

NO. 73535-7

---

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

**FILED**  
April 28, 2016  
Court of Appeals  
Division I  
State of Washington

---

In re the Detention of:

BRADLEY WARD,

Respondent.

---

**APPELLANT'S REPLY BRIEF**

---

ROBERT W. FERGUSON  
Attorney General

SARAH B. SAPPINGTON  
Senior Counsel  
WSBA #14514  
Attorney General's Office  
800 Fifth Avenue, Suite 2000  
Seattle, WA 98104  
(206) 389-3916

## TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	ARGUMENT .....	1
	A. Alleged Procedural Flaws In Appellant’s Opening Brief Do Not Act To Limit The Issues On Review. ....	1
	1. Appellant provided a concise statement of error.....	1
	2. The State’s References To Facts In The Record Are Properly Considered By This Court .....	3
	B. The Trial Court Cannot, As A Matter Of Law, Order The Relief Ward Seeks.....	6
	1. Release from confinement is not an available remedy where Ward alleges unconstitutional conditions of confinement .....	6
	2. The trial court’s authority to act in any sexually violent predator matter is limited to that found in the statute.....	12
	C. DSHS is a Necessary Party to Any Proceeding Relating To Conditions Of Confinement At The SCC.....	16
III.	CONCLUSION .....	18

## TABLE OF AUTHORITIES

### Cases

<i>Auto. United Trades Org. v. State</i> , 175 Wn. 2d 214, 285 P.3d 52 (2012), <i>citing</i> 7 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, <i>Federal Practice &amp; Procedure</i> § 1609, at 130 (3d ed.2001) .....	17
<i>Carson v. Johnson</i> , 112 F.3d 818, (5th Cir.1997) .....	10
<i>In re Campbell</i> , 139 Wn.2d 341, 968 P.2d 771 (1999).....	11
<i>In re Dependency of Schermer</i> , 161 Wn.2d 927, 169 P.3d 452 (2007).....	3, 6
<i>In re Detention McClatchey</i> , 133 Wn.2d 1, 940 P.2d 646 (1997).....	11
<i>In re Detention of D.W. vs. DSHS</i> , 181 Wn.2d 201, 332 P.3d 423 (2015).....	7, 8
<i>In re Detention of Turay</i> , 139 Wn.2d 379, 986 P.2d 790 (1999).....	9, 10, 11
<i>In re Parentage of L.B.</i> , 155 Wn.2d 679, 122 P.3d 161 (2005).....	13
<i>In re Rushton</i> , 190 Wn. App. 358, 359 P.3d 935 (2015).....	12, 16
<i>In re Skinner</i> , 122 Wn. App. 620, 94 P.3d 981 (2004).....	12, 13, 16
<i>In re the Detention of Hatfield</i> , 191 Wn. App. 378, 362 P.3d 997 (2015), <i>petition for review filed</i> , January 19, 2016 .....	11
<i>Ohlinger v. Watson</i> , 652 F.2d 775 (9 <sup>th</sup> Cir. 1981) .....	9

<i>Oregon Advocacy Ctr. V. Mink</i> , 322 F.3d 1101 (9 <sup>th</sup> Cir 2003) .....	9
<i>Putman v. Wenatchee Valley Med. Ctr.</i> , 166 Wn.2d 974, 216 P.3d 374 (2009).....	15
<i>State v. Johnson</i> , 69 Wn. App. 189, 847 P.2d 960 (1993).....	4
<i>State v. Olson</i> , 126 Wn.2d 315, 893 P.2d 629 (1995).....	2
<i>State v. Phelps</i> , 113 Wn. App. 347, 57 P.3d 624 (2002).....	13
<i>State v. Seibert</i> , 220 Wis.2d 308, 582 N.W.2d 745, 749, <i>review denied</i> , 220 Wis.2d 366, 585 N.W.2d 158 (1998).....	10
<i>Trueblood v. Wash.State Dep’t Soc. &amp; Health Servs., et.al</i> , 101 F.Supp.3d 1010 (W.D. Wash.2015).....	9
<i>Wyatt v. Stickney</i> , 325 F.Supp. 781 (M.D. Ala. 1971) .....	9
<i>Young v. Seling</i> , 531 U.S. 250, 148 L.Ed.2d 734, 121 S.Ct. 727 (2001).....	14

