

NO. 46319-9-II

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

In re Detention of Richard Hatfield,

STATE OF WASHINGTON,

Respondent,

v.

RICHARD HATFIELD,

Appellant.

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

The Honorable Robert A. Lewis, Judge

BRIEF OF APPELLANT

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A. INTRODUCTION

The guardian ad litem (GAL) appointed to represent Richard L. Hatfield's best interests in these chapter 71.09 RCW proceedings was absent throughout Hatfield's entire trial. The absence violated the GAL statute, case law, and Hatfield's due process rights. This error requires reversal and a new trial.

In addition, substantive due process requires that involuntarily committed individuals receive treatment that provides a realistic opportunity to improve their mental health conditions. The record before this court shows the State has denied Hatfield appropriate medical care, suitable medication, and any other treatment that would assist him in improving his current psychotic condition. Hatfield's confinement to the Special Commitment Center (SCC) under chapter 71.09 RCW violates substantive due process because the SCC is incapable of treating his psychosis. Hatfield asks this court to reverse and remand for proceedings that address Hatfield's right to adequate and individualized treatment.

B. ASSIGNMENTS OF ERROR

1. The trial court violated a mandatory statute, case law, and Hatfield's due process rights by permitting trial to proceed in the absence of Hatfield's court-appointed GAL.

2. The trial court violated Hatfield's substantive due process right by committing Hatfield to the SCC under chapter 71.09 RCW because the SCC is incapable of providing adequate and individualized treatment that would give Hatfield a realistic opportunity to improve his psychotic condition.

Issues Pertaining to Assignments of Error

1. Did the trial court violate RCW 4.08.060, the mandatory GAL statute, and Hatfield's due process rights by proceeding with trial during the entirety of which Hatfield's court-appointed GAL was absent?

2. The State has failed to provide Hatfield with appropriate medical treatment to rule out a physical etiology of his psychotic condition. The State has failed to provide medication to Hatfield in a way that could improve his psychotic condition. The State instead has locked Hatfield in a cell in the SCC's Intensive Management Unit, stripped him naked, and forcibly medicated him with a drug that has proven ineffective. The State has failed to provide Hatfield with any treatment that would give him an opportunity to improve his current mental health condition. Under these circumstances, does Hatfield's commitment to the SCC violate substantive due process because it does not provide constitutionally adequate treatment?

C. STATEMENT OF THE CASE

1. Petition and determination of probable cause

On February 21, 2012, the State filed a petition to commit Hatfield under chapter 71.09 RCW. CP 1-2. The petition alleged Hatfield was convicted of first-degree child molestation, a sexually violent offense, in April 1998 in Clark County. CP 1. The petition also recounted Hatfield's 1982 California conviction for attempted lewd and lascivious conduct with a minor under the age of 14. CP 1. The trial court found probable cause to believe Hatfield was a sexually violent predator. CP 4.

2. Incompetency determination

In October 2013, the trial court held a competency hearing, given that Hatfield was acutely psychotic and no longer identified himself as a Hatfield. CP 171. Based on the evidence presented at the hearing, the trial court ruled it was "reasonably convinced that Mr. Hatfield is not competent to understand the significance of legal proceedings and the effect of such proceedings on his best interests." CP 176. The trial court therefore appointed a GAI, Peter MacDonald, pursuant to RCW 4.08.060. CP 176-77.

Despite the trial court's ruling of incompetency, the State sought to depose Hatfield over Hatfield's objection. See CP 13-18. Brian Abbott, Ph.D., submitted a declaration stating that Hatfield was "incompetent to

testify as a witness because he is of unsound mind due to psychosis.” CP 19. Specifically, Abbott opined that Hatfield could not “tell the difference between the truth and a lie,” and detailed several delusions from which Hatfield suffered. CP 19-21. The trial court never ruled on the State’s motion to depose Hatfield and the parties proceeded to trial.

3. Jury demand

On the first day of trial, counsel for Hatfield indicated she wished to waive jury trial and proceed with a bench trial. RP 18. However, the trial court pointed out that neither party had filed a jury demand. RP 20-21. Defense counsel conceded it had not filed a jury demand. RP 21-22.

The State wanted to try its case to a jury, noting “We are all laboring under the assumption this would be a jury trial. Up until about 10 minutes ago the Court was prepared for a jury trial. Both parties were prepared for a jury trial, and nobody thought that nobody had demanded a jury trial.” RP 23-24. The State then formally demanded a jury. RP 24. Defense counsel deferred to the court. RP 24.

The trial court, citing CR 38(d) and In re Det. of Coppin, 157 Wn. App. 537, 238 P.3d 1192 (2010), stated it was not an abuse of discretion to deny an untimely request for a jury trial. RP 24-25. Over the State’s objection, the trial court ruled the State’s “demand should not be accepted and the case will be tried to the Court.” RP 26-27, 29.

4. GAL absence

On the first day of trial, Hatfield's GAL, Peter MacDonald, appeared to inform the trial court that Hatfield's psychotic condition rendered Hatfield unable to be present at trial. RP 2, 12-14. The trial court accepted this waiver, but then inquired whether MacDonald would be attending trial. RP 14. MacDonald indicated, "I think it's probably a good idea for me to stay." RP 15. He then clarified, "just until the jury has convened." RP 15.

The trial court stated it needed to be able to tell the jury who MacDonald was. RP 15. MacDonald expressed concern that "me being introduced as a guardian ad litem for anyone on the jury who knows what that is, creates an inference that wouldn't be created if your statement was just left alone and I wasn't here." RP 15-16.

When defense counsel waived jury trial, MacDonald stated he was not comfortable weighing in on the jury waiver: "I respectfully decline to give an opinion on that other than I don't really have the authority." RP 18. As noted, the trial court later ruled the case would be tried to the bench. RP 29. In doing so, the trial court eliminated the GAL's concern that the jury could draw a negative inference from his presence. However, despite being appointed to represent Hatfield's best interests in these proceedings, the GAL did not attend any other portion of the trial on Hatfield's behalf and he

was not heard from again. See RP 102, 316, 527, 649 (noting appearances of Hatfield's and the State's attorneys only).

