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COA NO. 52493-7-II

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

IN RE DETENTION OF MICHAEL A. MCHATTON:

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL A. MCHATTON,

Appellant.

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

The Honorable James Orlando, Judge

BRIEF OF APPELLANT (AMENDED)

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A. ASSIGNMENTS OF ERROR

1. The court erred in revoking appellant's less restrictive alternative under chapter 71.09 RCW.

2. The court erred in entering conclusions of law 6 and 7. CP 636-37.[1]

3. The court erred in entering finding of fact 10: "While Dr. Blasingame opined that the Respondent could be safely managed in a community-based LRA, he also agreed that the LRA ordered by the Court was not in the Respondent's best interest and that, as executed, it had been inadequate to protect the community." CP 635.

Issue Pertaining to Assignments of Error

Whether the court erred in revoking appellant's less restrictive alternative (LRA) under chapter 71.09 RCW because it did not consider how deficiencies in implementation of the LRA contributed to appellant's violations of its conditions, treating the issue as irrelevant to its decision?

B. STATEMENT OF THE CASE

In 2002, Michael McHatton stipulated to commitment as a sexually violent predator (SVP) under chapter 71.09 RCW. CP 26. In 2012, the court entered an order conditionally releasing McHatton from the Special

[1] The trial court's "findings of fact, conclusions of law, and order revoking less restrictive alternative" are attached as appendix A.

Commitment Center (SCC) to the Secure Community Transition Facility (SCTF) in Pierce County with Dr. Paula van Pul as his sex offender treatment provider. CP 26. In June 2017, the court entered an order conditionally releasing McHatton from the SCTF to Aacres WA, LLC, a less restrictive alternative (LRA) in the community. CP 25-44.

On April 23, 2018, the SCC filed an annual review report authored by Kristin Carlson, a licensed psychologist at the SCC.[2] CP 304-338. Dr. Carlson concluded McHatton meets the SVP definition. CP 327. Carlson also considered if conditional release to an LRA is in McHatton's best interest and whether conditions can be imposed that would adequately protect the community. CP 306. Dr. Carlson addressed McHatton's LRA placement at the community-based house and his sex offender treatment with Dr. van Pul. CP 325-26. She concluded McHatton appeared to be making good progress settling into his community placement and, aside from a few violations, appeared to be compliant with the requirements of his release and placement. CP 326. It was Dr. Carlson's professional opinion that "Mr. McHatton's current conditions continue to be appropriate and in his best interest at this time." CP 327.

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[2] The previous annual review report, dated April 27, 2017, was filed with the court on June 28, 2017. CP 227-29.

On June 1, 2018, the Department of Corrections (DOC) filed a notice of violation of LRA conditions, alleging McHatton possessed images of minors and failed to comply with treatment rules. CP 386-431. Under the terms of the LRA order, McHatton was prohibited from possessing images of children without the prior consent of the transition team. CP 42. McHatton was also required to notify his treatment provider, his community corrections officer (CCO) and the SCC in the event of a violation. CP 41. As set forth in the notice of violation, a CCO contacted McHatton to search his room at Aacres on May 4, 2018. CP 388. Before conducting the search, the CCO asked McHatton if he had anything contrary to his conditions of supervision. CP 388. McHatton said he had pictures of children. CP 388. The CCO found 76 photos of minors and objects related to minors, along with 51 handwritten scripts related to minors. CP 388. McHatton admitted to creating the material and using them for sexual arousal and gratification. CP 388. He began creating the media about three months after his release to Aacres. CP 388. He acknowledged that he failed in his obligation to report his violations and deviant masturbation to his treatment provider. CP 388. McHatton was placed into custody at the SCC. CP 388.

On July 12, 2018, the State filed a motion to revoke McHatton's LRA. CP 649-975. On July 13, Dr. van Pul, McHatton's treatment

provider, filed a motion to modify the LRA, requesting substitution of Dr. Hansen as treatment provider and the SCTF as McHatton's residence. CP 482-86, 504. The State opposed the modification motion on substantive and procedural grounds, asserting revocation was appropriate due to the nature of the violation, the "new LRA" did not meet statutory requirements, the court could not order McHatton to live at the SCTF without Department[3] authorization, and "modification" was not an issue before the court because the State only sought revocation. CP 976-85. The State attached a declaration from the SCC chief executive officer, which stated McHatton did not have authorization to reside at the SCTF and that release to the SCTF was not "currently" supported. CP 987-89.