**Statutes**

RCW 71.09 .....	1, 7, 12, 14
RCW 71.09.020(18).....	8
RCW 71.09.080 .....	14

**Rules**

CR 19 .....	16
CR 41(b)(3).....	6
RAP 2.3(b).....	3

## I. INTRODUCTION

Ward argues, based on a combination of statements taken out of context from controlling decisions and attempted application of cases from entirely different contexts, that this Court should affirm the trial court's order setting an evidentiary hearing on the conditions of Ward's confinement. Ward misapprehends the State's argument. The State does not argue that Ward has no remedy for his claim related to the conditions of confinement, or even that the Superior Court cannot hear those claims. The State argues that this claim cannot be litigated within the context of a sexually violent predator proceeding brought pursuant to RCW 71.09, that it cannot go forward in the absence of DSHS, the party that controls the conditions of confinement, and that the only relief that he has requested—release—is not available in such a proceeding. This Court should reverse the trial court's orders granting and scheduling an evidentiary hearing.

## II. ARGUMENT

### A. **Alleged Procedural Flaws In Appellant's Opening Brief Do Not Act To Limit The Issues On Review.**

#### 1. **Appellant provided a concise statement of error.**

Ward contends the State did not assign error to the trial court's ruling and that said failure "obfuscates the issues." Brief of Respondent ("Rsp.") at 8. This argument is meritless, and the State's failure to include a

section specifically entitled “Assignments of Error” does not act to limit the issues on review in this case.

Ward cites to *State v. Olson*, 126 Wn.2d 315, 322, 893 P.2d 629 (1995) in support of his suggestion that this Court treat the issues in this case as waived. Rsp. at 8. The court’s holding in *Olsen* is, however, to the contrary. There, the court made clear that an appellate court should normally exercise its discretion to consider cases and issues on their merits where there is a technical violation of the rules “unless there are compelling reasons not to do so.” *Id.* 126 Wn.2d at 323.

In a case where the nature of the appeal is clear and the relevant issues are argued in the body of the brief and citations are supplied so that the Court is not greatly inconvenienced and the respondent is not prejudiced, there is no compelling reason for the appellate court not to exercise its discretion to consider the merits of the case or issue.”

*Id.*

The nature and identity of each assigned error is abundantly clear in the State’s Opening Brief. First, the State plainly identified three “Issues Presented For Review,” beginning each issue statement with “Did the trial court err....” State’s Opening Brief at 2. The State then listed verbatim three conclusions of law that had been entered by the trial court. *Id.* at 8. Then, in the introductory paragraph of its argument, the State identified and numbered three distinct ways in which the trial court had “erred as a matter

of law...” *Id.* at 9. The issues in this case have clearly been identified, and Ward’s argument should be rejected.

**2. The State’s References To Facts In The Record Are Properly Considered By This Court**

Ward asserts that this Court should disregard factual allegations contained in the State’s brief. *Rsp.* at 8-10. First, he asserts that the State makes certain factual allegations for the first time in footnotes in its opening brief. *Rsp.* at 8. Next, he argues that he is unable to respond to the State’s allegations because of the incorrect citations to Clerk’s Papers “throughout the opening brief.” *Id.* at 8. Finally, Ward suggests that Ward’s claims “should be viewed in the light most favorable to him at this stage of proceedings,” citing *In re Dependency of Schermer*, 161 Wn.2d 927, 169 P.3d 452 (2007). These arguments lack merit and should be rejected.

First, the State is not precluded from making statements regarding the background of this case simply because those facts were not set forth in the State’s Motion for Discretionary Review (hereinafter “Motion”). The question before the Court in any motion pursuant to RAP 2.3(b) is not the same as the question now before the Court, and the resolution of that motion did not depend upon lengthy discussions of Ward’s behavior. That said, references to Ward’s problematic behavior were discussed in the State’s Motion (*see* pps. 3-4) as well as in the voluminous attachments to that Motion, and Ward’s suggestion that he has been unfairly surprised by

any of the State's references to his behaviors is not persuasive. The fact that details regarding Ward's behavior were set forth in footnotes does not matter, and Ward's citation to *State v. Johnson*, 69 Wn. App. 189, 847 P.2d 960 (1993) is misleading. Ward cites that case for the proposition that “[p]lacing information in a footnote is ‘at best, ambiguous or equivocal as to whether the issue is truly intended to be part of the appeal.’” Rsp. at 8-9 (emphasis added). There, however, the issue was not inclusion of “information,” such as certain factual details, in a footnote, but the fact that the appellant included an argument not raised in her brief-- and unsupported by exhibits made part of the appellate court's records—in a footnote. *Id.*, 69 Wn.App. 189, n4.

