NO. 98904-4

WASHINGTON STATE SUPREME COURT

In re the Detention of:

MICHAEL MCHATTON,

Appellant,

v.

THE STATE OF WASHINGTON,

Respondent.

RESPONSE TO PETITION FOR REVIEW

ROBERT W. FERGUSON
Attorney General

KELLY A. PARADIS
Assistant Attorney General
WSBA #47175/ OID #91094
800 Fifth Avenue, Suite 2000
Seattle, WA 98104
(206) 389-3001

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

I. INTRODUCTION

Michael McHatton, a civilly committed sexually violent predator, seeks discretionary review of a Court of Appeals' decision affirming the revocation of his less restrictive alternative (LRA) placement. Review of this case is unnecessary because it does not present an issue of substantial public interest that this Court should decide.

The Court of Appeals correctly concluded that an LRA revocation order is not appealable as a matter of right. Rule of Appellate Procedure 2.2(a) provides an exhaustive list of appealable orders, and the list does not include LRA revocation orders. Further, an LRA revocation order is neither an "order of commitment" under RAP 2.2(a)(8) nor a "final order after judgment" under RAP 2.2(a)(13) because it does not alter the sexually violent predator's commitment status or affect the trial court's ongoing jurisdiction over the case. The Court of Appeals' conclusion on this issue is consistent with both the plain language of RAP 2.2(a) and well-settled decisions of this Court, which hold that post-commitment orders in sexually violent predator cases are subject only to discretionary review.

The Court of Appeals also properly declined to consider whether due process requires a trial court to expressly consider alleged deficiencies of an LRA before revoking that LRA. It correctly noted that reaching this claim was unnecessary because the trial court in this case *did* consider McHatton's arguments and evidence on that point. Further, even if this Court were to consider the claim, a proper balancing of the *Mathews* factors indicates that due process does not require the trial court to expressly

consider alleged LRA deficiencies because the inquiry under the statute already accounts for such concerns. It was undisputed in this case that McHatton intentionally violated the terms of his LRA by creating sexually explicit content of children for his sexual gratification, and even his own expert agreed that his current placement was not in his best interest. For all of these reasons, this Court should deny McHatton's petition for review.

II. RESTATEMENT OF THE ISSUES

A. Where an LRA revocation order neither alters a sexually violent predator's commitment status nor impacts the trial court's continuing jurisdiction over the case, did the Court of Appeals correctly conclude that it is not appealable as a matter of right under RAP 2.2(a)?

B. Where the LRA revocation statute requires the trial court to hold a hearing, consider the evidence presented by both parties, and consider five individualized factors before revoking an LRA, does the statute satisfy procedural due process?

III. RESTATEMENT OF THE FACTS

A. McHatton's Sexual Offense History

McHatton is a 45-year-old man with a history of sexually offending against young children. CP 717-19. In August 1991, at age 15, he molested a three-year-old boy. CP 718. He was placed on house arrest with the stipulation that he not have contact with children. CP 718. McHatton violated this condition when he took two young boys, ages two and five, into a trailer in his backyard. CP 718. He was then placed in juvenile detention, where staff observed him fixating on young children and cutting out pictures of children from magazines. CP 718. In December 1991, McHatton pled guilty to

attempted child molestation in the first degree and was sentenced to a Special Sex Offender Disposition Alternative (SSODA). CP 718.

Five months later, while under SSODA supervision, McHatton lured a five-year-old boy with candy and forced him to the ground. CP 718. McHatton later confessed that his intention was to sexually assault the child. CP 719. One month after this offense, McHatton returned to the boy's house with binoculars, children's clothes, and a used diaper. CP 719. A few months after that, he stole children's clothing and baby magazines from his high school. CP 719. For these offenses, McHatton pled guilty to assault in the fourth degree with sexual motivation, criminal trespass in the second degree, and theft in the third degree. CP 719. His SSODA was revoked, and he was sentenced to 78 weeks in juvenile detention. CP 719. McHatton later admitted molesting at least 12 other young children. CP 720.

At age 19, after his release from juvenile detention, McHatton sexually molested a two-year-old boy in a church. CP 719. He subsequently pled guilty to attempted child molestation in the first degree and was sentenced to 66 months in prison. CP 719. While in prison, McHatton "continued to enact his sexually deviant fantasies" and hid pictures of young children under his mattress. CP 720.

