

NO. 71930-1

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

In re the Detention of Bradley Ward:

STATE OF WASHINGTON,

Appellant,

v.

BRADLEY WARD,

Respondent.

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 STATE OF WASHINGTON
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APPELLANT'S OPENING BRIEF

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ORIGINAL

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I. ISSUE PRESENTED FOR REVIEW

- A. **Whether the trial court abused its discretion where it ordered that an extremely delusional sex offender who is incapable of complying with court-ordered conditions and participating in sex offender treatment be housed in a less restrictive alternative placement rather than the total confinement of the Special Commitment Center.**

II. STATEMENT OF THE CASE

A. Procedural History

Bradley Ward, 42, stipulated to commitment as a sexually violent predator¹ in 1991. In 2007, he was transferred from the Special Commitment Center (SCC), a secure facility operated by the Department of Social and Health Services (DSHS) on McNeil Island, to a DSHS-operated less restrictive alternative (LRA) facility also on McNeil Island. While there, he received treatment from an off-island sex offender treatment provider and made regular off-island trips to such places as book stores, libraries, and grocery stores. After several years in the less restrictive facility, Ward began experiencing acute psychotic symptoms, so severe that, between February and October of 2012, it was necessary to return him to the SCC for periods of two to three months at a time to attempt to stabilize his mental condition and manage his increasingly

¹ A sexually violent predator is defined as, "Any person who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility." RCW 71.09.020(18).

bizarre and dangerous behavior. CP at 139. Each time his mental condition had improved sufficiently, he was returned to the less restrictive facility. Since October of 2012, however, Ward's behavior has only become more dangerous and bizarre, and a return to the LRA facility has not been possible. It was only after a prolonged period of decompensation, with numerous violations of his release conditions and no improvement in sight, that the State moved, in January of 2014, to revoke his placement at the less restrictive facility. CP at 75-125. Following the revocation hearing, while finding that Ward had violated the terms of his conditional release, the trial court denied the State's motion and ordered Ward returned to the less restrictive facility. The State moved for discretionary review, which was granted. This appeal follows.

B. Sexual And Psychological History

1. Sexual History Prior To Brain Injury

Bradley Ward has an extensive history of deviant sexual behavior that appears to have developed during childhood and adolescence. CP at 57. In a 1988 psychological evaluation, Ward indicated to the evaluating psychologist that his sexual deviancy began at approximately age 14, at which time he began engaging in anal intercourse and fellatio with his 12-year-old brother, activity that reportedly continued until Ward

was 17. CP at 160. The record also contains indications that Ward engaged in similar sexual abuse of his younger step-brother. CP at 160, 423. Ward admitted to the evaluating psychologist that, over a period of four years, he also molested several female cousins, all of whom were more than seven years younger than he. CP at 160. Ward also reported having molested two additional girls, ages five and eight, who were neighbors in his apartment building. CP at 160. He admitted to having fondled and digitally penetrated the five-year-old neighbor girl's vagina, having inserted a squirt gun into her anus, and having attempted to anally penetrate her anus with his penis. CP at 158, 433. He reportedly threatened to kill the girl if she told anyone. CP at 158.

2. Brain Injury And Effect On Sexual Behavior

Two years after his sexual misconduct began, Ward, then 16, was struck by a car and suffered a traumatic brain injury. *In re Detention of Ward*, 125 Wn. App. 381, 383, 104 P.3d 747 (2005); CP 161. Ward's deviant sexual behaviors increased after the accident and, after he was released from the hospital, he made roughly 200 obscene/scatological phone calls and engaged in repeated instances of exposure and voyeurism (peeping). CP at 158-59, 188, 423; *Ward*, 125 Wn. App. at 383. In one instance, Ward attempted to enter the apartment of a paraplegic woman, and later told his therapist that, had he gained entry, he would have raped

her. CP at 159. In another instance, after Ward had been harassing a woman by banging on her window and demanding entry to her apartment, the woman's brother saw Ward opening the sliding glass door of another apartment, and heard the occupant yell, "Get out! I'm calling the police!" CP at 159. Ward was also arrested for various instances of exposure, such as walking by an office window, pulling down his pants, and exposing his genitals and standing in front of a convenience store with his pants down to his knees holding his genitals. CP at 158. Ward was ultimately convicted of one count of Indecent Liberties (based on his assault of the five-year-old neighbor girl) and two counts of Indecent Exposure related to this and other behavior. CP at 158.

3. Behavior While Incarcerated

Ward's troubling behavior continued while in youth detention facilities. While at Maple Lane, Ward touched female staff on the buttocks and revealed having rape fantasies about female staff. CP at 160. During a sex offender treatment group in which other offenders provided disclosures of their offenses, Ward "reportedly became so aroused that he spontaneously ejaculated." CP at 160. He and another resident were caught "using their computers to develop plans to abduct, molest, and take nude photos of children." CP at 160-61. Ward also engaged in many

fights with peers and pleaded guilty to Assault in the Fourth Degree for an unprovoked attack on a peer. CP at 160-61.

After his period of confinement in Washington State facilities, Ward was released to a rehabilitation center in Louisiana. CP at 160-61. While there, he continued to expose himself, make obscene telephone calls, sexually molest vulnerable female patients, and act aggressively (throwing chairs and tables) at peers and staff. CP at 161. He admitted to having raped a female patient with brain damage, and “described his sexual fantasies of children and rape fantasies of female staff.” CP at 161. When, in 1990, he was moved to another adolescent inpatient treatment facility because he refused to comply with his treatment regimen, he “continued to verbalize rape fantasies about staff as well as children and female adults.” CP at 161. Documents from both facilities indicate that Ward “made several suicidal gestures while a patient to obtain staff attention.” CP at 161.