Ward next argues that the State's inaccurate citations to the record “throughout the opening brief” “create an unfair obstacle” for him, leaving him “to guess the source of the State's allegations” and “unable to rebut the State's assertions.” Rsp. at 8-10. This claim is not supported by the record. Ward specifically identifies three pages of the Clerk's Papers--CP 82, CP 313 and CP 315—as “inaccurate.” Rsp. at 9. He indicates that CP 82 “correlates to page three of the State's witness list but the citation purports to refer to a 2007 LRA agreement.” Reply at 9. Ward is incorrect. At the initiation of this case, the State sought an order supplementing the record with clerk's papers from a

related case, *In re Ward*, COA No. 71930-1-I.<sup>1</sup> That motion was granted. The record in this case was thus supplemented with Clerk's Papers 40-207 from COA No. 71930-1-I. That index identifies CP 75-125 as "Petitioner's Motion to Revoke Less Restrict Alternative." An attachment to that document, entitled "Order On Release to Less Restrictive Alternative (LRA)" dated June 29, 2007, begins at CP 79. CP 82, which Ward cites as an example of the State's inaccurate citations, contains, as "Residential Condition" No. 1, a sentence identifying the SCTF as a DSHS-operated facility on McNeil Island. CP at 82.<sup>2</sup>

Ward also incorrectly asserts that "the presently designated clerk's papers end at CP 274." Rsp. at 9. Ward, however, filed a Supplemental Designation of Clerk's Papers dated February 29, 2016, resulting in a Supplemental Index for which the last Clerk's Paper identified is CP 310.

As for the remainder of the State's allegedly inaccurate citations, Ward overstates the problem. Ward alleges errors "throughout the State's brief" but specifically identifies only 5 pages of that brief (pps. 3-9, 11, 19 and 23). Rsp. at 9. Those 5 pages contain roughly 41 references to clerk's papers, cumulatively referencing roughly 223 pages. It appears that 5 of those cited pages (313, 315, 417-18, & 422, cited on State's Opening Brief

---

<sup>1</sup> *In re Ward*, COA No. 71930-1-I relates to the State's unsuccessful attempt to reverse the trial court's decision ordering Ward returned to the SCTF on McNeil Island.

<sup>2</sup> Ward's assertion appears to have its origin in an inadvertent error on the part of the Snohomish County Clerk's Office. For further explanation, please see the State's Motion for Leave to file Corrected Brief, filed with this Reply.

pps. 3-4) are indeed “inaccurate” in the sense that they refer to portions of *In re Ward*, COA No. 71930-1-I which the State erroneously did not include in its earlier Motion to Supplement. With the exception of those five pages, however, the remaining citations to the record throughout the State’s Opening Brief are accurate.<sup>3</sup>

Finally, citing *In re Dependency of Schermer*, 161 Wn.2d 927, 169 P.3d 452 (2007), Ward argues that his case “should be viewed in the light most favorable to him at this stage of proceedings.” Rsp. at 10. Issues of law are reviewed *de novo*. *Kaplan v. Northwestern Mutual Life Ins. Co.*, 115 Wn. App. 791, 800, 65 P.3d 16 (2003). Ward’s attempt to substitute the standard of review for motions to dismiss brought pursuant to CR 41(b)(3) for the applicable standard of *de novo* review should be rejected.