B. McHatton's Civil Commitment as a Sexually Violent Predator, Release to a Less Restrictive Alternative, and Violation of His Release Conditions

In April 2002, McHatton stipulated to his civil commitment as a sexually violent predator, and the trial court entered an order placing him in

the custody of the Department of Social and Health Services at the Special Commitment Center for control, care, and treatment. CP 26. By statute, the trial court retains jurisdiction over McHatton until he is unconditionally discharged. RCW 71.09.090(5).

In October 2012, an evaluator determined that conditional release to an LRA[1] at the Secure Community Transition Facility in Pierce County would be appropriate for McHatton, and the trial court entered a conditional release order to that effect. CP 26, 853-64. Four years later, an evaluator determined that conditional release to an LRA in the community would be appropriate, and the trial court entered an order conditionally releasing McHatton to a residence called "Aacres." CP 26-28. The LRA order included many stringent restrictions, including one prohibiting McHatton from possessing any sexually explicit materials. CP 37-38.

It was not long before McHatton violated this condition. Three months after his release to Aacres, McHatton began creating photo collages of children and writing sexually explicit fantasies about them. CP 729-72. Over nine months, McHatton had amassed 76 photographs and 51 scripts. CP 729. Most of the children depicted in the photographs were toddlers and infants. *See* CP 733-47. Once discovered, McHatton admitted that he alone created the material and that he used it for the purposes of sexual arousal and gratification. CP 729. He acknowledged his obligation to report deviant

[1] A "less restrictive alternative" is "court-ordered treatment in a setting less restrictive than total confinement . . . ." RCW 71.09.020(6). A committed individual on conditional release to an LRA remains a civilly committed sexually violent predator.

masturbation to his treatment provider and admitted that he purposefully failed to report this behavior. CP 729. The Department of Corrections subsequently issued a notice of violation and recommended revocation of McHatton's LRA. CP 727-30.

C. The LRA Revocation Proceeding and Subsequent Appeal

In July 2018, the State moved to revoke McHatton's LRA under RCW 71.09.098. CP 649-71. The revocation hearing was less than two hours long, and with the exception of one testifying witness, the parties relied on the evidence attached to their pleadings. VRP (Vol. I) 1-70. The State argued that the violations endangered the community and that all five statutory factors weighed in favor of revocation of McHatton's LRA. CP 663-71. McHatton opposed revocation and instead asked the court to consider modification of the LRA. CP 491-511. He admitted the violations and his lack of treatment progress, but he shifted blame to Aacres and its staff. CP 491-511. He provided reports from a retained expert, Dr. Gerry Blasingame, to support his argument. CP 512-59, 565-84, 588-97. Although Dr. Blasingame found fault with the LRA, he agreed that McHatton intentionally violated the conditions of his release, that the violations were intimately connected with his mental abnormality, and that the LRA was not in his best interest. VRP (Vol. I) 46-47.

At the conclusion of the hearing, the trial court found that the State met its burden to prove by a preponderance of the evidence that McHatton violated his release conditions. VRP (Vol. I) 61-63. After considering five

statutory factors, it determined that revocation was appropriate. VRP (Vol. I) 61-63. The court later entered findings of facts, conclusions of law, and an order revoking the LRA.[2] CP 632-38.

McHatton appealed the revocation order by filing a notice of appeal. CP 639. The State challenged the appealability of the revocation order, arguing that an order revoking a sexually violent predator's LRA is subject only to discretionary review. *In re Det. of McHatton*, No. 37356-8, slip op. at 2-3 (Wash. Ct. App. July 14, 2020). A panel agreed to consider the issue of appealability along with the merits of the appeal. *Id.* at 3. On July 14, 2020, Division Three issued a decision concluding that LRA revocation orders are not appealable as a matter of right. *Id.* at 1. Nonetheless, it granted discretionary review and held that the trial court did not abuse its discretion by revoking McHatton's LRA. *Id.*

McHatton now seeks discretionary review in this Court.