5. Trial testimony

The State presented the testimony of one witness at trial, Henry Richards, Ph.D. Richards diagnosed Hatfield with 11 different psychological disorders.

Richards's principal diagnosis was pedophilia or pedophilic disorder, RP 145-46. He explained the pedophilic disorder was "non-exclusive type, sexually attracted to males." RP 145. Richards supported his diagnosis by describing in detail numerous contacts between Hatfield and male children under the age of 13 between 1979 and 1998. RP 173-206.

Richards also diagnosed psychotic disorder, cyclothymic disorder, bipolar disorder II, avoidant personality disorder, other specified personality disorder with mixed antisocial and passive-aggressive negativistic traits, alcohol dependence in a controlled environment, rapid eye movement sleep behavior disorder, attention deficit hyperactivity disorder, and generalized anxiety disorder. RP 157-66. As he enumerated each disorder, he explained his reasoning for diagnosing each. RP 157-66.

Richards also testified Hatfield suffered from Ganser's syndrome, which, according to Richards meant "the individual shows signs of either dementia, physical illness, or psychosis or all three, and it doesn't fit known

or typical forms of those disorders, and it's suspected to be psychological in origin, and not biological." RP 150. Richards acknowledged that Ganser's syndrome did not appear as a valid diagnosis in either the DSV-IV or DSM-V, but did appear in the text of DSM-IV. RP 150. Richards described Ganser's as part of the "dissociative disorder category."¹ RP 152-53.

Richards opined that Hatfield's "psychotic break [wa]s pretty much irrelevant to the pedophilic disorder." RP 220. Richards likened it to "a computer software that has a crash. So the brain is set on pedophilic disorder. There's a crash. Nothing is working. And then you reboot the system, reload the software, you've got the same activities, interests, orientation [as] previously." RP 221.

In addition to the pedophilic disorder, Richards testified Hatfield's other conditions contributed to a mental abnormality. RP 223. He went through each of his diagnoses and stated why they supported his conclusion that Hatfield suffers from a mental abnormality that "cause[s] him serious difficulty in controlling his sexually violent behavior." RP 225-33. However, on cross examination, Richards conceded he could not point to

¹ The issue of Ganser's syndrome was hotly contested by the parties. Defense counsel sought to exclude it from evidence as unreliable and unhelpful under ER 702 and ER 703. CP 67-70; RP 74-76. Defense experts testified the syndrome had not been scientifically validated or empirically researched and was not accepted in the scientific community. RP 562-64. Ultimately, the trial court excluded the Ganser's syndrome evidence. CP 158; RP 818-19.

any research supporting his conclusion that Hatfield's psychological disorders affected his emotional or volitional control. RP 421-29.

To determine Hatfield's risk of reoffending, Richards relied on a Hare Psychopathy Checklist assessment, the Static-99R, the Static-2002R, and other dynamic and clinical risk factors. RP 234-35. Based on the Static-99R and Static-2002R, the actuarial instruments Richards employed, Richards concluded that Hatfield's five-year risk of reoffending was 35.2 percent and his ten-year risk was 46 percent. RP 257. Richards believed these percentages under 50 still meant Hatfield was likely to reoffend because actuarials "underestimate the actual rate of reoffense" and that "there's an assumption that [sex offenses] are significantly under-reported." RP 261.

Richards also relied on other instruments, including the Stable 2007, to reach his conclusion that Hatfield was more likely to offend if not confined. RP 275-81. He testified Hatfield's delusional statements regarding molestation and incest showed continued sexual preoccupations even after the psychotic break. RP 283, 288. He also stated that Hatfield had exposed himself to SCC staff as a form of sexual coping or sexual provocation. RP 287-88.

Based on his risk assessment, Richards opined that Hatfield's mental abnormality made him "more likely than not to engage in predatory acts of sexual violence if not confined in a secure facility." RP 294.

Fabian Saleh, M.D., the only physician witness, testified on behalf of Hatfield. He described Hatfield's condition as "acutely psychotic," and diagnosed Hatfield with late-onset schizophrenia or schizoaffective disorder. RP 539, 542. He also indicated Hatfield's clinical presentation was consistent with major depressive disorder and bipolar disorder. RP 541.

Saleh also took issue with Richards's diagnosis of pedophilia. Saleh explained that for a pedophilia diagnosis, "the victim[s] have to be prepubescent. And based at least on my review of the data, it suggests that the children in question, the victims, were not prepubescent, but pubescent." RP 624.

Saleh's testimony leveled heavy criticism against the State's medical treatment of Hatfield. Saleh discussed the need to determine whether there was a medical or physical etiology that could explain Hatfield's psychotic condition, including conducting a full-fledged neurological examination, lab work, and brain imaging—none of which had been performed at the SCC. RP 544-45. Saleh also expressed concern regarding Hatfield's drug regimen, noting Hatfield "has been treated, I think now for almost a year, with Seroquel," an antipsychotic medication. RP 546. Saleh indicated Hatfield

had been “kept on almost the same dose, continued to suffer from the symptoms, and there was no intervention, really, to help him improve in terms of his clinical presentation” RP 549. This deeply concerned Saleh given that Seroquel is potentially lethal. RP 550.

In addition, Saleh countered Richards’s testimony that Hatfield was acting out sexually by exposing himself to staff. Based on a video that was played for the court showing SCC staff forcibly medicating Hatfield, who was naked. Saleh explained that SCC staff place Hatfield in an Intensive Management Unit cell, consistently strip him naked, and forcibly medicate him. RP 577-78. Contrary to Richards’s testimony, Saleh stated there was “[n]othing whatsoever” in the video that suggested Hatfield was flashing the SCC staff or was motivated by “anything sexual.” RP 578. Saleh was very disturbed by the State’s mistreatment of Hatfield that provided no opportunity for Hatfield’s psychotic condition to improve.

