 displayed treatment-interfering behaviors which distracted from working on sex offender specific  
6 issues. Mr. Rude had many dynamic risk factors that they were never able to address in treatment.

7 10. Michael Jacobsen was Mr. Rude's treatment provider for the last seven months of  
8 SOTP. Mr. Rude was hesitant to discuss details of his sexual offending history, and the complete  
9 nature of his sexual criminal history is in serious question. Mr. Rude's resistance to treatment  
10 continued to a substantial degree throughout treatment. Mr. Rude was not transparent with his  
11 treatment providers, which would have helped them discover his risks and negative behavior  
12 patterns and create successful intervention strategies. Mr. Rude was unwilling to divulge the full  
13 nature of his risks, vulnerabilities, and triggers. Mr. Rude appeared to manipulate and disclose  
14 information in such a way as to make him appear less of a risk to the community. He could  
15 present treatment jargon in an intellectual way, but there was a concern it was not grounded in any  
16 behavioral or attitudinal adjustment. Mr. Rude lacked understanding of his specific offending  
17 patterns, risks, vulnerabilities, triggers, and intervention strategies. Mr. Jacobson noted that  
18 transparency in fully disclosing all aspects of Mr. Rude's sexual deviance is imperative to  
19 counteract his decades of secrecy.

20 11. When Mr. Rude was preparing for release into the community after completing  
21 SOTP, he refused to disclose his sexual offending history to his assigned community based  
22 treatment provider. While this refusal may have involved advice of counsel, Mr. Rude's failure to  
23 comply with SOTP disclosure guidelines in a highly structured setting, his refusal to disclose to  
24 his community treatment provider, and his attitude toward treatment throughout raises serious  
25 doubts that he would be transparent in a less structured environment.  
26

1 12. Despite admitting to having rape fantasies, Mr. Rude has not addressed these  
2 deviant fantasies in treatment.

3 13. Several months after completing SOTP in prison, Mr. Rude assaulted his cellmate,  
4 J.F. Mr. Rude put his fingers in J.F.'s anus over his clothing. Mr. Rude was not charged with a  
5 sexual assault.

6 14. Mr. Rude arrived at the Special Commitment Center (SCC) in August 2010. Since  
7 his arrival at the SCC, Mr. Rude has not participated in any sex offender treatment. He said that he  
8 would participate in one-on-one treatment, which by itself is not available at the SCC without  
9 other treatment requirements.

10 15. In May 2012, a psychologist at the SCC discussed a sex offender treatment plan  
11 with Mr. Rude. Mr. Rude disagreed with his diagnoses. Mr. Rude disagreed with his dynamic  
12 risk factors and intervention strategies. He also disagreed with the well-documented historical  
13 background. In August 2012, the psychologist met with Mr. Rude again to discuss a treatment  
14 plan. Mr. Rude continued to take issue with his diagnoses and risk factors. In  
15 November/December 2012, Mr. Rude reported that he was not willing to enter group sex offender  
16 treatment out of concern they would use disclosed information against him.

17 16. The SCC offers a Counselor Assisted Self-Help (CASH) Group, which is a  
18 support group for residents with substance abuse problems. The CASH group meets once a week  
19 for a one hour session. In September 2010, Mr. Rude indicated an interest in attending CASH.  
20 Despite his expressed desire to participate in CASH, Mr. Rude did not start attending CASH until  
21 July 2012. Mr. Rude attended a total of five sessions between July 2012 and December 2012. He  
22 stopped attending CASH in December 2012.

23 17. In the 2013 annual review, Dr. Marquez identified the following long term  
24 vulnerabilities/risks for Mr. Rude: sexualized violence, sexual preoccupation, lack of emotional  
25 intimate relationships with adults, grievance thinking, poorly-managed anger, resistance to  
26 rules and supervision, and dysfunctional coping. Further compounding Mr. Rude's risk is his

1 refusal to participate in treatment, thereby avoiding the established process of transparently  
2 examining his risks, constructing viable intervention strategies, and effectively practicing them  
3 under clinical supervision.

4 18. Mr. Rude wants to manipulate and control his environment such that any treatment  
5 he receives is on his own terms.