IV. REASONS WHY REVIEW SHOULD BE DENIED

A. Well-Settled Precedent Supports the Court of Appeals' Conclusion That an LRA Revocation Order is Not Appealable as a Matter of Right

1. An LRA revocation order is not an "order of commitment" under RAP 2.2(a)(8)

The Court of Appeals properly determined that an order revoking a sexually violent predator's LRA placement is not an "order of commitment"

[2] The trial court consolidated the revocation order with an order on show cause. The appeal was later bifurcated and the show cause portion of the order is not at issue in this appeal.

under RAP 2.2(a)(8). As this Court previously explained, that provision applies only to orders of commitment following a trial where an individual is adjudicated to be a sexually violent predator.

In 1994, this Court amended RAP 2.2(a)(8) to allow for direct appeals from commitment orders "after a sexual predator hearing." *In re Det. of Petersen*, 138 Wn.2d 70, 85, 980 P.2d 1204 (1999). Following this amendment, this Court confirmed that RAP 2.2(a)(8) has limited application. In *In re Detention of Petersen*, 138 Wn.2d 70, 85, 980 P.2d 1204 (1999), the Court stated, "[T]here can be no dispute our initial intent was to provide an appeal as of right *only* from the *initial* commitment order *that followed the full evidentiary adjudication of an individual as a sexually violent predator*." (Emphasis added.) It reasoned that there should be a right to appeal such an order "[b]ecause it can result in a person's indefinite commitment." *Id.* This Court later reaffirmed this conclusion in *In re Detention of Turay*, 139 Wn.2d 379, 393 n. 8, 986 P.2d 790 (1999) (stating that sexually violent predators "may, as of right, appeal their *initial order of commitment* pursuant to RAP 2.2(a)(8)").

This Court has soundly rejected arguments to expand the scope of RAP 2.2(a)(8). In *Petersen*, it rejected an argument that an order denying a release trial and continuing Petersen's commitment following an annual review show cause hearing was an "order of commitment" under RAP 2.2(a)(8). 138 Wn.2d at 85-90. In reaching that conclusion, it analogized to a dependency case, *In re Dependency of Chubb*, 112 Wn.2d 719, 773 P.2d 851 (1989), where this Court determined that a dependency review order

was not appealable as a matter of right because it was simply a continuation of the status quo; it was not a new determination of dependency. *Id.* at 86-87 (citing *Chubb*, 112 Wn.2d at 724-25). Relying on that analysis, *Petersen* similarly concluded that an order denying a release trial is not tantamount to an order of recommitment. *Id.* at 84-87.

Here, there is no dispute that the LRA revocation order is not the initial commitment order. McHatton stipulated to his commitment as a sexually violent predator in 2002. CP 26. Further, like the orders in *Petersen* and *Chubb*, the LRA revocation order did not change McHatton's status as a committed sexually violent predator or amount to a new disposition on that issue. At an LRA revocation hearing, the court does not determine if the person is a sexually violent predator. *See In re Det. of Jones*, 149 Wn. App. 16, 30, 201 P.3d 1066 (2009) ("an SVP's commitment status is not at issue at an LRA revocation hearing"). Accordingly, McHatton's commitment as a sexually violent predator still flows from the original commitment order, and it is not the LRA revocation order that results in his indefinite commitment.

The Court of Appeals properly relied on *Petersen* when it concluded that an LRA revocation order is not an "order of commitment" within RAP 2.2(a)(8). Slip. op. at 4-5. McHatton's attempts to avoid application of that case fail.

McHatton first distinguishes LRA revocation orders from the order in *Petersen* by arguing that an LRA revocation proceeding is not a summary proceeding. *See* Petition at 4-6. But this argument oversimplifies *Petersen*'s

analysis. *Petersen*'s conclusion did not rest on the fact that a show cause hearing is a "summary proceeding." Rather, this Court's analysis hinged on the fact that the show cause hearing did not amount to a new disposition of the sexually violent predator's commitment status. *See Petersen*, 138 Wn.2d at 85-88. Thus, this distinction is immaterial. Further, to the extent that *Petersen* relied on the nature of the proceeding, an LRA revocation proceeding is a summary proceeding in that it is a nonjury proceeding and carries a lower evidentiary standard and lower burden of proof than a trial. *See* RCW 71.09.098(5); *see also* Summary Proceeding, *Black's Law Dictionary* (11th ed. 2019) ("A nonjury proceeding that settles a controversy or disposes of a case in a relatively prompt and simple manner"). Indeed, the hearing in this case was less than two hours long and involved just one live witness. *See* VRP (Vol. I) 3-69.