As for Hatfield’s risk of sexual violence, Saleh stated, given Hatfield’s psychosis, “there’s no evidence . . . that he is sexually preoccupied. There is no evidence in the records that he has morning erections. There is no evidence in the records that he is masturbating.” RP 553. In contrast, before the psychotic break, “there was evidence that Hatfield was still sexually active.” RP 553-54. Saleh also explained Hatfield’s schizophrenia has changed his clinical presentation: “his

presentation has changed so he may still carry a diagnosis . . . because of historical data of pedophilia or pedophilic disorder, but he does not present with symptoms or signs of that disorder.” RP 560. He concluded Hatfield “is a complete[ly] different person today compared to 2011, 2010, based on the records I mean, we talk about two different people.” RP 560. Saleh also stated that Hatfield’s psychosis could not predispose Hatfield to resume previous behaviors such as grooming or sexually assaulting a child:

I doubt that it would be possible. I mean, if he is in the state of mind he is in right now, as psychotic as he is and delusional as he is, I don’t think he would be able to execute those . . . planned, organized behaviors, as he did in the past, as far as I can see.

RP 631. In response to Richards’s use of actuarial instruments, Saleh opined that given Hatfield’s current psychosis, “[t]here is no such instrument that would accurately reflect the risk for Mr. Hatfield to reoffend sexually if he were to be released.” RP 587.

Brian Abbott, Ph.D. also testified for the defense. Abbott explained Richards’s diagnosis of pedophilic disorder was incorrect given Hatfield’s “interest in someone who has adult male physical development and so, again, that is not a paraphilia disorder. It’s a crime, clearly to have sex relations with somebody that age, but it’s not a paraphilic condition.” RP 688.

Like Saleh, Abbott explained Hatfield was “overtly psychotic.” RP 675. Abbott testified, “it’s like essentially he’s done a 180 in terms of his mental status. Whatever conditions he had previously to the psychosis have receded into the background. Essentially those diagnoses are no longer valid. What’s taken over his current mental status is this psychotic condition.” RP 679. Abbott echoed Dr. Saleh that in light of Hatfield’s current condition, “there are not any sexual themes” or “any themes of a sexually violent nature.” RP 679.

Abbott was also troubled by the SCC’s treatment of Hatfield as he discussed the video showing SCC forcibly medicating Hatfield. In stark contrast to Richards’s testimony, Abbott testified “there was no evidence of Mr. Hatfield showing any kind of sexual preoccupation, talking about sexual matters, exposing himself, masturbating. None of that was present in the records.” RP 683. Abbott also explained, “individuals who[m] I have seen who are psychotic and sexually preoccupied -- it’s a persistent preoccupation and it’s verbalized regularly or demonstrated regularly.” RP 684.

Abbott employed the Static-99R because in his opinion, “[i]t’s the most research instrument and[,] therefore, we know fairly clearly what its strengths and limitations are in terms of assessing risk. It also has the largest sample size behind its actuarial or experience tables.” RP 686. Abbott

acknowledged the instrument had a high error rate: “30 percent of the time a nonrecidivist is going to be falsely identified as a likely recidivist.” RP 687.

Abbott also criticized Richards’s risk assessment and selection of Hatfield into a particular reference group, noting “there’s no reliable or valid way to distinguish these reference groups.” RP 693. He described Richards’s methodology as “a speculative model at best. It has no published literature to support it. It has no known reliability or validity” RP 694. Abbott also indicated, “the group-risk estimate is not an accurate predictor of the risk of an individual.” RP 707.

Abbott also took issue with Richards’s testimony regarding the underestimating or underreporting of sexual offenses. Abbott testified,

we don’t know who is committing the undetected sexual offenses, whether they’re first-time sex offenders or repeat sex offenders And it’s the latter group that we’re interest in We have no idea what that number is and[,] therefore, any opinion regarding . . . how that affects an actuarial risk assessment is essentially speculation.

RP 726.

Abbott also indicated Richards erred in using “diagnoses to predict behavior what we know is the DSM diagnoses were not designed to determine how someone will function in the recent future or remote future.” RP 724. Abbott said Richards’s opinion amounted to mere clinical judgment, which was “about the equivalent of flipping a coin.” RP 725.

6. Trial court's ruling, findings of fact, conclusions of law, and order of commitment

The trial court ruled Hatfield had a mental abnormality, pedophilia. CP 155-56; RP 816-17. The court ruled this mental abnormality affected “the emotional or volitional capacity which predisposes [Hatfield] to the commission of criminal sexual acts in a degree constituting such person a menace to the health and safety of others.” CP 155.

The trial court stated the “crux of the issue” is whether the mental abnormality was current. RP 818. The trial court stated, “I’m convinced beyond a reasonable doubt that it’s current in this sense. It may be that it’s being masked in a way . . . by his psychotic symptoms.” RP 818; see also CP 156 (“Respondent’s mental abnormality currently exists and is present in Respondent, although the mental abnormality may be temporarily masked by the symptoms of his psychotic disorder.”).

Interestingly, the trial court rejected the statistical analyses provided by Richards and Abbott in their entirety. The trial court stated, “you can’t simply take a statistical analysis and say, this group’s statistical risk of something is this individual’s statistical risk of something.” RP 814. Instead, the trial concluded that courts “have to look at the individual human being and their characteristics over time to determine whether the statistical

predictions that you have make sense in any meaningful way.” RP 814-15;
accord CP 157,

The trial court determined Hatfield “is likely to engage in predatory acts of sexual violence unless he is confined in a secure facility.” CP 158. The trial court found Hatfield met the definition of sexually violent predator and committed Hatfield to the SCC. CP 158-59; RP 824. This timely appeal follows. CP 160.

D. ARGUMENT

1. THE GAL’S ABSENCE THROUGHOUT ALMOST THE ENTIRE TRIAL VIOLATED THE GAL STATUTE AND HATFIELD’S DUE PROCESS RIGHTS

The trial court appointed a GAL for Hatfield because he was not competent to understand the significance of the legal proceedings or their effect on his best interests. CP 176-77. But after the very beginning of the first day, Hatfield’s GAL did not attend any portion of the trial. The GAL’s absence violated the GAL statute as interpreted by the Washington Supreme Court and resulted in fundamental unfairness that violated Hatfield’s due process rights. The absence of Hatfield’s GAL requires reversal.

a. RCW 4.08.060 mandates the presence of a court-appointed GAL at all times during trial

RCW 4.08.060, the statute under which GAL Peter MacDonald was appointed, provides in pertinent part, “When an incapacitated person is a party to an action in the superior courts he or she shall appear by guardian, or

if he or she has no guardian . . . the court shall appoint one to act as guardian ad litem.” The Washington Supreme Court has held that this statute is mandatory: “A person under such legal disability can appear in court *only by a guardian ad litem.*” In re Dill, 60 Wn.2d 148, 150, 372 P.2d 541 (1962) (emphasis added). Moreover, this “statutory mandate is not satisfied when the person under legal disability is represented by an attorney.” Id. (citing Flaherty v. Flaherty, 50 Wn.2d 393, 397, 312 P.2d 205 (1957)). When a trial court violates RCW 4.08.060 by permitting proceedings in the absence of the court-appointed GAL, the error requires reversal. Dill, 60 Wn.2d at 151.