**B. The Trial Court Cannot, As A Matter Of Law, Order The Relief Ward Seeks**

**1. Release from confinement is not an available remedy where Ward alleges unconstitutional conditions of confinement**

Ward cites a variety of cases in support of his argument that, contrary to the State’s assertions, the trial court has authority to hold a hearing regarding the conditions of his confinement as part of its broad

---

<sup>3</sup> It is unclear whether Ward is arguing that the State’s references to CP 697-970 in its Opening Brief also leave him “unable to rebut” any of the State’s factual assertions. Rsp. at 9. Although these assigned numbers were superseded in the Corrected Index (*Id.*)(*see also* State’s Motion for Leave to File Corrected Brief), Ward should have been able to identify the documents referenced by referring to the original “Index To Attorney General’s 4<sup>th</sup> Supplemental Clerk’s Papers.”

equitable powers. Resp. at 10-21. None of these cases, however, arises in the context of the Sexually Violent Predator law, and his arguments overlook the distinction between commitment proceedings brought pursuant to RCW 71.09 and cases brought in entirely different contexts. Perhaps more importantly, Ward overlooks the fact that none of these cases involving challenges to the conditions for confinement hold that release is the appropriate remedy if conditions are determined to be unconstitutional. As such, none of these cases refutes the State's central argument, which is that the trial court, as a matter of law, cannot order the relief that Ward seeks—dismissal of the SVP petition and release

Ward cites *In re Detention of D.W. vs. DSHS*, 181 Wn.2d 201, 332 P.3d 423 (2015) in support of his contention that Ward is entitled to appropriate treatment. Resp. at 10, 12, 13, 17, 29. The State does not contest this proposition. *D.W.*, however, cannot be read to authorize either the type of hearing or the sort of relief that Ward seeks here. The issue in *D.W.* was whether the State's undisputed practice of detaining individuals in hospitals in which no mental health services were offered pursuant to "single bed certification" violated the Involuntary Treatment Act ("ITA"). Because the ITA specified both that individuals held pursuant to its terms could be held only in "evaluation and treatment facilities," and outlined precisely what facilities were included within that phrase, the court found that the ITA did

not authorize the sort of single bed certification being practiced by the County and DSHS. *D.W.* at 209.

This case does not present that issue. Ward is not being held in a facility—such as a hospital—that neither purports to nor actually offers mental health services. Pursuant to the clear requirements of the SVP statute, Ward is being held at the SCC, a total confinement facility, which is “a secure facility that provides supervision and sex offender treatment services in a total confinement setting.” RCW 71.09.020(19). Indeed, the State is expressly prohibited by statute from doing what Ward is asking for: Placing him at Western State Hospital, an option specifically made unavailable by the Statute’s clear language because it is “insufficiently secure for this population.” RCW 71.09.060(3). Nor, unlike the plaintiffs in *D.W.*, is Ward being detained due to incapacity; he is detained as a sexually violent predator following a judicial determination that he is likely to commit predatory acts of sexual violence if released. RCW 71.09.020(18).

Finally, *D.W.* does not stand for the proposition that Ward’s only proposed remedy—dismissal and release—is permitted. Indeed, the court did not address the issue of relief at all, finding only that the ITA “does not authorize psychiatric boarding as a method to avoid overcrowding certified evaluation and treatment facilities.” *Id.* at 211. There is nothing in *D.W.* that purports to overturn the Washington State Supreme Court’s decision in *In*

*re Detention of Turay*, 139 Wn.2d 379, 404. 986 P.2d 790 (1999). See Appellant's Opening Brief at 11-12.

Ward also cites *Trueblood v. Wash.State Dep't Soc. & Health Servs., et.al*, 101 F.Supp.3d 1010 (W.D. Wash.2015) for the proposition Ward has a liberty interest in treatment. Resp. at 11-12. The case, however, is similarly inapposite, and cannot be read to stand for the proposition that actions related to the conditions of confinement can or should be brought within the context of the SVPA. There, plaintiffs sought injunctive relief based on DSHS's failure to provide timely competency evaluation and restoration services for persons facing criminal charges. *Trueblood*, 101 F.Supp. at 1012-13. *Trueblood* illustrates how challenges to conditions of confinement should actually be raised: The case was filed in federal court, identified DSHS as a defendant, and involved a request for injunctive relief. As such, it is precisely the sort of action—in precisely the sort of forum—that is appropriate in this case. Likewise, the other cases cited by Ward for the proposition that there is a right to appropriate mental health treatment (*Oregon Advocacy Ctr. V. Mink*, 322 F.3d 1101 (9<sup>th</sup> Cir 2003); *Ohlinger v. Watson*, 652 F.2d 775 (9<sup>th</sup> Cir. 1981); *Wyatt v. Stickney*, 325 F.Supp. 781 (M.D. Ala. 1971)) all involve instances in which the plaintiff(s) sought injunctive relief from the agency responsible for the allegedly unconstitutional treatment, and sought such relief by filing an action