Next, McHatton attempts to distinguish *Petersen* by claiming that unlike an order denying a trial, an LRA revocation order "change[s] the indefinite nature of the commitment." Petition at 6. This claim fails because it completely misapprehends the sexually violent predator statutory scheme. A person remains indefinitely committed as a sexually violent predator even while on conditional release. *Jones*, 149 Wn. App. at 30; *see also* RCW 71.09.020(18), (16). *Petersen* did not hold to the contrary. The quotations from that case on which McHatton relies are summaries of RCW 71.09.060(1). And that statute simply stands for the proposition that a sexually violent predator shall be placed in *a secure facility operated by the department of social and health services* until the person is

unconditionally released or conditionally released to an LRA. RCW 71.09.060(1).

McHatton also distinguishes *Petersen* and *Chubb* on the basis that, unlike the orders in those cases, his removal from the LRA and return to total confinement resulted in a change in the status quo. Petition at 7-8. But this argument, too, oversimplifies *Petersen*'s analysis. The relevant inquiry is not whether there has been any change in the status quo. Rather, it is whether the change, in effect, amounts to a new disposition on the issue of whether the person should be committed as a sexually violent predator. *See Petersen*, 138 Wn.2d at 86-87. Here, as discussed above, while the LRA revocation order changed McHatton's placement, it did not amount to a new determination of the issue of his commitment as a sexually violent predator. At all times during these proceedings, McHatton has remained indefinitely committed as a sexually violent predator and subject to the court's jurisdiction as such. *See* RCW 71.09.090(5).

Lastly, both McHatton and the dissent point out that *Petersen* acknowledged in a footnote that orders following release trials are "arguably" appealable as a matter of right. Petition at 9; Slip. op. (Fearing, J, dissenting in part) at 2. They argue this footnote should encompass LRA revocation orders. *Id.* But *Petersen* reasoned that such orders are arguably reviewable as a matter of right because "[s]uch hearings appear to be the equivalent to whole new trials with the same procedural protections as the initial commitment trial," the "State "must again prove [the person] to be a sexually violent predator beyond a reasonable doubt," and the person's "continuing commitment would flow

from this new, subsequent determination, rather than from the original order of commitment for purposes of RAP 2.2(a)(8).” 138 Wn.2d at 87 n.13. None of those factors apply to an LRA revocation order. Thus, while *Petersen* may support a conclusion that an order following a release trial is an “order of commitment,” it does not support a conclusion that an LRA revocation order falls within that category.

2. An LRA revocation order is not a “final order after judgment” under RAP 2.2(a)(13)

The Court of Appeals also properly determined that an LRA revocation order is also not a “final order after judgment” under RAP 2.2(a)(13). As the Court correctly recognized, an LRA revocation order is not a “final order” within the scope of that rule due to the trial court’s continuing jurisdiction over the sexually violent predator proceeding. Slip. op. at 5-6.

A right to appeal under RAP 2.2(a)(13) requires “‘a showing of (1) effect on a substantial right and (2) finality.’” *State v. Coleman*, 6 Wn. App. 2d 507, 518, 431 P.3d 514 (2018) (quoting *State v. Howland*, 180 Wn. App. 196, 201 n. 3, 321 P.3d 303 (2014)). The State does not dispute that an LRA revocation order affects a substantial right. As McHatton notes, the revocation order placed him back in total confinement. Petition at 10-11; *see also In re Det. of Wrathall*, 156 Wn. App. 1, 6-7, 232 P.3d 569 (2010). However, an LRA revocation order does not satisfy the “finality” prong. “A final judgment or order ‘leaves nothing else to be done to arrive at the ultimate disposition of the petition.’” *Coleman*, 6 Wn. App. at 519 (internal

quotation marks omitted) (quoting *State v. Gossage*, 138 Wn. App. 298, 302, 156 P.3d 951 (2007)).

This Court has repeatedly determined that post-commitment orders in sexually violent predator cases are not final appealable orders because the trial court retains jurisdiction until the person's unconditional discharge. The reasoning in those cases applies equally to LRA revocation orders.