McHatton, through counsel, opposed the State's revocation motion, arguing the appropriate course was to modify the LRA and install appropriate oversight and supporting professionals, not revoke the LRA and return an intellectually disabled person to total confinement. CP 491. Counsel requested the court deny the motion to revoke "to allow for the petition for modification to be heard." CP 492. Counsel acknowledged it was not in McHatton's best interest to return to Aacres, but it was in his best interest to continue on LRA status at an adequately supportive and

[3] Department of Social and Health Services.

supervised facility. CP 497.[4] Dr. Hansen, a certified sex offender treatment provider, agreed to treat McHatton. CP 628-29.

Counsel argued that McHatton was released into the community LRA based on the expectation that the professionals charged with overseeing his case would do their jobs. CP 494-97. They failed to do so. CP 496-97.

The contract between Aacres and DSHS/SCC was attached to the LRA order. CP 28, 171-98. It required Aacres to assist McHatton with education, vocation and employment. CP 195. Aacres needed to support and implement the resident's individual treatment plan and goals. CP 194. It needed to provide staff work hours at a level sufficient to provide for community safety and meet the requirements of the court-ordered conditions. CP 195. Aacres informed DOC that it would provide a one-to-one staff to resident ratio in the house. CP 206. The DOC plan included random checks of McHatton's residence. CP 214, 217. As part of the LRA order, the court found the LRA conditions recommended by DOC to be necessary to ensure McHatton's compliance with treatment.

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[4] In September 2016, McHatton's counsel urged the Department to contract with Community Integrated Services (CIS) as the special needs housing provider for the LRA, but the Department chose to contract with Aacres instead. CP 492-93.

CP 28. The LRA order incorporated the visual inspection condition. CP 32.

Counsel presented a report by Dr. Blasingame, a clinical psychologist, member of the Association for the Treatment of Sexual Abusers (ATSA), and recognized figure in the field of sex abuse treatment providers who had prior familiarity with McHatton and investigated what went wrong on the current LRA. CP 497, 515.

In 2017, the State's retained expert opined McHatton had reached the maximum therapeutic benefit from his SCTF placement because it limited his ability to form prosocial relationships through support groups, the type of thing a community-based LRA like Aacres could provide. CP 84, 496-97.[5] Aacres did not provide those opportunities. CP 497, 499-500, 525, 531, 540. According to Blasingame, McHatton "had far too much unstructured, unproductive time by himself. The support and structure he had at the SCTF ended the day he moved to the Aacres' home." CP 559. Nor did Aacres provide appropriately trained staff and the expected level of supervision. CP 498-99, 531, 533, 536-37. Aacres staff allowed McHatton to buy magazines containing images of children. CP 518-19, 536-37. Aacres staff conducted no room searches. CP 499,

[5] The State's expert supported a community based LRA even though McHatton had violated conditions of his SCTF LRA, including possessing images of children. CP 83-84.

524, 531, 537-38. A CCO conducted only one visual inspection of McHatton's room between McHatton's release to Aacres in July 2017 up until the search that led to his arrest in May 2018. CP 505-06, 520, 526. The lack of room searches led McHatton to believe that he could "get away with this." CP 520.

Dr. van Pul, meanwhile, offered no real treatment plan, did not recognize McHatton's continued sexual interest in children despite evidence to the contrary, and grew complacent. CP 501-04, 530-31, 539. According to Blasingame, "Dr. van Pul lost her way on this case." CP 539. The LRA order entered by the court was not implemented as intended. CP 541. The lack of adequate implementation of a structured program contributed to McHatton's violations. CP 540, 559.

Counsel argued the LRA ordered by the court required heavy external controls like constant supervision by well-informed support staff. CP 507. "Removing those conditions — in effect, removing the protection of the LRA — and then highlighting the inevitable violation proves only that those conditions were necessary, not that they were inadequate to protect the community." CP 507. Regarding the statutory factors for revocation, counsel maintained the violation was expected given the lack of external controls that were supposed to be in place. CP 508.