4. Nature And Origins Of Ward’s Psychological Conditions

The origins of Ward’s various psychological disorders are not entirely clear. Several evaluators have concluded that Ward’s paraphilic interests and behaviors were clearly established prior to his brain injury at age 16 (CP at 162), and an evaluation in 1989 assumes “severe pre-injury

sexual deviance, and that sexual deviance was an integral part of Mr. Ward's character structure." CP at 54. A consulting psychiatrist at Maple Lane in 1989 opined that Ward had a severe personality disorder with brain damage. CP at 397. He viewed Ward as very predatory and as someone who would need "a structured setting away from children for an indefinite period of time." CP at 397. Neurological screenings in 1992 and 1999 revealed overall abilities in the average range, with verbal and abstract reasoning abilities being higher than nonverbal skills. CP at 398-99. Both evaluations indicated that Ward "needed more structure than does the average sex offender" and that his "personality disorder represented an interaction of longstanding maladaptive traits and acquired organic brain dysfunction." CP at 162. The examiner for the 1999 evaluation "concluded that the cognitive and executive impairments from Mr. Ward's brain injury did not constitute the major reason for his lack of treatment progress." CP at 162. An evaluation conducted in 2003 indicated that Ward's pattern of functioning at the time was more consistent with the sort of residual brain injury that can produce "flattened affect, slowing, and lack of initiative" than with "disinhibited and impulsive behavior." CP at 165. The evaluator concluded that Ward "appears to have recovered inhibitory control as demonstrated by his ability to devise a plan for kidnapping children from a school neighboring

his residential facility using a map, stalk female staff without touching them, and other goal-directed activities that require inhibitory control of behavior.” CP at 399.

5. Ward’s Sexual Fantasies

Ward has disclosed numerous coercive sexual fantasies involving adult females over the last 20 years. CP at 189. In 2005, he told an evaluating psychologist that 20-30 percent of his sexual fantasies were coercive. CP at 189. As recently as 2011, he admitted to having had fantasies involving tying up and raping a female SCC staff member, although he denied that he had had any such fantasies since being placed at the less restrictive facility on McNeil Island. CP at 189. At that time, however, he reported that fantasies involving coercion were more arousing than “relationship-based” fantasies. CP at 189.

6. Ward’s History Of Delusional Thinking And Acute Psychosis

Ward has experienced occasional delusional thinking for many years. As early as 1992, when Ward was 18, he is reported to have had delusional thoughts about being the “second coming” and that people were not who they claimed to be, but were in fact “doubles” of some other

person. CP at 57.² In both 2009 and 2010 he experienced “significant” delusions (for example, that staff at the SCC were trying to set him up on a date with a woman from a book store he had visited), apparently due, each time, to not having taken his medication for several days prior to the thoughts. CP at 214, 217. Other delusions involved believing that covert training operations for special military/security forces were occurring on McNeil Island, that his food was being poisoned, and that his mother, who resides in New Mexico, was residing on the island. CP at 190.

In addition to periodic delusional thoughts, Ward has also had periods of acute psychosis, and indeed his community treatment provider, Dr. Whitehill, his community therapist since 2007, has noted that “you don’t have to dig too deep to elicit psychosis” in Ward. CP at 180. There is no clear pattern to the onset of his psychotic episodes, and while medication—which he has taken for years to control his delusional thinking—improves the symptoms of these episodes, it does not eliminate them. CP at 190. Ward has stated that, when these delusional periods occur, he does not realize that he is delusional, but “feels a sense of loss of control” over himself. CP at 150. One such episode occurred in 2005, when Ward jumped over a wall and fractured his pelvis. CP at 58. While

² In 2007, for example, he discussed his delusion that a staff member at the less restrictive facility was actually a “nymph,” a “fairy, a wooded creature! I can only describe it as a man impersonating a woman!” CP at 376.

hospitalized and afterwards, he was described as “agitated and delusional.” CP at 58. After a legal proceeding in 2005, Ward “became acutely psychotic and [made] a suicide attempt.” CP at 374. In 2009, he experienced a period of decompensation which lasted roughly three weeks before he was stabilized. CP at 61. During these periods, despite decompensation, Ward appeared able to maintain a therapeutic connection to Dr. Whitehill, and, while “not insightful,” remained “reasonably compliant.” CP at 214.

C. 2007 Trial And Release To A Less Restrictive Alternative

In 2005, Ward was granted a trial on the issue of unconditional release pursuant to RCW 71.09.090(2).³ In April 2007, a jury determined that Ward continued to be a sexually violent predator and, therefore, was not eligible for release. CP at 303-04. Ward, however, had been doing well for some time while at the SCC and, two months later, the parties agreed to an order conditionally releasing⁴ Ward to a less restrictive facility at the Pierce County Secure Community Transition Facility (SCTF). CP at 288-302.

³ The superior court’s order granting the trial followed issuance of this Court’s decision in *In re Detention of Ward*, 125 Wn. App. 381, 104 P.3d 747 (2005).

⁴ “Conditional release” refers to release that is supervised by the committing court. This is opposed to “unconditional release,” in which the committing court no longer has any supervisory authority.