For example, in *Petersen*, this Court held that the order denying a release trial was not appealable under RAP 2.2(a)(13) because it was not a final order "in light of the court's continuing jurisdiction over the committed persons until their unconditional release." 138 Wn.2d at 88. It explained that the order disposed "only of the petition before the trial court and achieve[d] no final disposition of the sexually violent predator." *Id.* Accordingly, the order was an interlocutory order subject to discretionary review. *Id.*

Similarly, in *In re Detention of Turay*, 139 Wn.2d 379, 392-93, 986 P.2d 790 (1999), this Court concluded that the order denying Turay's motions to dismiss and for reconsideration was not a "final judgment" under RAP 2.2(a)(1). In doing so, it cited *Petersen* and noted that the trial court has continuing jurisdiction over a sexually violent predator until the person is unconditionally discharged. *Id.*

Here, like in those cases, an LRA revocation order "achieves no final disposition of the sexually violent predator." *Petersen*, 138 Wn.2d at 88. It only altered the nature of his confinement. Further, the trial court retains jurisdiction over McHatton until his unconditional discharge pursuant to RCW 71.09.090(5). Indeed, once back in total confinement, McHatton will

continue to receive annual reviews, which entitle him to show cause hearings at which the issue of his conditional release may again be litigated. *See* RCW 71.09.098(8), RCW 71.09.090.

Both McHatton and the dissent argue that an LRA revocation order is appealable as a matter of right because it affects a substantial right, similar to the revocation of parole or probation. Petition at 11 (citing *Wrathall*, 156 Wn. App. at 6-7; *State v. Pilon*, 23 Wn. App. 609, 611, 596 P.2d 664 (1979)); slip op. (Fearing, J, dissenting in part) at 2-3. They also compare sexually violent predator LRA revocation orders to a variety of other proceedings, including revocation orders in other commitment proceedings and orders altering visitation rights. Petition at 15 n. 2; slip. op. (Fearing, J, dissenting in part) at 3.

But sexually violent predator post-commitment proceedings are unique. They involve an indefinite civil commitment, regular review hearings, and changes in placement depending on the sexually violent predator's treatment needs or community safety. Moreover, the cases upon which McHatton relies about other commitment proceedings did not address the question of appealability of revocation orders. Petition at 15 n. 2. And the decision upon which the dissent relies about visitation rights did not contain any analysis about the finality of the visitation order at issue. *See Sutter v. Sutter*, 51 Wn.2d 354, 355-56, 318 P.2d 324 (1957). Thus, these cases fail to establish that *Petersen* is incorrect.

Further, the fact that the trial court retains jurisdiction over sexually violent predators distinguishes this case from the criminal parole context. Under the Sentencing Reform Act (SRA), the authority to sanction most

offenders on criminal supervision rests with the Department of Corrections or Indeterminate Sentence Review Board, not the courts. *See* RCW 9.94A.6332; *State v. Bigsby*, 189 Wn.2d 210, 214-216, 399 P.3d 540 (2017). The case on which McHatton relies for the proposition that parole revocation is appealable as a matter of right was decided prior to the SRA. *See Pilon*, 23 Wn. App. at 609. And, since 1981, parole decisions have been appealed as personal restraint petitions. *See e.g.*, *In re Mines*, 146 Wn.2d 279, 45 P.3d 535 (2002); *In re McNeal*, 99 Wn. App. 617, 994 P.2d 890 (2000).

McHatton also claims that the revocation order satisfies the finality prong because there was a final disposition of "the State's petition to revoke [his] LRA." Petition at 11. But as this Court made clear in *Petersen*, an order is not appealable under RAP 2.2(a)(13) if it "disposes only of the petition before the trial court and achieves no final disposition of the sexually violent predator." 138 Wn.2d at 88. Here, there is no dispute that the order did not achieve final disposition of the sexually violent predator. Thus, the fact that the order disposed of the State's revocation petition is immaterial.

McHatton again attempts to distinguish *Petersen* and *Chubb* by claiming that in those cases there was a "certainty of future, regularly occurring proceedings mandated by statute at which the same issue could be litigated." Petition at 13. He claims that a revocation order is different because it is "a one-time event." *Id.* However, this argument fails because it overlooks the fact that in light of the trial court's continuing jurisdiction over McHatton, he will continue to have regularly occurring proceedings at

which the issue of conditional release may be litigated. *See* RCW 71.09.098(8), RCW 71.09.090.