McHatton is intellectually disabled with an IQ of 65. CP 494. He was enrolled in special education through his school years and qualified for disability benefits. CP 494. Counsel argued McHatton should not be held to the same standard of culpability as a resident of normal intellectual ability, where professionals did not provide the external controls that were deemed necessary for McHatton to succeed in his LRA. CP 508-09. McHatton had the ability and willingness to comply with the conditional release order when properly assisted by support staff trained on his offense history, concerning behaviors and treatment needs. CP 509. Such staff, however, were not put in place. CP 509. The lack of treatment progress was a reason to modify the LRA by installing a different treatment provider. CP 509. McHatton did not pose a risk to the community so long as external controls as contemplated by the LRA order were actually implemented at the placement. CP 510. The LRA order was never implemented in the manner anticipated. CP 510. Even so, there was no evidence that the public was acutely endangered. CP 510. There was no indication that McHatton tested the security of the Aacres facility by accessing the community without authorization. CP 510.

A hearing on the State's revocation motion was held on August 24, 2018. RP[6] 4-5. McHatton's counsel acknowledged the pending modification petition but noted "the only motion that is noted for this afternoon is the state's motion to revoke." RP 5.

Dr. Blasingame testified on behalf of McHatton. He had expertise in the community management of people with an intellectual disability and offense history. RP 15-16. According to Blasingame, staff need to be precisely trained to deal with a client's specific needs. RP 16. A behavioral support plan should be put in place and staff should know how to respond when problematic behavior occurs. RP 16. Supervision should be calibrated to the risk associated with each client. RP 16-17.

On the treatment side, there are standards of practice for the provision of services to clients with an intellectual disability and sex offense history. RP 17-18. The provider must assess the patient and then provide a written treatment plan that identifies the needs of the patient to be addressed. RP 17-18. McHatton's criminogenic needs included sexualized coping, sexual preoccupation, and deviant sexual interest. RP 18-19. His non-criminogenic needs included self-esteem, creative expression, and dealing with depression. RP 19. Transition from an

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[6] The verbatim report of proceedings is cited as follows: RP - two consecutively paginated volumes consisting of 8/24/18 and 9/7/18.

institutional setting to the community creates a tremendous amount of anxiety and stress, so it is common that people struggle and slip backwards in treatment. RP 20. Dr. Blasingame suspected McHatton felt overwhelmed. RP 20.

In 2016, Blasingame was retained in preparation for McHatton's LRA transition. RP 20. He met with the directors of Community Integrated Services (CIS). RP 20. When asked what he reviewed in terms of whether CIS would be an effective program for McHatton, the State objected. RP 21. The court ruled the line of inquiry was irrelevant because the LRA did not include CIS; it was specific to Aacres. RP 21. "[T]he issue really is whether or not he should be maintained in the LRA or whether it should be revoked." RP 21. The court explained it could not undo what occurred with the LRA when he was released: "I mean, certainly in hindsight any program could be judged and found to be flawed and may not have been ideal," but "[i]f he's not in a program that is meeting his needs or the community needs at this point, then the rest of it really isn't relevant." RP 21.[7]

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[7] As an offer of proof, McHatton's counsel intended to elicit from Dr. Blasingame that the SCC declined to contract with CIS and chose Aacres instead, "which confined Mr. McHatton's legally available options in terms of what he was able to access as a developmentally disabled individual. His options are confined within what the SCC is providing, and so the idea of, well, shouldn't have proposed Aacres. I think it's

Dr. Blasingame testified that McHatton was known to be a high risk and high needs individual when he was placed at Aacres. RP 23. McHatton could not independently manage himself in the community. RP 23-24. In entering his LRA at Aacres, it was agreed that McHatton needed one-to-one staffing, fulfillment of identified treatment needs, and "issues related to medication, sexuality, vocational, all the aspects of life." RP 24-25. It was known at the time of placement that he had difficulties with lying. RP 25. Despite his mental health diagnoses, "[w]ith adequate staffing that were active and actually doing their job, he would be fine. He is a manageable person in the right context and the question is what's that context." RP 25.