6 19. The Court recognizes that it has the authority to grant an LRA in this case despite  
7 the fact that Mr. Rude is not participating in sex offender treatment at the SCC. The Court also  
8 recognizes that it has the authority to grant an LRA in this case despite the fact that there has been  
9 no change in Mr. Rude's mental condition since his commitment. However, the Court finds that  
10 Mr. Rude's history of treatment participation and his attitude towards treatment is relevant to his  
11 overall risk to the community and relevant to whether an LRA is in his best interests or will  
12 adequately protect the community.

13 20. The Court finds that the proposed LRA is not appropriate at this time for Mr. Rude  
14 given his sexual offending history, his lack of transparency and poor participation in SOTP, his  
15 lack of understanding of his offending patterns, risks, and interventions, his disagreement with  
16 his diagnosed disorders and risk factors, and his ongoing refusal to address any of these issues  
17 in sex offender treatment.

18 21. The proposed LRA fails to provide sufficient security in order to protect the  
19 community.

20 Based on the foregoing Findings of Fact, the Court hereby enters the following:

21 **II. CONCLUSIONS OF LAW**

- 22 1. The Court has subject matter and personal jurisdiction in this matter.  
23 2. The Findings of Fact enumerated herein have been proven beyond a reasonable  
24 doubt.

1 3. The evidence presented at the October 9, 2013 stipulated facts trial proves  
2 beyond a reasonable doubt that the proposed LRA is not in Mr. Rude's best interests and does  
3 not include conditions that would adequately protect the community.

4 4. Mr. Rude's petition for an LRA is denied.

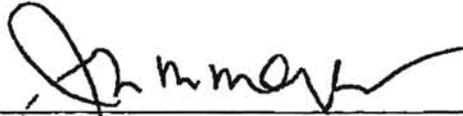
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6 Based on the foregoing Findings of Fact and Conclusions of Law, the Court hereby enters  
7 the following:

8 **III. ORDER**

9 IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Mr. Rude's petition for  
10 an LRA is denied. The proposed LRA is not in Mr. Rude's best interests and does not include  
11 conditions that would adequately protect the community.

12 The Court considered Mr. Rude's CR 59 Motion for Reconsideration before entry of  
13 these Findings of Fact, Conclusions of Law, and Order. It is denied and granted as set forth  
14 herein.

15  
16 DATED this 26 day of December, 2013.

17  
18   
19 THE HONORABLE JOHN MEYER  
Judge of the Superior Court

20 Presented by:

Approved as to form:

21 ROBERT W. FERGUSON  
22 Attorney General

23 KRISTIE BARHAM, WSBA #32764  
24 Assistant Attorney General  
25 Attorney for Petitioner

26 KELLI ARMSTRONG-SMITH, WSBA #24879  
Attorney for Respondent

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE**

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|                        |   |               |
|------------------------|---|---------------|
| IN RE THE DETENTION OF | ) |               |
|                        | ) |               |
| RICHARD RUDE,          | ) | NO. 71460-1-I |
|                        | ) |               |
| APPELLANT.             | ) |               |

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, DECLARE THAT ON THE 30<sup>TH</sup> DAY OF JUNE, 2014, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

- |   |                            |  |
|---|----------------------------|--|
| <p>[X] KRISTIE BARHAM, AAG<br/>[kristieb@atg.wa.gov]<br/>OFFICE OF THE ATTORNEY GENERAL<br/>800 FIFTH AVENUE, SUITE 2000<br/>SEATTLE, WA 98104-3188</p> | <p>(X)<br/>( )<br/>( )</p> | <p>U.S. MAIL<br/>HAND DELIVERY<br/>_____</p> |
| <p>[X] RICHARD RUDE<br/>SPECIAL COMMITMENT CENTER<br/>PO BOX 88600<br/>STEILACOOM, WA 98388</p>   | <p>(X)<br/>( )<br/>( )</p> | <p>U.S. MAIL<br/>HAND DELIVERY<br/>_____</p> |

**SIGNED** IN SEATTLE, WASHINGTON THIS 30<sup>TH</sup> DAY OF JUNE, 2014.

X \_\_\_\_\_ 

**Washington Appellate Project**  
701 Melbourne Tower  
1511 Third Avenue  
Seattle, Washington 98101  
☎(206) 587-2711