independent of and separate from the proceeding under which they were being detained. This is precisely what the State contends Ward must do.

Ward attempts to distinguish *Turay* on the basis that Ward, unlike *Turay*, is not mounting a double jeopardy challenge. Resp. at 18-19. Ward, however, ignores critical language regarding his remedy for alleged unconstitutional conditions of confinement. The court, having rejected *Turay*'s "as applied" double jeopardy claim, continued:

The fact that a federal court recently found that the conditions of confinement at the SCC do not yet meet constitutional standards is irrelevant to our holding here ***because Turay's remedy for these unconstitutional conditions is not a release from confinement.*** *Turay*'s remedy for unconstitutional conditions of confinement at the SCC is, therefore, an injunction action and/or an award of damages.

139 Wn. 2d at 420 (Emphasis added). In so holding, the court noted that "this conclusion is supported by case law from other jurisdictions" and went on to cite *State v. Seibert*, 220 Wis.2d 308, 582 N.W.2d 745, 749, *review denied*, 220 Wis.2d 366, 585 N.W.2d 158 (1998) for the proposition that a sex predator challenging the conditions of his confinement must "litigate that issue and, if successful, obtain appropriate treatment, not supervised release." *See also Carson v. Johnson*, 112 F.3d 818, 820 (5th Cir.1997) ("Generally, § 1983 suits are the proper vehicle to attack unconstitutional conditions of confinement"). *Id.*, n 32.

This principle was most recently affirmed by this Court in *In re the Detention of Hatfield*, 191 Wn. App. 378, 362 P.3d 997 (2015), *petition for review filed*, January 19, 2016. Hatfield argued that his commitment under the Act “violates substantive due process because it does not provide him a realistic opportunity for improvement.” *Id.*, 191 Wn. App. at 403. Arguing that he “is not capable of participating in sex offender treatment until he receives adequate treatment for his psychotic condition,” he further asserted that the SCC was “unequipped to give [him] the adequate medical attention he needs to treat his condition.” *Id.* Citing to both *Turay* and *In re Detention McClatchey*, 133 Wn.2d 1, 5, 940 P.2d 646 (1997), this Court concluded that “[t]he combined force” of these decisions “forecloses Hatfield’s present claim.” *Id.* at 404.

Ward also seems to cite *In re Campbell*, 139 Wn.2d 341, 968 P.2d 771 (1999) for the proposition that the trial court may properly hold hearings relating to the conditions of an individual’s confinement because the trial court did so in that case. *Resp.* at 20. The propriety of that hearing does not appear to have been an issue in the appeal, and the propriety of the trial court’s holding such a hearing was not addressed in the Supreme Court’s opinion.

Where precedent is absolutely clear on this point, and where release is the only remedy Ward requests, it is pointless to hold a trial where, after the conclusion of evidence, the trial court can order no relief.<sup>4</sup>

**2. The trial court's authority to act in any sexually violent predator matter is limited to that found in the statute**

Ward argues that the trial court, as a court of general jurisdiction, has broad power to “hear and determine all matters legal and equitable in all proceedings known to the common law” unless expressly denied. Rsp. at 14. Sexually violent predator actions brought pursuant to RCW 71.09 are not, however, equitable actions, and the trial court’s authority to act in any sexually violent predator matter “is limited to that found in the statute, and the court’s failure to follow the statute renders the court’s action void.” *In re Skinner*, 122 Wn. App. 620, 632, 94 P.3d 981 (2004)(published in part). *See also In re Rushton*, 190 Wn. App. 358, 380, 359 P.3d 935 (2015) (Court of Appeals, in context of request for release due to late filing of DSHS annual report, “need not decide whether release from civil confinement is an equitable remedy,” because whether release is available remedy is question of statutory construction.)