The Pierce County SCTF is one of two less restrictive alternative facilities run by DSHS, and is located on McNeil Island, near the Special Commitment Center. CP at 416. A “less restrictive alternative,” as the name suggests, refers to “court-ordered treatment in a setting less restrictive than total confinement” which satisfies certain statutory conditions related to housing, treatment, and cooperation with supervision by DSHS and the Department of Corrections. RCW 71.09.092.⁵ The SCTF is a self-contained residential housing facility with three cottages, each capable of housing eight residents. CP at 416. The goal of the SCTF “is to promote successful community reintegration” of persons formerly living in the total confinement of the SCC (CP at 417, 422), and persons committed as sexually violent predators may reside there only with

⁵ RCW 71.09.092 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.

permission of the DSHS secretary. RCW 71.09.250(1)(a). After a period of time during which all treatment occurs on the island, residents are allowed off island to pursue employment opportunities, education/training, treatment or other approved activities. CP at 418.

The full cooperation of any person released to an less restrictive placement is, of course, essential, and any person transitioning to such a placement must agree to comply with “all requirements imposed by the treatment provider and by the court,” as well as those imposed by the Department of Corrections. RCW 71.09.092(4), .092(5). This requirement was written into Ward’s release order, which also specified that “respondent shall abide by all rules, regulations, and policies of the SCTF, including staff directives.” CP at 292. Elsewhere in the order, Ward was specifically required to “comply with all verbal and written instructions of the [community corrections officer] and SCC staff.” CP at 293. Continuing participation in treatment is also required of any person placed in a less restrictive placement, and the court order further required that Ward “shall participate in any treatment, including but not limited to sex offender specific treatment, as recommended by the transition team.” CP at 292.

Ward was initially moved to a “pre-transition” placement in the Accommodated Transition Program at the SCTF. CP at 374. This

program is designed to allow residents of the SCC who require more flexible and individualized assistance (e.g. additional supports, longer period for transition) to move to a less restrictive alternative. CP at 374. Although Ward had occasional difficulties at first regarding such things as personal hygiene and lack of motivation to maintain a schedule, when given directives in those areas he was generally compliant, as he had been for several years before transitioning to the SCTF. CP at 374. As required when a resident is moved to the SCTF, Ward began individual treatment with a community treatment provider, Mark Whitehill, Ph.D. RCW 71.09.092(2); CP at 374, 377.

For several years, Ward was able to go on outings into the community with Dr. Whitehill, including visiting bookstores, the Seattle Public Library, the grocery store, and restaurants, with no problematic behavior. CP at 211-215; 376-77. Ward took medication for his occasionally delusional thoughts because he was told to, although he stated that he was not personally convinced that he needed it. CP at 381. By 2010, and in addition to his individual sessions, he had begun group treatment with Dr. Whitehill, and his off-island outings to various locations continued. CP at 211-12, 215. While Ward occasionally had to be reminded not to stare at women, he was compliant when re-directed,

and the vast majority of these outings were positive and successful. CP at 215.

1. Decompensation: 2011 - February 2012

In late 2010, due to Ward's progress at the SCTF, the SCC's Senior Clinical Team, at the request of both Ward's attorneys and the SCC Superintendent, began to consider transitioning Ward from the SCTF on McNeil Island to a group home in the community.⁶ CP at 214. Ward's behavior, however, began to deteriorate by early 2011, and numerous professionals have speculated that this deterioration was related to stress associated with the possibility of that transition. CP at 140, 181, 184. Indeed, Ward's mother, with whom he has continued to have a close relationship throughout his placement at the SCC, has suggested that Ward "sabotaged" himself at a time when a step-down to a community placement was being seriously considered. CP at 360.

Whatever the underlying cause, Ward began to show increasing symptoms of mental illness, including increased delusions and paranoia. CP at 139, 181. Whereas Ward had previously been able to "talk his way

⁶ The Senior Clinical Team is a team of professionals appointed by the Superintendent of the SCC consisting of the clinical director, assistant clinical director, facility psychiatrist, associate superintendent, forensic services manager, a designated forensic evaluator, an external psychologist, and an external psychiatrist. CP at 140. The team periodically reviews a resident's information to provide consultation and decision-making collaboration regarding treatment participation, decisions regarding less restrictive alternative placement and other recommendations or assistance as needed. CP at 140.

through” some of his paranoid ideation, he was no longer able to do so. CP at 181. There were troubling disclosures regarding his sexual functioning as well: He told his Accommodated Transition Group that he felt the only way he would be able to get close to a woman was by “manipulation and coercion.” CP at 182. In September of 2011, Ward also disclosed that he had viewed profiles of women on an internet dating site during a library visit, in violation of his court conditions. CP at 354. Ward began masturbating more frequently, “suggestive of sexual preoccupation,” and an October 2011 polygraph indicated that he had not disclosed the full extent of his masturbatory behaviors to Dr. Whitehill. CP at 183. Ward disclosed having masturbated, *inter alia*, “to an incident of pulling down the pants of his future stepmother.” CP at 182-83. He also reported a sexual fantasy with themes of manipulation and coercion to Dr. Whitehill, who noted that Ward had reported that “normative,” relationship-based fantasies were significantly less arousing than those involving manipulation and coercion. CP at 183. In addition, he reported suicidal ideation. CP at 182.

