NO. 100080-4

SUPREME COURT
OF THE STATE OF WASHINGTON

In re Detention of Bruce S. Rafford:

BRUCE S. RAFFORD,

Appellant,

v.

STATE OF WASHINGTON

Respondent.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

The Attorney General's Office serves as the prosecuting attorney in this sexually violent predator matter. *See* RCW 71.09.020(12); RCW 71.09.030. By statute, it is a separate entity from the Department of Social and Health Services ("DSHS") for purposes of these proceedings. *See* RCW 71.09.020(1).

The prosecuting attorney is a third party in this appeal.[1] It did not take any position on the issues presented in this case in the Court of Appeals, and it continues to take no position on the underlying merits of this appeal. However, the prosecuting attorney offers this response for two purposes: (1) to clarify that it is distinct from DSHS in this matter and (2) to respond to Rafford's arguments about the appealability of orders modifying less restrictive alternatives.

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[1] The prosecuting attorney believes it is a party to this appeal entitled to file a brief in response to the petition for review, but in the alternative, the prosecuting attorney requests permission to file this brief as an amicus curiae memoranda in opposition to the Petition for Review pursuant to RAP 13.4(h).

On the second point, the prosecuting attorney agrees with Rafford that the Rules of Appellate Procedure identify only a limited number of superior court orders that are appealable as of right. It further agrees that this Court's recent decision in *In re Detention of McHatton*, 197 Wn.2d 565, 485 P.3d 322 (2021) was correctly decided and that, under *McHatton*, orders modifying less restrictive alternatives are not appealable as of right by either the committed person or by the prosecuting attorney.

The prosecuting attorney disagrees, however, that this Court should accept review of the appealability issue presented in this case. Contrary to Rafford's representation, the Court of Appeals did not permit "the State's appeal from an order modifying a previously imposed LRA . . . ." Petition at 10. Rather, the Court of Appeals permitted a nonparty to appeal an order directing it to pay for certain expenses. Slip op. at 3. Such a case is readily distinguishable from *McHatton* and thus, there

is no conflict warranting this Court's review of the appealability issue.

II. STATEMENT OF THE ISSUE

The Court of Appeals held that an aggrieved nonparty may appeal an order requiring it to pay for a less restrictive alternative. In *McHatton*, this Court held that the parties to a Sexually Violent Predator case may not appeal modification and revocation determinations as a matter of right. Is the Court of Appeals decision distinguishable from *McHatton*?

III. STATEMENT OF THE FACTS

In 2003, the prosecuting attorney[2] filed a petition alleging that Rafford is a sexually violent predator. CP 39. In 2004, a jury agreed, and the trial court committed Rafford to the custody of DSHS at the Special Commitment Center. CP 40.

In 2014, the trial court entered an order conditionally releasing Rafford to a "less restrictive alternative" (LRA) at the

[2] The prosecuting attorney in this case is the Attorney General's Office. This case originated in Snohomish County, and at the request of the Snohomish County prosecutor, the Attorney General's Office handles sexually violent predator cases arising out of that county.

Secure Community Transition Facility in Pierce County.[3] CP 40. Three years later, the trial court entered an agreed order releasing Rafford to a community based LRA. *Id*. Rafford resided at this LRA placement for two years until his housing provider stopped providing housing. *Id*. At that point, he was returned to the Secure Community Transition Facility in Pierce County. *Id*.

In April 2020, Rafford submitted "Respondent's Motion for Change of Address," requesting to move to a residence operated by the Complete Care Company. CP 155-62. He requested that: (1) the trial court order DSHS to pay the amount the Complete Care Company had requested under aborted contract negotiations ($30,006 a month), and (2) the trial court modify the 2017 LRA order to reflect the change in housing. CP 161-62.

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[3] A "less restrictive alternative" is "court-ordered treatment in a setting less restrictive than total confinement . . . ." RCW 71.09.020(7). Individuals on less restrictive alternatives are still civilly committed sexually violent predators. RCW 71.09.096.

Both DSHS and the prosecuting attorney filed responses to this motion. DSHS appeared by special appearance and objected to Rafford's request that the trial court order it to pay $30,006 a month for Rafford's proposed new housing placement. CP 138-44.