---

<sup>4</sup> Ward suggests in his brief that the SCC has the capability to release an individual to Western State Hospital who is better suited to their mental health treatment and that “[t]his type of transfer has happened before.” *See*, Rsp. at 6. Ward fails to point out the major distinction between those “past” instances and Ward’s situation. Those individuals had been determined by the Court not to meet the statutory criteria, and were facing discharges from the SCC. CP at 893B/197C. No finder of fact has ever determined that Ward does not meet SVP criteria.

In *Skinner*, the trial court had determined that equal protection considerations required a trial, immediately following the commitment trial, on the question of whether Skinner should be released to a less restrictive alternative placement. 122 Wn.App. at 632. This Court reversed, vacating the verdict on the less restrictive alternative placement hearing and determining that that hearing “should not have occurred.” *Id.* Ward attempts to overcome this holding by citing to *State v. Phelps*, 113 Wn. App. 347, 356, 57 P.3d 624 (2002), noting that while a statute limits a court’s authority “in some situations,” “such as setting a ceiling on a lawful sentence or determining the time period in which the government has the power to act by statute of limitation,” the sex predator statute “does not prohibit the court from engaging in other fact-finding.” *Rsp.* at 14. The *Skinner* Court, however, expressly based its holding related to the limitations of a trial court’s authority to act in any sexually violent predator matter on *Phelps*, and as such Ward’s attempt to distinguish the two cases fails. 122 Wn. App. at 632, n. 28.

Nor are the cases Ward cites in support of his theory of the broad equitable powers of the SVP trial court helpful to him. *In re Parentage of L.B.*, 155 Wn.2d 679, 122 P.3d 161 (2005), for example, deals with “the equitable power of the courts to adjudicate relationships between children and families,” and has nothing to do with proceedings brought pursuant to

RCW 71.09. Ward's reference to language from *Young v. Seling*, 531 U.S. 250, 265, 148 L.Ed.2d 734, 121 S.Ct. 727 (2001) (which itself was not a case brought pursuant to RCW 71.09, but instead was filed as a Petition for Writ of Habeas Corpus) is similarly unhelpful to him. Rsp. at 15. The Supreme Court, while agreeing that "some of the respondent's allegations [regarding conditions of his confinement] are serious," (263), and acknowledging state courts' competence to "adjudicate and remedy" federal constitutional challenges to SVP schemes, did not suggest that claims such as that brought by Ward could or should be adjudicated within the context of the SVP statute itself. Indeed, in discussing remedies available to Young, the Court made specific reference to the availability of other remedies, such as a civil rights action brought pursuant to 42 U.S.C. § 1983 or a "state law cause of action" under RCW 71.09.080 demanding "adequate care and individualized treatment." *Id.* at 265-66.

In a closely related argument, Ward asserts that the trial court's "equitable power" "defines its authority to permit argument and factual presentation for a motion," suggesting that such "equitable power" permits an evidentiary hearing in this case. Rsp. at 16-17. He supports this argument with quotes from various Supreme Court cases touching on the broad powers of the federal district courts' equitable powers to fashion a remedy once a constitutional violation has been found in school desegregation

cases. *Id.* Ward also cites to *Putman v. Wenatchee Valley Med. Ctr.*, 166 Wn.2d 974, 216 P.3d 374 (2009) apparently for the principle that it is “the duty of the courts to administer justice by protecting the legal rights and enforcing the legal obligations of the people” Rsp. at 17 (citing *Putman*, 166 Wn.2d at 979), a proposition with which the State does not disagree. These cases, however, have nothing to do with the ability of a trial court in Washington State to hold an evidentiary hearing on the conditions of confinement at the SCC within the context of an SVP proceeding, and cannot be read to stand for the proposition that any party to any proceeding may pursue any remedy without reference to the nature of the proceeding, the identity of the parties to that proceeding, and the forms of relief set forth in the statute governing the particular proceeding.