2. Return To The SCC: February 2012

By the beginning of 2012, Ward’s delusions intensified. He began to report delusions about SCTF staff: He believed, for example, that a metal pin on a staff member’s badge was a camera filming him, and that

the SCC is a CIA operation. CP at 183. He also described a delusional belief of being programmed at the SCC, “like a marionette on strings,” and believed that his “actions are pre-determined by someone else.” CP at 183. One weekend, he began to make phone calls to Dr. Whitehill, “increasingly bizarre in nature and replete with delusional material of a familiar type,” i.e. that other SCTF residents were being used as staff “proxies” and that staff security badges contained hidden microphones that were being used to spy on him and record their conversations. CP at 308. Ward also appears to have threatened to hit a female resident of the SCTF with whom he had been having ongoing conflicts at around the same time. CP at 105.

After consultation between Dr. Whitehill and SCC staff, it was determined that his off-island visits to Dr. Whitehill for individual and group therapy should be cancelled and Ward should be returned to the SCC for monitoring by the SCC medical director, psychiatrist Leslie Sziebert, M.D., while his medications and dosages were adjusted. CP at 195, 308-09. SCC staff made special efforts to assure Ward that this was not a form of punishment. CP at 308.

Commenting on this decompensation after having interviewed Ward, Dr. Mark McClung, M.D., a consulting psychiatrist who wrote Ward’s Annual Review for the period March 2011 through February 2012,

noted that several of Ward's rule violations "feel antisocial in their motivation, not related to his brain damage," (CP at 182) but observed that "this most recent episode of psychosis indicates that Mr. Ward can still decompensate rapidly in response to stressors, and that he has probably been more chronically delusional than had previously been understood." CP at 195. Dr. McClung noted:

The lack of predictability and transparency, the presence of bizarre and idiosyncratic sexual fantasies, and engaging in serious behavior without a whole lot of warning, is a significant concern, making it difficult to predict the times when he may be at greater risk of offending or at risk of aggression to self or others.

CP at 182. SCC staff made similar observations, noting that it was "often difficult to find early warning signs for one of Ward's impending psychotic episodes." CP at 183-84. With regard to the anticipated move to the community, Dr. McClung opined that Ward "needs to demonstrate more consistent openness about his psychotic thought processes for several months at the SCTF before he should be considered safe for a community group home setting such as the [community less restrictive placement]." CP at 195. In his opinion, Ward "could be safely and adequately managed there again after his current psychotic episode resolves." CP at 196.

After his return to the SCC in February of 2012, Ward initially continued to demonstrate considerable delusional thinking, telling staff, for example, that the CIA was planning a party for him at the SCC. CP at 105-06. He also engaged in problematic behavior (exposing himself by unbuttoning/unzipping his pants in the dayroom, sitting in the dayroom focusing on female staff at the desk, and ignoring staff directives to return to his room during a daily census count). CP at 104-05.

3. Return To The SCTF: May 2012

Despite problems, staff decided to try returning Ward to the SCTF in late May of 2012. Dr. Whitehill noted in a report to the court that there had been “some improvement in his cognitive functioning,” and that the high-stimulation environment of the SCC could be triggering certain delusions and instances of negative behavior. CP at 311-12. Ward’s transition team and the SCC medical director, Dr. Sziebert, presented Ward with specific, written directives prior to being returned to the SCTF. These give some sense of the difficulties Ward’s behavior presented: Ward was directed to “wear clothing that meets with SCTF standards in terms of coverage of [his] genitals and buttocks, and to keep that clothing fastened in such a manner that prevents any view of those areas;” to “attend to personal and environmental hygiene as it pertains to urine and feces;” to “develop skills in monitoring your visual behavior such that

your gaze does not fix on” any woman’s breasts, buttocks, or any other body part;” that there “is never an acceptable reason to decline a staff directive either at the SCTF or in the community;” and, finally, that he was expected at all times “to demonstrate the general treatment skills that made a move to Accommodated Transition possible.” CP at 124. These conditions were read to Ward, after which he was required to sign them, indicating his understanding of the terms. CP at 124, 143. In addition, it was decided that he would not be permitted to leave the island. CP at 311-12. He was returned to the SCTF on May 30, 2012.

Ward’s return to the SCTF in May of 2012 was initially characterized as “satisfactory” (CP at 107) and, in early July, he was permitted to resume off-island trips to Dr. Whitehill’s office for individual and group therapy. CP at 313. Two days after one of the trips, however, Ward became convinced that his garlic bread had been poisoned, and he told SCC staff that he had thoughts about hurting both SCTF staff and residents. CP at 113, 313. After an emergency telephonic transition team meeting was convened in which Dr. Sziebert and representatives from the Department of Corrections also participated, it was decided that Ward presented a danger to others at the SCTF and that he should once again be returned to the SCC. CP at 113.

4. Return to SCC: July 25, 2012

Ward was returned to the SCC on July 25, 2012. CP at 113. While there, medication adjustments were overseen by Dr. Sziebert who, in Dr. Whitehill's words, made "dogged" attempts to find a medication "cocktail" that "could allow for a measure of re-compensation." CP at 313. In addition, the SCC arranged for specialized medical assessments, including a CAT-scan and an EEG, neither of which appear to have produced any new medical findings that could account for Ward's recent mental decline. CP at 1, 315. Meanwhile, despite his continued expressions of certain delusional views, many centering on the SCC's role as a CIA operation, Ward appeared to stabilize, and was again returned to the SCTF on September 12, 2012. CP at 315.