Here, the trial court appointed attorney Peter MacDonald to serve as Hatfield’s GAL. CP 176-77. MacDonald appeared on the trial’s first day to tell the trial court that Hatfield’s psychotic condition rendered Hatfield unable to be present at trial. RP 2, 12-14. The trial court accepted MacDonald’s waiver of Hatfield’s presence and then inquired whether MacDonald would be attending trial, to which MacDonald responded,

I can stay if it serves the purpose of what we’re doing here; otherwise, you know, I wasn’t going to stay. I think there’s some indication that it might be good for me. I’m thinking -- I’m trying to think of what would be good for Mr. Hatfield, of course. And perhaps it would be good for me to at least have a presence in front of the jury, at least when they first come in to be introduced, so the jury knows that there is a person out there speaking on his behalf, and that might clear up some issues as to why he’s not here.

So thinking aloud through the issue. I think it's probably a good idea for me to stay.

RP 14-15. MacDonald then clarified he was going to stay "just until the jury has convened." RP 15.

Based on MacDonald's intention to stay, the trial court expressed a need to instruct the jury about MacDonald's role in the proceedings. RP 15-16. MacDonald expressed concern about "being introduced as a [GAL] for anyone on the jury who knows that is, creates an inference that wouldn't be created if your statement was just left alone and I wasn't here." RP 15-16. That trial court suggested that if MacDonald sat in the back as a spectator, it would not need to identify him, "but if [MacDonald] want[e]d to sit . . . at counsel's table and be a presence," it was "going to explain why [Hatfield] has a guardian ad litem" RP 16. MacDonald said that any such explanation was "totally appropriate because it's essentially a neutral statement," but stated "in that case I shouldn't be here [b]ecause there's no reason for me to be. Thank you for going over that." RP 16. Thus, MacDonald decided not to attend trial because he did not want jurors to draw a negative inference based on Hatfield's need for a GAL.

However, defense counsel moved to waive a jury trial shortly thereafter. RP 18. The GAL weighed in on the waiver issue:

I don't believe I have the authority to waive a right like that, Your Honor. I'm here to, essentially, let the Court

know what I just told you. And I don't feel comfortable -- it's just too big of an issue. It's a constitutional right that he has, and he has it whether he's in court or not. So I respectfully decline to give an opinion on that other than I don't really have the authority.

RP 18. The trial court then noted that neither the State nor the defense had filed a jury demand in Hatfield's case. RP 19-21. At that time, the State orally demanded a jury; defense counsel again indicated it preferred to waive a jury but deferred the issue to the court. RP 26-28. The trial court ultimately denied the State's jury demand as untimely and ruled "the case will be tried to the Court." RP 28-29.

By requiring a bench trial, the trial court eliminated the GAL's concern that the jury might draw a negative inference from the GAL's presence. But the GAL did not attend any other portion of the trial on behalf of Mr. Hatfield. See RP 102, 316, 527, 648 (noting appearances of Hatfield's attorneys only).

The GAL's absence for the remainder of trial violated RCW 4.08.060. As Dill makes clear, a trial may proceed only when the GAL is present in court to represent the interests of his or her ward. 160 Wn.2d at 150. The fact that Hatfield's appointed counsel was also present does not matter. Id. Under Dill and RCW 4.08.060, because Hatfield's GAL was absent during the entire trial, this court must reverse and remand for a new trial.

- b. Superior court GAL rules provide persuasive guidance regarding the mandatory presence of GALs in all court proceedings

By their own terms, the Guardian ad Litem Rules (GALR) for superior courts do not apply to GALs appointed under RCW 4.08.060 outside of proceedings under Titles 11, 13, or 26 RCW. GALR 1(a). Nonetheless, the GALR provide helpful guidance regarding the scope, duties, and expectations of GALs in superior court proceedings.

Among the several duties of a GAL, enumerated in GALR 2 is the duty to appear at all hearings. Under GALR 2(f), “A guardian ad litem *shall appear at any hearing* for which the duties of a guardian ad litem or *any issues substantially within a guardian ad litem’s duties and scope of appointment* are to be addressed.” (Emphasis added.) GALR 4(e) similarly provides, “Consistent with rule 2(f), a guardian ad litem shall participate in court hearings through submission of written and supplemental oral reports and as otherwise authorized by statute and court rule.” These rules illustrate that our supreme court expects GALs appointed under RCW 4.08.060 to attend the entirety of their wards’ trials.

MacDonald’s obligation was to represent Hatfield’s best interests in the chapter 71.09 RCW proceedings against him. Given this broad function, all court hearings and the trial itself fell clearly within the scope of MacDonald’s appointment. The policies reflected in the GAL rules strongly

suggest that MacDonald was required to attend every hearing related to his appointment. The trial court erred by allowing the trial to continue in MacDonald's absence.

c. The GAL's absence undermined the fairness of the proceedings, violating Hatfield's due process rights

The GAL's absence from all portions of the trial during which substantive evidence was presented undermined the overall fairness of the proceedings. When an incompetent party is deprived of the assistance of a court-appointed GAL, he or she is stripped of an important procedural protection intended to ensure the fundamental fairness of the proceeding. Hatfield's trial failed to comport with due process.