McHatton also claims that "if *Petersen* is interpreted to compel the conclusion that LRA revocation orders are not appealable, then *Petersen* is incorrect and harmful and should be overturned." Petition at 16. But overturning *Petersen* would be a major upheaval of well-settled law regarding the appealability of post-commitment orders in sexually violent predator cases. Such a result is unnecessary where, as McHatton acknowledges, *Petersen* did not even address LRA revocation orders. Petition at 4, 8-9. More importantly, *Petersen* was correctly decided. It is consistent with the plain language of RAP 2.2(a) and the sexually violent predator scheme, which provides that a trial court retains jurisdiction over a sexually violent predator until the person's unconditional discharge. Further, McHatton's argument that *Petersen* is harmful is premised entirely on the erroneous assumption that discretionary review is an inferior review process. *See* Petition at 16. Yet *Petersen* expressly rejected this argument by recognizing that "as a practical matter, for meritorious claims, the discretionary review screening should present no great obstacle to obtaining review by an appellate court under RAP 2.3(b)." 138 Wn.2d at 89. The mere fact that *Petersen* supports a conclusion that an LRA revocation order is subject to discretionary review does not make it a harmful decision.

Lastly, McHatton claims that policy considerations weigh in favor of concluding that LRA revocation orders are appealable as a matter of right. Petition at 13-15. In general, he claims that direct review is

appropriate because discretionary review is "seldom granted" and an LRA revocation order has "tremendous consequence." *Id.* at 14, 15. But appealability under RAP 2.2(a)(13) is more than a determination of whether an order is likely to result in the grant of discretionary review or whether it has significant consequences. McHatton's policy arguments, in effect, eliminate the finality prong of RAP 2.2(a)(13). And such a ruling would drastically expand the number of orders that are appealable as a matter of right, as it could even encompass orders granting or denying petitions for modification of LRAs, which are brought under the same statute as petitions for revocation. RCW 71.09.098. Moreover, the policy considerations cited by McHatton apply equally to the State. For example, the State would also be required to seek discretionary review of any order *denying* its petition to revoke an LRA.

B. The LRA Revocation Statute Satisfies Due Process and Does Not Require the Trial Court to Expressly Consider Alleged Deficiencies of an LRA

McHatton also asks this Court to grant review of an issue not decided by the Court of Appeals—whether due process requires a trial court to expressly consider alleged inadequacies of an LRA before it revokes that LRA. This Court should decline review of that issue for three reasons.

First, as the Court of Appeals correctly recognized, the trial court in this case *did* consider evidence about the alleged inadequacies of the LRA. Slip op. at 9. The trial court was required by statute to consider the evidence from both parties, and it did so, as reflected in its findings of fact and oral

ruling. *See* RCW 71.09.098(6)(a); CP 635; VRP (Vol. I) 61-63. McHatton's claims to the contrary are mistaken. McHatton relies on a quotation taken out of context to assert that the trial court treated the LRA's alleged deficiencies as irrelevant. Petition at 20 (citing VRP (Vol. I) at 21). But the quotation upon which he relies was not a statement about the irrelevance of the alleged LRA alleged deficiencies, rather, it was a statement about the irrelevance of a completely different LRA. *See* VRP (Vol. I) at 21.

Second, the constitutional issue is not one of substantial public interest that should be determined by this Court. Rather, it is based on a unique set of facts that is unlikely to recur. Specifically, it is based on McHatton's belief that his housing and treatment providers failed him and did not carry out the LRA as intended. In general, cases that are limited to their facts are not of substantial public interest. *See Hart v. Dep't of Social & Health Servs.*, 111 Wn.2d 445, 449, 759 P.2d 1206 (1988).

Lastly, review of this issue is unwarranted because the LRA revocation statute satisfies due process and did not require the trial court to expressly consider the inadequacies of McHatton's LRA. Thus, there was no error in this case.

Due process is a "flexible concept." *In re Det. of Stout*, 159 Wn.2d 357, 370, 150 P.3d 86 (2007). In determining what procedural due process requires in a given context, courts employ the *Mathews*[3] test, which balances: (1) the private interest affected; (2) the risk of erroneous

[3] *Mathews v. Eldridge*, 424 U.S. 319, 334, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976).

deprivation of that interest through existing procedures and the probable value, if any, of additional safeguards; and (3) the governmental interest, including costs and administrative burdens of additional procedures. *Id.*

Here, application of the *Mathews* factors indicates that trial courts are not required to expressly consider alleged inadequacies of the LRA placement when considering revocation of the LRA. Only the first factor weighs in McHatton's favor, because he has a liberty interest in his LRA. *See Wrathall*, 156 Wn. App. at 6. The third factor weighs in favor of the State. As this Court has recognized, "it is irrefutable that the State has a compelling interest both in treating sex predators and protecting society from their actions." *See In re Young*, 122 Wn.2d 1, 26, 857 P.2d 989 (1993); *see also Stout*, 159 Wn.2d at 371.