5. Return to SCTF: September 12, 2012

Ward's return on September 12, 2012 was followed by a period of relative stability, albeit with continued delusional thinking. In mid-October, however, Ward's mental state suddenly took a turn for the worse. In early October, 2012, he had reported "a wide variety of delusional material" to Dr. Whitehill, including his belief that he would be recruited to the CIA and transferred to South America, where he would have a child with a 35-year-old psychologist and then, through a black hole, would time travel to the 1960s where "he will be involved in some

unknown capacity in President Kennedy's assassination." CP at 3. Dr. Whitehill reported to the court that Ward's mental state had, by the time of his transfer back to the SCC, "deteriorated to the point where concerns arose as to whether he could comport himself safely in the community" and that "the confines of the SCC enable more careful assessment and management of his psychiatric condition." CP at 1. Ward's debilitated state, Dr. Whitehill reported, "renders him essentially unable to benefit from psychotherapy[.]" CP at 2. Continued medication management, he wrote, "is needed for Mr. Ward to induce greater cognitive clarity and suppression of delusional thoughts; this remains the province of psychiatry." CP at 2. Although Ward's risk of sexual re-offense was "unclear," Dr. Whitehill reported that "I cannot assert that it has declined since my previous report." CP at 2. Dr. Whitehill reported that, although he had not heard reports of Ward becoming physically violent, "the risk of his becoming involved in a physical altercation with other residents has increased commensurate with the ire he has inspired on the unit as a result of his attenuated personal hygiene."⁷ CP at 2.

6. Final Return To The SCC: Oct 17, 2012

Between his return to the SCC in mid-October 2012 and the hearing to revoke his less restrictive placement, Ward was housed on a

⁷ This remark appears to refer to the numerous instances involving Ward's being soaked in his own urine and his smearing of feces.

high management unit within the SCC and escorted to appointments by security staff. CP at 139. During this time, his behavior became increasingly bizarre. In May of 2013, Megan Carter, Ph.D., submitted an Annual Review pursuant to RCW 71.09.070. In it, she described both Ward's problematic behaviors and his worsening mental condition. CP at 142-144. Ward, she stated, "repeatedly left his room during census to answer the phone stating that he had to answer the phone because the CIA was calling him to let him know about a party in his honor." CP at 142. Although Ward repeatedly got in trouble for this behavior, he "appeared unable to stop himself." CP at 142. He reported to residential staff that he felt he was being ordered around by the delusions/voices/God. CP at 142. At times, he showered and washed his clothing multiple times per day and avoided having his feet touch the floor after bathing, stating that he needed to be properly cleansed for time travel.⁸ He also reported that the air freshener in the facility was sending him signals telling him he did something bad, that God was in the shower telling him to shower, and that Ward had received messages through the TV saying God was lying "to them." CP at 142.

⁸ The July 3, 2013 Notice of Violation states that Ward had "confided" that this cleansing ritual was in preparation for time travel in which he would go back in time "in order to get credit" for killing President Kennedy. CP at 123.

In July 2013, the Department of Corrections community corrections officer who supervised Ward on his less restrictive placement filed a violation report with the superior court. CP at 126-134. The violation report documented numerous instances in which Ward had refused to comply with directives, exposed himself by walking around naked, smeared his feces or defecated on himself, and engaged in inappropriate behavior towards other residents. CP at 128-32. The community corrections officer requested that a hearing be held to address revocation of Ward's less restrictive placement. CP at 133. In January of 2014, the State filed a motion to formally revoke Ward's placement. CP at 75-125. The trial court heard the State's motion in May 2014. CP at 28-29. After considering the materials that had been submitted by the parties and hearing argument, the trial court denied the State's motion, ordering that Ward be returned to the SCTF within 45 days, and that he not be returned to the SCC unless he "poses a direct and specific threat to the safety of himself or the staff or other residents of the SCTF-PC." CP at 28-29. At the State's request, this Court stayed the effect of that order and granted discretionary review.

III. ARGUMENT

The trial court abused its discretion by denying the State's motion to revoke Ward's less restrictive placement. Between February and

October 2012, Ward's decompensation required that he be repeatedly returned to the SCC for psychiatric stabilization. Between October 2012 and the revocation hearing in June 2014, his condition continued to deteriorate, and required periodic placement in the Intensive Management Unit. Given both the nature and extent of Ward's bizarre and, at times, dangerous behavior, the trial court's order requiring that he be returned to the less restrictive environment of the SCTF was an abuse of discretion. That order should be reversed, and the State's motion to revoke Ward's LRA granted.

A. The Court's Decision Is Reviewed For Abuse Of Discretion

The parties agree that the trial court's decision not to revoke Ward's conditional release is reviewable under the abuse of discretion standard. [Ward's] Answer to State's Motion for Discretionary Review at 10-14; [State's] Amended Reply on Motion for Discretionary Review at 9; *see also* Ruling, *In re the Detention of Ward*, COA No. 71930-1-I, August 4, 2014, at 4. A trial court abuses its discretion if its decision "is manifestly unreasonable or based upon untenable grounds or reasons." *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). A court's decision "is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard." *In re Marriage of Littlefield*, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997).

“A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard.” *Id.*

B. A Less Restrictive Alternative Should Be Revoked If One Or More Statutory Factors Are Met

1. Less Restrictive Alternative Placement

A less restrictive alternative, as explained above, is an alternative form of confinement for a person who has previously been found to be a sexually violent predator. In order to be placed in a less restrictive placement for court-ordered treatment, the person must receive ongoing treatment from a certified sex offender treatment provider, have appropriate housing that protects the community, and be willing to comply with the treatment provider's and the court's requirements. RCW 71.09.092.⁹ In addition, before a person can be released to a less restrictive alternative, the fact-finder must determine that such placement “is in the best interest of the person and includes conditions that would adequately protect the community[.]” RCW 71.09.096(1). If “conditions do not exist that will both ensure the person's compliance with treatment and protect the community, then the person shall be remanded to the custody of the department of social and health services for control, care, and treatment in a secure facility[.]” RCW 71.09.096(2).