Looking at the LRA involving Aacres, "[t]here was not a lot of integrity between what was promised and what was delivered." RP 26. There was no behavioral support plan signed by McHatton. RP 27. No training manual was produced. RP 27. There was no one-to-one staffing inside the residence, which gave him "opportunities to do things without supervision." RP 27. Staff were disengaged while McHatton "spent hours in his room." RP 28. He bought the magazines from a Fred Meyer while

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relevant to have explored what it was the defense proposed and then why that wasn't ultimately where he was placed." RP 22. The State responded that the Department did not propose Aacres or force anyone to choose Aacres, and the court said it understood how the process works. RP 22.

staff looked on. RP 28, 40. Staff did not know what to look out for. RP 40-41. McHatton had no day programming activities. RP 28. There was no vocational programming aside from "one short-term educational bit." RP 28-29. McHatton's day was spent at the house. RP 29.

According to Blasingame, the treatment provided by Dr. van Pul did not meet the standard of practice in the field. RP 39. Dr. van Pul became emotionally caught up in her relationship with McHatton, crossed professional boundaries, and lost objectivity. RP 30. When treatment providers become "overly familiar," they become prone to complacency and leniency. RP 31. Dr. van Pul fell into this category. RP 38. Dr. van Pul minimized McHatton's need for treatment and excused his behavior. RP 31-32, 38-39. She was unwilling to consider that McHatton's past interest in children remained a current interest. RP 40. There was no written treatment plan, which "allowed the case to be incredibly casual." RP 39-40.[8]

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[8] When counsel asked about Hansen as a treatment provider for McHatton, the State objected that the line of inquiry was not relevant to whether the LRA that was in place was in McHatton's best interest and adequate to protect the community. RP 32-33. Counsel argued the line of inquiry was relevant to "whether it's appropriate to revoke this LRA or provide the opportunity for a potential petition to modify. So it's the juxtaposition of the issues identified with Dr. van Pul with what's available with Mr. Hansen, and that option being foreclosed if the state's motion is granted." RP 32. The court sustained the State's objection. RP 33.

The CCO involved in the case was not properly trained. RP 34. Blasingame identified the lack of room searches by the CCO as a huge concern, finding it "incredibly surprising and stunning." RP 33-35, 37-38. The transitional team, meanwhile, was dysfunctional in terms of communication and the tension between Dr. van Pul and the CCO, resulting in no action taken on day programming, vocational activity or community integration. RP 36-38. The dysfunction played a role in McHatton's violation behavior because it placed him in "limbo" while others engaged in a stalemated power struggle. RP 37.

Blasingame agreed McHatton intentionally violated LRA conditions and knew they were violations. RP 47. McHatton did not make much progress in his community-based treatment. RP 47. Blasingame also acknowledged McHatton was responsible for committing the violation, but the LRA needed to be modified, not revoked. RP 41. "The thing he did in this current protracted violation, it's the same things he did at the facility, and he was eight months later released on an LRA. So it's not like this is a new thing. This is a management issue on a client that you expect bad behavior in clients with these kinds of diagnoses." RP 45. When McHatton was placed in the LRA, it was known that he had intellectual disabilities and mentally illnesses that undermine his thinking and make him likely to engage in behavioral mistakes. RP 42. The

accountability system envisioned by the LRA was not delivered in practice. RP 42.

According to Blasingame, McHatton should not be returned to the SCC for treatment because he needed individual treatment in a community setting, as he "needs to be able to integrate into society and to be able to integrate those skills into your lifestyle, into your persona, into your behavioral repertoire." RP 43. Blasingame opined it is not in McHatton's best interest to return to total, indefinite confinement. RP 44. He did not recommend return to Aacres or Dr. van Pul. RP 44. Neither was in his best interest. RP 46. McHatton could be safely managed in the community with appropriate conditions in place. RP 44-45.[9]

McHatton's counsel asked the court to discontinue the placement at Aacres but not revoke the LRA because revocation would restrict his ability to get the kind of placement "we all thought he was going to get when the Court ordered his LRA." RP 58. Counsel asked for "breathing room" to consider modification, which would be foreclosed if revocation occurred. RP 59-60.

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[9] When asked about whether there is a residential setting where McHatton could be safely managed, the State's relevancy objection was sustained. RP 45. As an offer of proof, counsel intended to elicit the availability of the SCTF and CIS as residential placements. RP 45-46.