The remaining factor also weighs heavily in favor of the State. Under the statutory scheme, there is minimal risk of erroneously depriving a sexually violent predator of his liberty interest in the LRA. In general, the risk of erroneous deprivation in SVP proceedings is low given the extensive procedural safeguards in chapter 71.09 RCW, including the right to appointed counsel at all stages. *See, e.g.*, *In re Det. of Morgan*, 180 Wn.2d 312, 321, 330 P.3d 774 (2014); *Stout*, 159 Wn.2d at 370-71.

Moreover, there are ample procedural protections in RCW 71.09.098, the statute governing LRA revocation. Specifically, revocation is adjudicated at a hearing at which the State bears the burden of proof by a preponderance of the evidence that the person has violated the conditional release order. RCW 71.09.098(5)(c). In addition, the committed

person has the right to request a mental examination, and the court "shall, upon request, assist him or her in obtaining a qualified expert or professional person to conduct the examination." RCW 71.09.098(4). Further, if the State meets its burden, the statute requires the trial court to consider the evidence presented by the parties. RCW 71.09.098(6)(a). It also requires the trial court to consider five factors to determine whether revocation is warranted, including: the nature of the violation in the context of the person's criminal history and underlying mental conditions, the intentionality of the conduct, the ability and willingness of the person to comply with the order, the degree of progress that person had made before the violation, and the risk to the public if the conditional release continues. RCW 71.09.098(6). These factors account for the specific circumstances of the individual under review and the circumstances that led to the violation. And they allowed McHatton to present evidence and fully argue his theory of the case and the remedy that he thought was appropriate given the circumstances. *See* VRP (Vol. I) at 56-60. Overall, this process affords sexually violent predators an individualized determination and an opportunity to be meaningfully heard.

Requiring the trial court to expressly consider alleged deficiencies of the LRA adds little to this process, especially when the statute already requires the trial court to consider the evidence from both parties and the individual circumstances of each case. The clear implication of this statute is that violations that occur for reasons outside the person's control should be treated differently than those that are intentionally committed. Although

consideration of alleged failings of the housing or treatment providers is not specifically listed among the factors, such circumstances are encompassed in an analysis of these factors. Thus, the statutory factors already require the court to consider whether the alleged violation was due to circumstances beyond the sexually violent predator's control, and they sufficiently protect against an erroneous deprivation of a sexually violent predator's liberty interest while also safeguarding the government's interest in protecting the public from an adjudicated sexually violent predator.

CONCLUSION

For the foregoing reasons, this Court should deny McHatton's petition for review.

RESPECTFULLY SUBMITTED this 28th day of September, 2020.

ROBERT W. FERGUSON
Attorney General

Kelly A. Paradis

KELLY A. PARADIS, WSBA #47175
Attorney for Respondent, State of Washington
Attorney General's Office
Criminal Justice Division
800 Fifth Ave, Suite 2000
Seattle WA 98104-3188
(206) 389-3001

NO. 98904-4

WASHINGTON STATE SUPREME COURT

In re the Detention of: Michael McHatton, Petitioner.	DECLARATION OF SERVICE

I, Malia Anfinson, declare as follows:

On September 28, 2020, I sent via electronic mail, per service agreement, a true and correct copy of Response to Petition for Review and Declaration of Service, addressed as follows:

Casey Grannis grannisc@nwattorney.net
Nielsen, Bromman & Koch, PLLC sloanej@nwattorney.net

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

DATED this 28th day of September, 2020, at Seattle, Washington.

MALIA ANFINSON

WASHINGTON STATE ATTORNEY GENERAL'S OFFICE - CRIMINAL JUSTICE DIVISION

September 28, 2020 - 3:18 PM

Transmittal Information

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Appellate Court Case Title:	In the Matter of the Detention of Michael A. McHatton
Superior Court Case Number:	01-2-06282-0

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