⁹ RCW 71.09.092 is set forth in full in n.5, *supra*.

Placement in a less restrictive alternative may be revoked by the court for violation of the conditions of release. RCW 71.09.098. At a hearing to revoke the alternative placement, the State “shall bear the burden of proving by a preponderance of the evidence that the person has violated or is in violation of the court’s conditional release order or that the person is in need of additional care, monitoring, supervision, or treatment.” RCW 71.09.098(5)(c). If the State meets its burden, the court then considers the evidence as it relates to five factors “relevant to whether continuing the person’s conditional release is in the person’s best interests or adequate to protect the community[.]” RCW 71.09.098(6)(a). Those factors are:

- (i) The nature of the condition that was violated by the person or that the person was in violation of in the context of the person’s criminal history and underlying mental conditions;
- (ii) The degree to which the violation was intentional or grossly negligent;
- (iii) The ability and willingness of the released person to strictly comply with the conditional release order;
- (iv) The degree of progress made by the person in community-based treatment; and
- (v) The risk to the public or particular persons if the conditional release continues under the conditional release order that was violated.

Id. “Any factor alone, or in combination, shall support the court’s determination to revoke the conditional release order.” RCW 71.09.098(6)(b). Less restrictive placement has been revoked where a sexually violent predator engaged in prohibited consensual intercourse with his wife (*See In re Detention of Jones*, 149 Wn. App. 16, 21, 201 P.3d 1066 (2009)) and in cases where the revocation was based on the sexually violent predator’s lack of progress in treatment “and other concerning behaviors.” *In re Wrathall*, 156 Wn. App. 1, 2, 232 P.3d 569 (2010).

2. The Conditions Ward Violated And The Statutory Revocation Factors Overwhelmingly Supported Revocation

It is undisputed that Ward violated numerous conditions of his less restrictive placement. In its oral ruling, the court found Ward violated the conditional release order by not complying with treatment, and by not complying with requirements related to the Department of Corrections. VRP at 23. It is also undisputed, and the court found, that the State had demonstrated that Ward is in need of additional care. VRP at 23. Having properly made these determinations, however, the trial court abused its discretion when it determined that revocation was not warranted. By returning Ward to the SCTF, the trial court placed Ward in an environment where he is simply unable to comply with the most basic and

fundamental requirements of less restrictive alternative placement, effectively requiring DSHS to turn the SCTF into an intensive management unit in order to ensure the safety of Ward and his fellow residents.

At the time of the revocation hearing in May 2014, the trial court had before it overwhelming evidence of Ward's deteriorated mental condition, delusional state, and complete inability to comply with the terms and conditions of any court order. The facts presented to the court demonstrated that Ward's conditional release to the SCTF should be revoked, and the trial court abused its discretion in ordering Ward's return to the SCTF.

As noted above, once it has been established that the person has violated the terms of his or her less restrictive placement or is in need of additional care or treatment, the reviewing court is required to consider five factors, any one of which can be determinative in deciding to revoke the alternative placement. The court is first required to consider the nature of the violation "in the context of the person's criminal history and underlying mental conditions." RCW 71.09.098(6)(a)(i). This factor strongly supported revocation here: Many of Ward's problematic behaviors were sexual, and were consistent with his offending history of exposure and sexual aggression. These included walking naked between

his room and the bathroom (CP at 143), masturbating openly during a census check (CP at 143), and walking around with his penis showing or entirely naked. CP at 143-44. On November 13, 2012, Ward was questioned by SCC staff as to why he was walking around naked at the SCC. CP at 123. Ward responded, "Cause I want to have sex." CP at 123. When asked with whom he wanted to have sex, he responded, "Anybody." CP at 123. Ward also admitted to walking around in the nude with an erection at times. CP at 123. The following day, Ward was seen lying nude on his bed during a census check, standing outside his room naked, and later walking naked from his room to the bathroom. CP at 143. That same day, two residents approached SCC staff indicating that they were uncomfortable with Ward's behavior. CP at 121. They reported that, while they were at the urinal, Ward had approached them and stood "right next" to them; another resident reported that, while he was using the computer, Ward had approached him and "started caressing" his neck. CP at 121. On November 26, 2012, Ward, while in the Intensive Management Unit, "kept taking his clothes off to masturbate." CP at 121. Two days later, Ward put his arms around another resident, who pushed him away; Ward said he loved the other resident and wanted to marry him. CP at 143. The other resident responded by shoving Ward to the floor and kicking him, requiring staff

intervention. CP at 123, 143-44. The next day, Ward approached a person identified as “the most dangerous person at the SCC” and gave him a bear hug, in response to which the other resident shoved Ward away and kicked him in the ribs. CP at 121.

Although the trial court, in its oral findings, referenced some of these behaviors, it does not appear to have considered those behaviors in the context of Ward’s criminal history or mental condition as required by RCW 71.09.098(1). Ward’s repeated exposures and open masturbation at the SCC were, however, the same behaviors that led to some of his convictions in the community. In failing to revoke on these bases, the court’s decision was unreasonable.