"It is well settled that civil commitment is a significant deprivation of liberty, and thus individuals facing SVP commitment are entitled to due process of law." In re Det. of Morgan, 180 Wn.2d 312, 320, 330 P.3d 774 (2014). "Although 'due process' cannot be precisely defined, the phrase requires 'fundamental fairness.'" In re Dependency of K.N.J., 171 Wn.2d 568, 574, 257 P.3d 522 (2011). "The process due depends on what is fair in a particular context." Morgan, 180 Wn.2d at 320 (citing In re Det. of Stout, 159 Wn.2d 357, 370, 150 P.3d 86 (2007) (citing Mathews v. Eldridge, 424 U.S. 319, 332, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976))).

To determine what process is due, courts weigh the familiar Mathews factors: (1) the private interest at stake in the governmental action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government's interest, including fiscal and administrative burdens that the additional or substitute procedural requirement would entail. Mathews, 424 U.S. at 335.

Turning to the first factor, “[c]ommitment is a deprivation of liberty. It is incarceration against one’s will, whether it is called ‘criminal’ or ‘civil.’” In re Det. of D.F.F., 172 Wn.2d 37, 40 n.2, 256 P.3d 357 (2011) (quoting Application of Gault, 387 U.S. 1, 50, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967)). It should go without saying that Hatfield has a very significant private interest in his physical liberty.

The second Mathews factor also weighs in favor of Hatfield. The trial court provided a GAL as a procedural safeguard to protect Hatfield’s best interests during the chapter 71.09 RCW proceedings. The GAL was intended to minimize the risk of erroneously depriving an incapacitated party of his liberty. Proceeding in the GAL’s absence eliminated the very procedural safeguard the courts and the legislature have chosen to protect against the risk of error. The risk of erroneous deprivation was therefore high.

Although the Washington Supreme Court has allowed incompetent persons to stand trial in this context given the “[r]obust statutory guaranties in chapter 71.09 RCW,” it has done so only by recognizing that “the trial court’s appointment of a GAL . . . provided an additional safeguard.” Morgan, 180 Wn.2d at 321. The Morgan court also determined the GAL’s presence during trial partially remedied the fact that Morgan’s “participation was potentially diminished due to incompetency.” Id. at 322. Consistent with Morgan, this court should hold that the presence of Hatfield’s GAL at trial was necessary to guard against the erroneous deprivation of Hatfield’s rights.

This court came to a similar conclusion in State v. Ransleben, 135 Wn. App. 535, 144 P.3d 397 (2006). There, Ransleben argued that he was entitled to be competent to stand trial under chapter 71.09. Id. at 537-38. This court disagreed, relying in part on the GAL’s participation in the case:

The GAL was given full authority to investigate and report factual information, to make recommendations and decisions based on an independent investigation of Ransleben’s best interests, and to access records and information relating to the case. The GAL was also *required to appear at all court hearings and conferences*. The GAL filed various motions on Ransleben’s behalf but, like everyone else, the GAL was unable to communicate effectively with Ransleben.

Id. at 537 (emphasis added). This court clearly indicated that the GAL's presence at and participation in superior court proceedings mitigated the risk of being tried while incompetent.

A recent Division One decision also provides helpful instruction. In In re Dependency of P.H.V.S., ___ Wn. App. ___, 339 P.3d 225, 228 (2014), the trial court appointed GALs to assist parents in a dependency proceeding, given that they could not "understand or intelligently comprehend the significance of the legal proceedings and their effect on [their] best interests." The father's GAL failed to appear for the morning session of the third day of the dependency fact-finding hearing and the trial court proceeded without him. Id. at 229. Division One held this absence was error: "Because the GAL had a mandatory obligation under RCW 4.08.060 and the GALR to attend and participate in the entire dependency fact-finding hearing, the court erred in proceeding without the presence of [the father]'s GAL." Id. at 232. However, the court contended there was no due process violation because the testimony that occurred during the GAL's absence was repeated earlier during the fact-finding hearing or was too insignificant to violate due process. Id. Given that the P.H.V.S. court found the absence of the GAL was error, however, it undoubtedly would have concluded there was a due process violation had the GAL absented himself from the entire proceedings rather than for just a half-day.

The risk of erroneous deprivation is high when an incompetent person is made to stand trial without a GAL representing the incompetent person's best interests as the law requires. The second Mathews factor favors Hatfield.

As for the third Mathews factor, Hatfield acknowledges the government's interest is significant in "treating sex predators and protecting society from their actions." In re Det. of Young, 122 Wn.2d 1, 26, 857 P.2d 989 (1993). But, as discussed in greater detail below, the government is in no position to provide sex predator treatment to Hatfield given his current state of psychosis. See Alan A. Abrams et al., The Case for a Threshold for Competency in Sexually Violent Predator Civil Commitment Proceedings, 28 AM. J. FORENSIC PSYCHIATRY no. 3, at 7, 22-23 (2007) ("[A]ttempting to curb the compulsively lurid behaviors of an SVP that precipitate within the matrix of a florid psychosis or severe cognitive impairments would likely prove futile [C]urrently available treatments for SVPs finds its provenance in rational, goal-directed, even insightful, cognition."). The government's interest in treating Hatfield amounts to no interest at all when the "services" it provides would fail to treat any of Hatfield's psychotic symptoms.

Moreover, the government's burden in ensuring Hatfield was represented by a GAL during the trial was extremely minimal. There is no

significant fiscal or administrative burden for the State to guarantee the GAL's attendance at *all* superior court proceedings. The State agreed to the appointment of a GAL to protect Hatfield's interests. CP 171. The State should not be heard now to complain of the negligible burden it was willing to take on to ensure fundamental fairness in these proceedings.

In sum, Hatfield's interest in his physical liberty is extremely high. Not providing a GAL during the trial presented an unacceptable risk of erroneous deprivation of Hatfield's physical liberty. And the additional protection of insisting that Hatfield's GAL attend the entire trial was minimally burdensome for the State. On balance, the Mathews factors demonstrate that Hatfield was, as a matter of minimum due process, entitled to have his GAL present in court to represent his best interests at all times during the trial. The GAL's absence was constitutional error. This court must accordingly reverse.

d. Defense counsel failed in their duty to object to the absence of Hatfield's GAL.

The absence of Hatfield's GAL from all substantive parts of the trial violated Hatfield's constitutional rights to due process of law. Nonetheless, if this court concludes this issue has not been adequately preserved, Hatfield was also denied his right to effective assistance of counsel when his attorneys failed to object to the GAL's absence. See State v. Nichols, 161

Wn.2d 1, 9, 162 P.3d 1122 (2007) (“A claim of ineffective assistance of counsel may be considered for the first time on appeal as an issue of constitutional magnitude.”).