Finally, Ward argues that, before this Court determines whether he is entitled to the remedy he seeks, he should be entitled to a hearing on his mental health needs “and the need for the remedy of detention at a mental health hospital.” Rsp. at 21. Such a hearing would serve no purpose where, upon consideration of all of the evidence, the trial court does not have the power to grant the only relief Ward seeks: release. As Ward himself notes, the trial court in this case has ordered a trial on the issue of Ward’s unconditional release.<sup>5</sup> Rsp. at 18. He appears to argue that, because his

---

<sup>5</sup> Trial was continued, at Ward’s request, from May, 2016 to October, 2016.

deteriorated condition makes him unlikely to prevail in that case, release should be granted in this one. This is not a persuasive argument. No statute or court rule provides authority for dismissal or release unless and until a person is determined to no longer meet criteria as an SVP. *Rushton*, 190 Wn.App. at 375 (Under RCW 71.09.090, Washington legislature intended a release only upon a showing of a change in the mental health condition of the sexually violent person) (*see also* State's Opening Brief at 10-21). The trial court lacks the "equitable" powers to, as Ward has suggested, release Ward and "transfer [him] to a mental health facility." Rsp at 28-29. *See Skinner*, 122 Wn. App. at 632.

**C. DSHS is a Necessary Party to Any Proceeding Relating To Conditions Of Confinement At The SCC**

One of the foundational principles of the practice of law is that a lawyer represents a party to an action and but is distinct from the party. Ward appears to misunderstand this most basic principle when he argues that the State "cites no case law that parses the attorney general's office into distinct entities constituting wholly unrelated persons for joinder under CR 19" (Rsp. at 23) and seems to argue that, because the Attorney General is involved in this proceeding, any agency in the State that is also represented by the Office of the Attorney General is a party to this proceeding.

Ward's argument conflates representation by the Attorney General's Office with joinder of DSHS as a party in this action. Under Ward's

reasoning, if he wished to sue the Department of Transportation, the Department of Ecology, or some other state agency, he could do so in the context of the SVPA merely because the Attorney General represents those agencies as well. Put another way, it is akin to saying that, because appellate counsel for Ward represents both Ward and Curtis Brogi, another SVP at the SCC, Mr. Brogi is a party to this appeal.

The issue is not who should *represent* DSHS in any hearing on the conditions of confinement. The issue is whether DSHS is a necessary *party* to any hearing that has, as its focus, conditions for which DSHS is uniquely and exclusively responsible. Nor is it incumbent upon DSHS to intervene. If it appears from “an initial appraisal of the facts” that there is an unjoined indispensable party, “the burden devolves on the party whose interests are adverse to the unjoined party to negate this conclusion and a failure to meet that burden will result in the joinder of the party or dismissal of the action.” *Auto. United Trades Org. v. State*, 175 Wn. 2d 214, 221-23, 285 P.3d 52, 55 (2012), *citing* 7 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice & Procedure* § 1609, at 130 (3d ed.2001). Ward is unable to cite any authority whatsoever for the proposition that such an action can or should go forward without the party responsible for creating and maintaining the allegedly unconstitutional conditions. As noted above, all of the cases cited by Ward in support of the proposition that he is entitled to

bring a claim for these allegedly unconstitutional conditions, the custodial party was a named defendant in the suit.

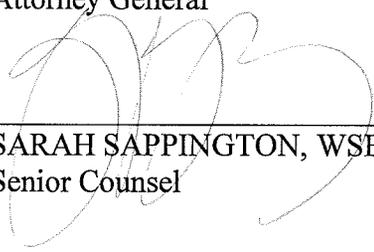
Nor is Ward's "privity" argument well taken. It is not entirely clear whom Ward believes to be in "privity" with whom in this context, but he seems to assert that the Attorney General's Office is "in privity" with DSHS or the SCC. Rsp. at 26. None of the cases cited support this novel proposition. Moreover, all of these cases deal with questions of privity within the context of collateral estoppel, an analysis not applicable here.

### III. CONCLUSION

For the aforementioned reasons, this Court should reverse the trial court's order ordering trial on the question of the conditions of Ward's confinement in this matter.

RESPECTFULLY SUBMITTED this 28<sup>th</sup> day of April, 2016.

ROBERT W. FERGUSON  
Attorney General

  
SARAH SAPPINGTON, WSBA# 14514  
Senior Counsel