The second factor requires that the trial court consider “the degree to which the violation was intentional or grossly negligent.” RCW 71.09.098(6)(a)(ii). The trial court, finding that Ward’s behavior was the result of “a mental health problem more than any kind of willful behavior” on his part, found that that factor “tips towards the defense.” VRP at 24. Where a person’s mental impairment is so severe that he cannot comply with conditions, however, consideration of the “willful” or intentional nature of those violations becomes meaningless.

Moreover, for purposes of a revocation action, there is no requirement that the behavior be willful “where the violation itself creates

a threat to society.” *In re Wrathall*, 156 Wn. App. 1, 9, 232 P.3d 569 (2010). Ward’s bizarre behavior has frequently implicated safety and security, thereby creating a threat to both Ward and those around him. Ward has engaged in numerous behaviors and practices that place him and those around him at risk of harm and, as such, many of his violations create “a threat to society.” *Id.* As noted above, Ward has a history of suicidal ideation and apparent suicide attempts. CP at 159, 182. In addition, Ward had, while incarcerated as a juvenile, assaulted others on numerous occasions (CP at 397) and had, on two occasions, been returned to the SCC from the SCTF due to statements that he wanted to physically harm other SCC residents, SCTF staff, or both. CP at 105, 113. Behaviors cited in support of revocation were consistent with this history: First, consistent with his history of suicidal ideation and attempts, Ward, on October 27, 2012, climbed on a counter and threatened to jump. Security was called and moved Ward to another room. CP at 143-44. Two days later, the transition team was notified that Ward had been “sticking his head in the toilet and trying to drown himself.” CP at 123. He has also attempted to flood his cell. CP at 141. On November 13, 2012, Ward stated, “I want to die,” and reported banging his head against the wall. CP at 123.

Ward's behaviors were also consistent with his demonstrated capacity for assaultive outbursts: On June 10, 2013, Ward, when told that security might be called to help him into the shower, or that the medical unit might try further to have him take his medications, stated that "if you or anyone else here tries to make me take a shower or take medications that I don't want try to come in here and see what happens." CP at 65-68. On September 25, 2013, Ward, after being asked about the smell coming from his room, "threw his hands up, then yelled [at SCC staff] 'WHAT THE FUCK'" before charging toward staff "in an aggressive manner." CP at 65-68. One of the staff put his arm up so that Ward—a large man who weighs well over 200 pounds (CP at 107)—could not physically assault the other staff. CP at 65-68. After being directed to return to his room, Ward "began to bang his head against the door and kick and hit the door." CP at 65-68.

Ward's sexually aggressive behaviors also expose him to harm in a different way, as was the case with the two instances on November 28 and November 29, 2012, in which he hugged other residents, included one identified as "the most dangerous person at the SCC," and was kicked by both men in response to his advances. CP at 121, 123, 143-44. The SCC is inhabited by roughly 300 persons designated as dangerous sex offenders. Many of these people are not only sexually dangerous, but

have histories of significant physical violence as well. Where Ward repeatedly acts in a way that provokes responses from others, he and any person intervening in the dispute could be harmed.

Ward's behaviors also create a health risk: He has repeatedly smeared his feces, and at times soaked his clothes, bed, or both, with both feces and urine. On November 19, 2012, Ward, who at this point was in the Intensive Management Unit, smeared himself, his bed, and his clothes with feces when told he would have to wait until day shift to take a shower. CP at 143-44. On June 10, 2013, Ward was placed back in the Intensive Management Unit after refusing his medications and being found "sitting on his bed saturated with urine and refusing to take a shower." CP at 65-68. At one point, Ward was questioned about having urinated in front of his therapist while she was speaking to him, and admitted having done it on purpose because he wanted to go back to the Intensive Management Unit where he could urinate, defecate, and walk around naked. CP at 123. The incident on September 25, 2013, during which Ward charged staff occurred after he was asked about the smell coming from his room. CP at 65-68. On November 15, 2013, Ward was again taken to the Intensive Management Unit; he had repeatedly urinated on himself and refused directives. He was later noted to have defecated on himself. CP at 65-68.

This behavior presents a significant health risk on various levels: First, there is the danger of contamination by various pathogens that may be present in the fecal material. Second, the record is replete with references to the reaction of those around him to this practice (*see e.g.* CP at 122), and, as pointed out by Dr. Whitehill, “the risk of his becoming involved in a physical altercation with other residents has increased commensurate with the ire he has inspired on the unit as a result of his attenuated personal hygiene.” CP at 2. As noted by Dr. Whitehill in his November, 2012 report to the court, Ward’s mental state had, at the point at which he was last returned to the SCC, “deteriorated to the point where concerns arose as to whether he could comport himself safely in the community.” CP at 1. Under the circumstances of this case, that fact that his behavior was neither “intentional” nor “grossly negligent” does not “tip toward the defense,” (VRP at 24) and indeed strongly supports revocation.

The third factor relates to “the ability and willingness of the released person to strictly comply with the conditional release order.” RCW 71.09.098(6)(a)(iii). Whatever his theoretical willingness to comply with the conditional release order, it is abundantly clear that Ward’s severely delusional state leaves him unable to do so. Indeed, questions have been raised as to his competency and his need for a guardian ad

litem. CP at 73. The trial court concluded that this factor supported revocation. VRP at 25. This conclusion was correct, in that violations caused by Ward's mental illness are much more serious than inadvertent or accidental violations by an otherwise competent person capable of following directives and behaving rationally.