Persons subject to commitment under chapter 71.09 RCW have the right to counsel. RCW 71.09.050(1). This “right to counsel is meaningless unless it includes the right to effective counsel.” Ransleben, 135 Wn. App. at 540. In involuntary civil commitment cases, Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), measures whether counsel’s assistance was ineffective. In re Det. of T.A.H.-L., 123 Wn. App. 172, 180-81, 97 P.3d 767 (2004).

To establish ineffective assistance, an appellant must show counsel’s performance was deficient and the deficient performance resulted in prejudice. Strickland, 466 U.S. at 687. “Deficient performance occurs when counsel’s performance falls below an objective standard of reasonableness.” State v. Yarbrough, 151 Wn. App. 66, 89, 210 P.3d 1029 (2009). If counsel’s conduct demonstrates a legitimate strategy or tactic, it cannot serve as a basis for an ineffective assistance of counsel claim. Id. at 90. “Prejudice occurs when, but for the deficient performance, there is a reasonable probability that the outcome would have differed.” Id.

No reasonable attorney could agree to the absence of a court-appointed GAL, whose purpose is to ensure protection of her client’s best

interests in the legal proceedings. Nor could any legitimate strategy explain the failure to object to proceeding in the GAL's absence. This is particularly true in this case where the GAL was an attorney with significant experience in chapter 71.09 RCW cases.

As for prejudice, had defense counsel insisted that Hatfield's GAL be present at all times—as the Due Process Clause of the Fourteenth Amendment and Washington case and statutory law require—there is a reasonable, if not a high, probability the trial court would have required Hatfield's GAL to be present during the entire trial.

Even if defense counsel's acquiescence in the GAL's absence could constitute waiver, this acquiescence was ineffective assistance of counsel. In the event that this court concludes Hatfield failed to adequately preserve the GAL absence issue, the failure resulted from constitutionally ineffective assistance of counsel.

e. Requiring the GAL's presence at all times during trial makes good policy sense

The legislature and the Washington State Supreme Court have decided that an incapacitated person, like Hatfield, is unequivocally entitled to the increased procedural protection of having a GAL appear in court on his behalf. RCW 4.08.060; Dill, 60 Wn.2d at 150. This represents an unqualified policy choice to protect the rights and interests of vulnerable

adults. As a basic matter of public policy, the legislature and our supreme court have determined that mandating a GAL's presence is the only way to ensure a fair and evenhanded proceeding for incompetent persons.

This policy choice reflects the reality that the prejudice accompanying the deprivation of this important procedural protection is not readily or easily ascertainable or quantifiable. The prejudice inheres in the deprivation itself. Indeed, when a GAL is absent, no court can say what the GAL would or would not have noticed, or how or whether the GAL could have provided vital insights to assist the defense. This is the point of having a GAL attend all hearings: the GAL performs the functions the ward cannot; and when the ward is deprived of the GAL, no one can perform these functions. This is inherently prejudicial.

More fundamentally, cutting corners with regard to the procedural protections intended to protect incapacitated persons would establish dangerous precedent. The public trusts the court system to treat even the most vulnerable and the most unpopular in our society fairly. If trial courts fail to provide basic, legally required procedural safeguards to protect such persons, then there can be no confidence in the substance of their rulings. Consistent with the policy objective of requiring a GAL's courtroom presence to protect the rights and interests of incapacitated persons, this court

should reverse and provide Hatfield with a proceeding that affords him every protection to which he is entitled under the law.

2. HATFIELD'S COMMITMENT UNDER CHAPTER 71.09
RCW VIOLATES SUBSTANTIVE DUE PROCESS
BECAUSE IT DOES NOT PROVIDE HIM A REALISTIC
OPPORTUNITY FOR IMPROVEMENT

"The State's lawful power to hold those not charged or convicted of a crime is strictly limited." In re Det. of D.W., 181 Wn.2d 201, 207, 332 P.3d 423 (2014). The State has a valid interest in treating the mentally ill and in protecting society from them; however, an individual must be both mentally ill and dangerous for involuntary civil commitment to comport with the Due Process Clause of the Fourteenth Amendment. Id. at 207-08 (citing In re Albrecht, 147 Wn.2d 1, 7, 51 P.3d 73 (2002) (citing Addington v. Texas, 441 U.S. 418, 426, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979); Foucha v. Louisiana, 504 U.S. 71, 80, 112 S. Ct. 1780, 118 L. Ed. 2d 437 (1992))). Moreover, "[a]nyone detained by the state due to 'incapacity has a constitutional right to receive 'such individual treatment as will give each of them a *realistic opportunity to be cured or to improve his or her mental condition.*'" D.W., 181 Wn.2d at 208 (emphasis added) (quoting Ohlinger v. Watson, 652 F.2d 775, 778 (9th Cir. 1981) (quoting Wyatt v. Strickney, 325 F. Supp. 781, 784 (M.D. Ala. 1971))).

This requirement of individualized treatment geared toward improvement has roots in the basic principle that the nature of the detention must reasonably relate to its purpose. Oregon Advocacy Ctr. v. Mink, 322 F.3d 1101, 1121-22 (9th Cir. 2003). Indeed, “due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed.” Jackson v. Indiana, 406 U.S. 715, 738, 92 S. Ct. 1845, 32 L. Ed. 2d 435 (1972). Were it otherwise, the mentally ill “could be held indefinitely as a result of their mental illness” Ohlinger, 652 F.2d at 778.

Chapter 71.09 RCW comports, at least theoretically, with this general rule. It provides, in pertinent part, “Any person committed pursuant to this chapter has the right to *adequate care and individualized treatment*.” RCW 71.09.080(3) (emphasis added). In short, persons confined under chapter 71.09 RCW are constitutionally and statutorily entitled to adequate, individualized treatment that provides a realistic opportunity their condition will improve. Hatfield has no chance of benefiting from the sex offender treatment offered at the SCC until his psychosis improves. But the SCC is unequipped to provide individualized, adequate treatment for his psychosis. Thus, his confinement at the SCC without appropriate treatment fails to provide any reasonable opportunity for his condition to improve or be cured.