The prosecuting attorney argued that a change in housing required Rafford to file a new petition under RCW 71.09.090, which would trigger a trial on the issue of whether the new LRA was in Rafford's best interest and was adequate to protect the community. CP 147-48. The prosecuting attorney took no position on whether DSHS should be required to pay for the new LRA, but it noted that this determination would affect its position at the trial on the LRA petition. CP 148. It explained that if the trial court concluded that DSHS *was* required to pay for the proposed housing, the prosecuting attorney would not oppose Rafford's new LRA petition. *Id.* But if the trial court concluded that DSHS was *not* required to pay for the proposed housing, there would be no reason to proceed to trial because the

proposed LRA does not exist and the prosecuting attorney would be entitled to summary judgment. *Id*.

Following a hearing at which DSHS, Rafford, and the prosecuting attorney all presented argument, the trial court entered an order titled "Order Modifying LRA to Change Housing." CP 39-49. The court concluded that it had jurisdiction over DSHS, that DSHS was a party, and that DSHS must pay the amount requested by Rafford. CP 43, 47-48. The court also concluded that the new LRA was in Rafford's best interest and was adequate to protect the community. CP 43. The court modified the conditions set out in the 2017 LRA order to reflect the change in housing. CP 43-48. Additionally, it ordered DSHS to pay various costs, totaling $30,006 per month. CP 47-48. The court also ordered Rafford to be conditionally released to Complete Care's facility on May 13, 2020. CP 43-44.

DSHS timely filed a notice of appeal of this order. It sought review of the portion of the order requiring it to pay for Rafford's living expenses and care. Slip op. at 5. The prosecuting

attorney did not seek review of the order or the court's determination that the LRA was in Rafford's best interests. *Id.*

On appeal, Rafford contested DSHS's ability to appeal the order under RAP 2.2. Slip op. at 3. With respect to the appealability question, the Court of Appeals concluded that DSHS could appeal under RAP 3.1 and RAP 2.2(a)(3) because DSHS has a pecuniary interest in the proceeding and because the order "is a final judgment in that DSHS is now required to pay Complete Care." Slip op. at 1, 5, 7. With respect to whether the trial court properly ordered DSHS to pay for Rafford's costs, the Court of Appeals concluded that the trial court went beyond its statutory authority when it ordered DSHS to pay costs other than those related to Rafford's treatment. *Id.* at 9.

Rafford now seeks discretionary review in this Court.

IV. ANALYSIS

A. The Prosecuting Attorney and DSHS are Separate Entities

In sexually violent predator proceedings, the prosecuting attorney and DSHS are separate entities with distinct interests.

The sexually violent predator statute defines "Department" as "the department of social and health services." RCW 71.09.020(1). The statute imposes a number of obligations on DSHS related to the control, care, and treatment of sexually violent predators. For example, relevant here, DSHS is the agency responsible for the costs relating to treatment for sexually violent predators on less restrictive alternatives. RCW 71.09.060(1); RCW 71.09.110.

The sexually violent predator statute separately defines "prosecuting agency" to mean "the prosecuting attorney of the county where the person was convicted or charged or the attorney general if requested by the prosecuting attorney, as provided in RCW 71.09.030." RCW 71.09.020(12). Notably, the sexually violent predator statute uses the term "prosecuting attorney" and "the State" interchangeably. *See, e.g.*, RCW 71.09.040(2) (discussing "the State's" evidence at the probable cause hearing); RCW 71.09.060(1) (discussing "the State's" burden of proof at the commitment trial); RCW 71.09.090 (discussing "the State's"

burden of proof at show cause hearings and at any resulting trial); RCW 71.09.094 (referring to the prosecuting attorney as "the State" in LRA trials); RCW 71.09.098 (referring to the prosecuting attorney as "the State" in LRA modification and revocation proceedings).

Courts have also recognized that DSHS and the prosecuting attorney are separate entities with different obligations and interests. *See e.g.*, *In re Detention of Nelson*, 2 Wn. App. 2d 621, 628, 411 P.3d 412 (2018) (noting that the production of the annual report is an obligation of DSHS and recognizing that DSHS and the prosecuting agency have different responsibilities); *In re Detention of Rushton*, 190 Wn. App. 358, 369-81, 359 P.3d 935 (2015) (noting that DSHS must annually examine a committed person and provide the results to the trial court, the respondent, *and the prosecuting attorney*, but that the respondent's remedy for a late report is not a finding that the prosecutor's failed its burden of proof at a show cause hearing, but a motion to compel DSHS to produce the report.)