Fourth, the trial court is required to consider "the degree of progress made by the person in community-based treatment." RCW 71.09.098(6)(a)(iv). Participation in treatment with a certified sex offender treatment provider is a required component of any release to a less restrictive alternative pursuant to RCW 71.09.092(3), and no order releasing an individual to a less restrictive alternative may be entered in the absence of that condition. RCW 71.09.092. *See also* RCW 71.09.090(2)(d) (court cannot find probable cause for a trial addressing less restrictive alternatives unless a proposed less restrictive alternative placement meeting the conditions of RCW 71.09.092 is presented to the court). The order releasing Ward to the SCTF was consistent with this statutory requirement. CP at 289.

Ward's utter inability to participate in treatment meant that he was no longer suitable for a less restrictive placement, and this fact, standing alone, supported revocation. Although Ward had made considerable progress prior to 2010, he began to decompensate in 2011 and since then

has regressed considerably. Ward's debilitated state as of November 2012, Dr. Whitehill reported, "render[ed] him essentially unable to benefit from psychotherapy[.]"¹⁰ CP at 2. In order to achieve the cognitive clarity required for psychotherapy, Dr. Whitehill went on, "continued medication management," the "province of psychiatry," was required. CP at 2. "The confines of SCC," rather than placement in the SCTF, Dr. Whitehill concluded, "enable more careful assessment and management of his psychiatric condition." CP at 1. Although the trial court acknowledged that Ward was not "able to follow the conditions of the treatment," the court, nevertheless, ordered Ward returned to the SCTF, "under the terms of his current [less restrictive alternative] order." VRP at 24-25; CP at 28-29. This current less restrictive order, however, consistent with existing law, explicitly required ongoing treatment with Dr Whitehill and compliance with terms and conditions imposed by Dr. Whitehill. CP at 289. Dr. Whitehill had, however, already reported to the court that Ward's deteriorated condition rendered him unable to benefit from psychotherapy. CP at 2. By ordering return to the SCTF, the trial court required the imposition of conditions it was well aware could not realistically be imposed upon or possibly followed by Ward.

¹⁰ Dr. Whitehill submitted no further reports between November 2012 and the time of the revocation hearing, presumably because treatment had been terminated.

Fifth and finally, the court must consider the risk “to the public or particular persons” if conditional release continues. RCW 71.09.098(6)(a)(v). This factor also strongly supports revocation. As discussed above in relation to factor (ii), Ward’s behavior has been dangerous to both himself and to those around him. Prior to the most recent return to the SCC on October 17, 2012, Ward had to be returned to the SCC twice, both times because his behavior was sufficiently alarming to cause staff to conclude that his continued presence there was a risk to staff or other residents. *See infra* at 13-21. Since his most recent return to the SCC, his dangerous and delusional behavior continued even within the much more secure confines of the SCC, including both on the high management unit where he resides and in the Intensive Management Unit where he is frequently placed when his behavior becomes dangerous, uncontrollable, or both. *See supra* at 30-33.

The trial court’s order returning Ward to the SCTF, and providing that he shall not be returned to the SCC unless he “poses a direct and specific threat to the safety of himself or the staff or other residents of the SCTF-PC” (CP at 28) demonstrates the trial court’s fundamental failure to appreciate the severity and implications of Ward’s behaviors. Although it noted that “folks at the SCTF were concerned about Mr. Ward’s behavior,” the trial court dismissed those concerns, believing that “there

was no person identified as being particularly at risk. Nobody was assaulted, although they had concerns.” VRP at 25. But in so finding, the court failed to recognize the fact that many of the documented behaviors and threats were in fact directed both against specific staff and specific residents, and could easily have resulted in harm to either.

To require that someone who presents severe management challenges even while within the secure environment of the SCC be placed in the significantly less restrictive environment of the SCTF will have one of two effects: It will either present an intolerably high risk of harm at the SCTF as currently constituted, or it will require the SCTF, in order to protect both Ward and the other residents there, to adopt the security constraints of the SCC and/or the Intensive Management Unit, effectively eliminating the “less restrictive” qualities of that less restrictive alternative facility. Pursuant to RCW 71.09.098(6)(b), “[a]ny factor alone, or in combination, shall support the court’s determination to revoke the conditional release order.” The factors to be considered in a less restrictive alternative revocation proceeding overwhelmingly supported revocation here. Revocation was warranted in light of Ward’s out-of-control behaviors over an extended period of time, his clear need for more active supervision and care, and his inability to comply with the

terms of his conditional release order. The trial court's failure to grant the State's motion was an abuse of discretion.

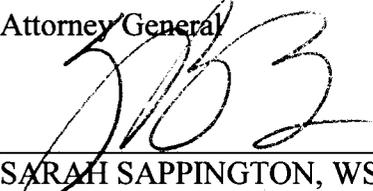
IV. CONCLUSION

For the foregoing reasons, this Court should reverse the trial court's order, and order that Ward's less restrictive placement be revoked.

RESPECTFULLY SUBMITTED this 17th day of November, 2014.

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NO. 71930-1

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

In re the Detention of:

BRADLEY B. WARD,

Respondent.

DECLARATION OF
SERVICE

I, Joslyn Wallenborn, declare as follows:

On November 17, 2014, I sent via electronic mail and regular
USPS mail a true and correct copy of Appellant's Opening Brief and
Declaration of Service, postage affixed, addressed as follows:

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COURT OF APPEALS
STATE OF WASHINGTON

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

DATED this 17th day of November, 2014, at Seattle, Washington.


JOSLYN WALLENBORN