The trial court violated Hatfield's right to substantive due process when it ordered him committed without adequate treatment.

- a. Hatfield cannot benefit from SCC sex offender treatment while he is psychotic

Hatfield is not capable of participating in sex offender treatment until he receives adequate treatment for his psychotic condition. The record in this case makes clear that he has not received and will not receive adequate, individualized treatment to improve his psychosis at the SCC. Committing Hatfield under chapter 71.09 RCW and confining him to the SCC therefore violates substantive due process.

According to the State's expert, Henry Richards, Ph.D., Hatfield's psychosis is "more of a mask that we just see less of what's going on with him. He's not making any meaningful decisions. In fact you could take the point of view that all of his emotional volitional capacity is gone right now." RP 227. Indeed, Richards likened Hatfield's psychotic break to "computer software that has a crash . . . Nothing is working. And then you reboot the system, reload the software, you've got the same activities, interests, orientation [as] previously." RP 221. This statement implicitly concedes that SCC treatment will accomplish nothing for Hatfield until the system is "rebooted" by improving his psychotic condition.

Richards also described some of Hatfield's statements made under psychotic delusion, including that McNeil Island "would be bombed to destroy the bodies of children who had been sexually molested," that Dr. Abbott, the defense expert, "was a child molester, and that he was molesting his own daughter," that Hatfield "was born on the island quite recently" and has "never left the island," that Hatfield was going to be picked up by his brother, father, and President Obama, and that children were "molested on the island and Obama [was] killing them or covering them up." RP 281, 283-84, 356-58, 386. The defense experts echoed similar delusions during their testimony. RP 567, 676-77. If Hatfield is unable to make meaningful decisions, lacks volitional capacity, and has completely broken from reality, it is difficult to conceive that he is capable of meaningfully participating in the intensive, long-term sex offender treatment that chapter 71.09 RCW contemplates. See Abrams, supra, at 22-23 (noting that SVP treatment "finds its provenance in rational, goal-directed, even insightful cognition"); RP 604-06 (defense expert Fabian Saleh testifying Hatfield is unable to execute goal-oriented, purposeful behaviors). Richards conceded Hatfield was not participating in SCC treatment. RP 285, 287. Indeed, how could he? Jailing Hatfield in the SCC provides no opportunity for him to ameliorate his current psychosis.

Moreover, Hatfield is not aware of his sex offender status, has exhibited no sign of sexual behavior or preoccupation since his psychotic condition arose, and is otherwise incapable of sexual function. RP 552-55, 559-60, 584, 628, 631, 679, 681, 683-84. The focus of the chapter 71.09 RCW scheme is treatment of sex offenders for their sexually violent behavior. Because Hatfield is unable to acknowledge his past sex offenses—indeed, Hatfield does not believe he *is* Hatfield—sex offender treatment available at the SCC provides him with absolutely no benefit or opportunity to improve his condition.

Richards, however, opined that Hatfield's delusions about President Obama or Dr. Abbott molesting children demonstrated Hatfield's "fixation on sex with children," "preoccupation with sex and a violation of the incest taboo," and "[d]eviant sexual preference," rendering him sexually dangerous and thus in need of confinement at the SCC. RP 283, 288. Richards acknowledged that "there's little evidence that recently" Hatfield had engaged in sexual behavior, "unless one counts him exposing himself, which he has done." RP 287. Richards explained Hatfield "took his pants off and was exposed" and "in the [SCC] staff opinion, [he was] acting odd But as a result of this, many of the staff had to observe him exposed on multiple occasions over the course of shift work." RP 288. Richards did not "know if [he] would count that as sexual coping or a form of sexual provocation."

RP 288. Richards's concern that Hatfield was sexually acting out by exposing himself to SCC staff was wholly belied by evidence that Hatfield is stripped naked, placed in a cell, and forcibly medicated. See 568-77 (discussion and argument regarding video admitted into evidence and played for the court portraying SCC staff forcibly medicating Hatfield naked). Richards's suggestion that Hatfield's psychotic hallucinations and SCC-imposed nudity demonstrated Hatfield was likely to commit another sex offense and thus could benefit from being confined to the SCC is absurd.

b. The SCC is unable or unwilling to provide adequate treatment for Hatfield's psychosis

The entire chapter 71.09 RCW scheme is based on the idea that sex offenders require specialized treatment to address mental illness that predisposes them to commit sex offenses. As the legislature has expressly stated, "the treatment needs of [sexually violent offenders] are very long term, and the treatment modalities for this population are very different than the treatment modalities for people appropriate for commitment under the involuntary treatment act[, chapter 71.05 RCW]." RCW 71.09.010. The legislature has also defined a "[t]otal confinement facility" as "a secure facility that provides supervision and sex offender treatment services in a total confinement setting." RCW 71.09.020(19). In order for a person to be released from a total confinement facility to a less restrictive alternative, he

or she must agree to comply with sex offender treatment provided by a statutorily authorized provider under chapter 18.155 RCW. RCW 71.09.092(1)–(2), (4). The focus of chapter 71.09 RCW is unquestionably mental health treatment specifically related to sex offenders and sex offenses.

In light of this focus, the record shows the SCC is unequipped to give Hatfield the adequate medical attention he needs to treat his condition. The defense expert and only physician who testified at trial, Fabian Saleh, M.D., expressed the importance of ensuring “there’s nothing medical explaining this presentation.” RP 543. Dr. Saleh then went over several physical medical conditions that could be contributing to Hatfield’s symptoms. RP 544. To ensure there was no physical etiology for Hatfield’s condition, Saleh explained,

you would have to first rule out that there is no medical condition, and one way is you do a full-fledged neurological evaluation. So you refer the patient to a neurologist, who can go in an in-depth neurological examination . . . [that] looks beyond just the quick neuro exam we do as psychiatrists . . .

Then you would do lab work on the patient, so you would draw various . . . labs on the patient to determine that there is no infection, any deficiencies accounting for their presentation.

And then the one I think that one would do in a case like this is brain imaging. You would want to image the patient’s brain to make sure that he doesn’t have any lesion explaining this presentation.