But despite the fact that the statute plainly differentiates between DSHS and the prosecuting attorney, Rafford repeatedly conflates the two. Throughout his petition for review, Rafford consistently refers to both the prosecuting attorney and DSHS as "the State." *See generally* Petition 1-16. Most significantly, he asserts that "the State" appealed the order at issue in this case. Petition at 5. In addition, he asserts that "the Court of Appeals here permitted *the State's* direct appeal of an order the rule[s] do not encompass." *Id.* at 7 (emphasis added); *see also id.* at 10 ("The Court of Appeals permitted *this [sic] State's* appeal from an order modifying a previously imposed LRA . . . .") (emphasis added).

Given that the statute expressly distinguishes between DSHS and the prosecuting attorney—and that the statute generally uses the term "the State" when referring to the latter—Rafford's assertions are confusing, at best. DSHS and the prosecuting attorney are separate entities with separate interests,

and this Court should maintain that distinction when evaluating the Court of Appeals' opinion and Rafford's petition for review.[4]

B. *McHatton* Was Correctly Decided and is Distinguishable From this Case

This Court recently addressed the appealability of post-commitment orders in sexually violent predator cases. Specifically, in *McHatton*, this Court concluded that an order revoking a sexually violent predator's conditional release to an LRA is not one of the limited number of superior court orders appealable as of right. 197 Wn.2d at 565. It first concluded that such orders are not appealable under RAP 2.2(a)(8)—which allows for appeals for "orders of commitment"—because that provision provides for an appeal only from the initial commitment order. *Id.* at 569-70. It next concluded that such orders are not appealable under RAP 2.2(a)(13)—which allows for appeals for "final orders after judgment"—because an LRA

[4] In his petition for review, Rafford notes that DSHS is also represented by the Attorney General's Office. To the extent this is relevant, it should also be noted that different attorneys represent the two entities, and there is a formal screen in place.

revocation order "achieves no final disposition of the sexually violent predator." *Id.* at 571. Rather, the order "altered the nature of McHatton's confinement but did not alter his status as a civilly committed [sexually violent predator]." *Id.*

This Court's decision in *McHatton* correctly adhered to the plain language of the Rules of Appellate Procedure, the sexually violent predator statutory scheme, and prior controlling case law including *In re Detention of Petersen*, 138 Wn.2d 70, 85, 980 P.2d 1204 (1999). And the prosecuting attorney agrees with Rafford that *McHatton*'s analysis would also govern appeals of orders modifying LRAs, such that neither the prosecuting attorney nor the committed person could seek direct review of LRA modification orders. Indeed, the same statute that addresses revocation of LRAs also addresses modification of LRAs. *See* RCW 71.09.098. And like the order in *McHatton*, an order modifying an LRA would merely alter the nature of the committed person's confinement and would not alter his status as a civilly committed sexually violent predator. *Id.*

Nevertheless, the Court of Appeals properly concluded that *McHatton* is distinguishable from this case. For one, this appeal was brought by an "aggrieved party"—a nonparty who nonetheless is "aggrieved by orders entered in the course of those proceedings" – DSHS. Slip op. at 3. It is thus not analogous to appeals brought by either the committed person or the prosecuting attorney, both of which will remain parties in the ongoing, underlying action. Second, the order at issue in this case is not simply characterized as an LRA modification order. Instead, the order is more properly categorized as a consolidated order doing two things: (1) modifying Rafford's LRA and (2) directing DSHS to pay for related expenses. CP 42, 43, 47-48.[5] Importantly, neither DSHS, nor the parties, seek review of the portion of the order that modifies Rafford's LRA. Instead, DSHS

[5] The clerk's notes also reflect that this was the trial court's intention, stating, "Respondent's Motion for Change of Address and Order Costs Related to Treatment be Paid by the Special Commitment Center: Granted." CP 50 (de-capitalized for readability).

only sought review of the portion of the order directing it to pay for certain expenses. In short, the appealability analysis in this case is not controlled by this Court's decision in *McHatton*, and thus, there is no conflict warranting this Court's further review.

V. CONCLUSION

For the foregoing reasons, this Court should deny review of the appealability issue.

This document contains 2289 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 8th day of October, 2021.

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NO. 100080-4

WASHINGTON STATE SUPREME COURT

In re the Detention of: BRUCE S. RAFFORD Respondent.	DECLARATION OF SERVICE

I, Nancy Lee, declare as follows:

On October 8, 2021, I sent via electronic mail, per service agreement, a true and correct copy of Answer to Petition for Review and Declaration of Service, addressed as follows:

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

DATED this 8th day of October, 2021, at Seattle, Washington.

Nancy Lee
NANCY LEE

WASHINGTON STATE ATTORNEY GENERAL'S OFFICE - CRIMINAL JUSTICE DIVISION

October 08, 2021 - 9:34 AM

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