RP 544-45. Saleh's testimony regarding Hatfield's need of medical diagnostics was not rebutted by the State or challenged on cross examination. Indeed, the State's expert conceded the treatment available at the SCC did not include medical treatment for medical conditions that would be available at Western State Hospital. RP 295. As his testimony made clear, the SCC is no place to address physical conditions potentially underlying Hatfield's psychotic state. Hatfield has not received and cannot receive constitutionally adequate medical treatment at the SCC.

Saleh also highlighted the SCC's failure to provide appropriate antipsychotic medication to Hatfield. Saleh indicated that Hatfield "has been treated, I think now for almost a year. with Seroquel," an antipsychotic medication. RP 546. Saleh noted that Hatfield "is not responding to the treatment," and therefore had not received adequate treatment via medication. RP 547. Saleh then explained how to properly treat a person with antipsychotic drugs:

[Y]ou start the patient . . . on the antipsychotic medication. You increase the dose to a reasonable dose, which would be 600 milligrams, 700 milligrams with the Seroquel, and then you keep the patient or the individual on this medication at that dose for four weeks, six weeks.

And then if there is no response . . . you take him off the medication, start him on a different medication. If there's a partial response, meaning that there is some response to the treatment, his symptoms are less severe, less intense, less frequent, he is able to function more, has gained or regained

partial reality testing at that point -- so with the Seroquel it's not fully effective, somewhat effective, then you may augment the effects of the medication with introducing another medication, adding another medication to the Seroquel.

RP 548. Saleh criticized Hatfield's treatment at the SCC because Hatfield was "kept on almost the same dose [of Seroquel], continued to suffer from the symptoms, and there was no intervention, really, to help him improve in terms of his clinical presentation" RP 549. Saleh was particularly concerned given that Seroquel has potentially lethal side effects. RP 550. By not appropriately medicating Hatfield, the State has failed to provide the adequate, individualized treatment required by the constitution.

More alarming, the State has apparently "treated" Hatfield by locking him in a cell for 23 hours per day, stripping him naked, and forcibly medicating him (with medication that has not proven effective). RP 577-78, 682. This, under any stretch of the imagination, is not treatment that affords Hatfield a realistic possibility of improvement. Hatfield's commitment to the SCC is unconstitutional.

- c. The trial court violated Hatfield's right to substantive due process when it ordered him civilly committed without access to constitutionally adequate treatment

Despite concluding Hatfield currently suffered from a mental abnormality, the trial court acknowledged this mental abnormality is "being masked in a way . . . by his psychotic symptoms." RP 818. Similarly, in its

written findings, the trial court stated, "The psychotic disorders that cause Respondent to believe he is a different person mask Respondent's underlying mental abnormality. The evidence supports the conclusion that Respondent's psychotic disorder, if treated correctly, would result in Respondent reverting to actual reality, where his is Richard Hatfield. Richard Hatfield has a mental abnormality." CP 156. The trial court's ruling exposes the substantive due process violation in this case. In the trial court's view, Hatfield's mental abnormality and sexual dangerousness will not surface until he obtains effective treatment for his psychotic condition. But there is no available effective treatment at the SCC. The trial court's commitment of Hatfield to the SCC is nothing more than an indefinite confinement without a realistic opportunity for Hatfield's condition to improve.

Finally, defense counsel recognized Hatfield is not capable of improvement under the chapter 71.09 RCW scheme and thus attempted to present testimony that involuntary commitment under chapter 71.05 RCW, the Involuntary Treatment Act (ITA), would supply Hatfield with the treatment he needs to improve his condition. CP 65-66; RP 42-43, 108. However, the trial court refused to consider the appropriateness of ITA commitment. RP 113.

The trial court's refusal was based on Ransleben, 135 Wn. App. at 538-39, in which this court refused to consider Ransleben's eligibility for treatment under the ITA. RP 113. But, unlike this case, Ransleben conceded "his pedophilia diagnosis plac[ed] him within the statutory definition of sexually violent predator." Ransleben, 135 Wn. App. at 539. Nor did this court consider a substantive due process challenge based on the dearth of treatment available to address Ransleben's condition. See In re Electric Lightwave, Inc., 123 Wn.2d 530, 541, 869 P.2d 1045 (1994) ("[Courts] do not rely on cases that fail to specifically raise or decide an issue."). This court's decision in Ransleben does not preclude courts from addressing Hatfield's substantive due process claim based on the need for adequate, individualized treatment.

By committing him to continued detention at the SCC, the trial court violated Hatfield's fundamental liberty interest in receiving treatment that provides him a realistic opportunity for improvement. The State's failure to provide adequate care and individualized treatment to address Hatfield's psychotic condition has deprived Hatfield of substantive due process. Hatfield's confinement to an environment that cannot address his treatment needs is little different than boarding psychiatric patients in emergency rooms, which our supreme court recently declared unlawful. D.W., 181

Wn.2d at 204, 211. This court should reverse and remand for proceedings that address Hatfield's entitlement to individualized treatment.

E. CONCLUSION

The absence of Hatfield's GAL violated a mandatory statute, case law, and due process. The absence requires reversal. Hatfield's civil commitment to the SCC, which is incapable of treating his current psychosis, violated Hatfield's substantive due process right to treatment that provides a realistic opportunity for improvement or cure. Hatfield asks this court to reverse the trial court and remand for proceedings that adequately address Hatfield's mental health condition.

DATED this 9th day of January, 2015.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

A handwritten signature in black ink, appearing to read "Kevin A. March", written over a horizontal line.

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Attorneys for Appellant

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

In re Detention of Richard Hatfield,)	
)	
STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	COA NO. 46319-9-II
)	
RICHARD HATFIELD,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, JAMILA BAKER, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 9TH DAY OF JANUARY 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] RICHARD HATFIELD
SPECIAL COMMITMENT CENTER
P.O. BOX 88600
STEILACOOM, WA 98388

SIGNED IN SEATTLE WASHINGTON, THIS 9TH DAY OF JANUARY 2015.

x Jamila Baker

NIELSEN, BROMAN & KOCH, PLLC

January 09, 2015 - 1:10 PM

Transmittal Letter

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