The court found by a preponderance of the evidence that McHatton violated the LRA order by collecting images of children, writing storylines about them, not disclosing his behavior, and lying to his treatment provider about his masturbation, fantasies and habits. CP 634-36; RP 61-62. The court ordered revocation of the LRA after determining the statutory factors supported this result. CP 636-38; RP 61-63. McHatton appeals from the revocation. CP 639-46.[10]

C. ARGUMENT

1. THE LESS RESTRICTIVE ALTERNATIVE ORDERED BY THE COURT WAS NOT PROPERLY IMPLEMENTED AND THE COURT ERRED IN ORDERING REVOCATION WITHOUT TAKING THIS INTO ACCOUNT.

McHatton has a liberty interest in his less restrictive alternative (LRA) protected by due process. Before that liberty interest can be snatched away, the trial court should be required to consider as relevant the extent to which the requirements of the court-ordered LRA failed to be implemented in the community. The LRA conditions ordered by the court are designed to ensure the LRA will be in the person's best interest and

[10] As part of the same order, the court concluded the State presented prima facie evidence at the show cause stage that McHatton continued to meet the SVP definition and that the LRA was inappropriate, and that McHatton did not demonstrate probable cause for a new trial. CP 637 (CL 9). Per the ruling entered by the Court of Appeals commissioner on June 27, 2019, McHatton seeks discretionary review of that decision in a separate filing under No. 53493-2-II.

adequate to protect the community. When the LRA that is ordered is not the LRA that is delivered, the person on the LRA is left in a perilous position, facing the loss of his liberty interest because the necessary supports are not in place. Consistent with due process, the revocation statute can and should be interpreted to require the court to take into account deficiencies in the LRA that are outside of the LRA recipient's control in determining whether revocation is the solution. The trial court failed to do that here, requiring reversal of the revocation order.

a. Findings must be supported by substantial evidence and the court abuses its discretion when it applies the wrong legal standard.

Revocation decisions are generally reviewed for abuse of discretion. See State v. McCormick, 166 Wn.2d 689, 705-06, 213 P.3d 32 (2009) ("Revocation of a suspended sentence due to violations rests within the discretion of the trial court and will not be disturbed absent an abuse of discretion."); State v. Partee, 141 Wn. App. 355, 361, 170 P.3d 60 (2007) (trial court's decision to revoke a Special Sex Offender Sentencing Alternative reviewed for abuse of discretion); State v. Osman, 168 Wn.2d 632, 640, 229 P.3d 729 (2010) ("Discretion in judicial decisions is most often evidenced by a need for the court to balance or weigh competing interests or factors.").

A trial court's discretionary decision falls outside the range of acceptable choices and will be reversed when "it is manifestly unreasonable, rests on facts unsupported by the record, or was reached by applying the wrong legal standard." State v. Curry, 191 Wn.2d 475, 484, 423 P.3d 179 (2018). The trial court here abused its discretion because it used the wrong legal standard in resolving the revocation issue. As explained below, the court needed to consider and weigh the failure of the LRA to be implemented as required by court order and its effect on McHatton's behavior in deciding whether revocation was warranted. The court treated the point as irrelevant to its decision. The court therefore applied the wrong legal standard in reaching its decision.

The court also abused its discretion in relying on a fact unsupported by the record. Findings of fact must be supported by substantial evidence in the record. In re Estate of Miller, 134 Wn. App. 885, 889, 143 P.3d 315 (2006), review denied, 161 Wn.2d 1003, 166 P.3d 718 (2007). "Substantial evidence" is "evidence sufficient to persuade a fair-minded person of the truth of the asserted premise." State v. Homan, 181 Wn.2d 102, 106, 330 P.3d 182 (2014). McHatton challenges finding of fact 10: "While Dr. Blasingame opined that the Respondent could be safely managed in a community-based LRA, he also agreed that the LRA ordered by the Court was not in the Respondent's best interest and that, as

executed, it had been inadequate to protect the community." CP 635. This finding is unsupported by substantial evidence in two ways.

First, Dr. Blasingame did not testify "the LRA ordered by the Court was not in the Respondent's best interest." Rather, Blasingame testified the LRA ordered by the court, in terms of placement conditions and appropriate treatment, was not executed as envisioned by the court order. RP 24-29, 40-41. Blasingame recognized a significant distinction between the LRA that was ordered and the LRA that was actually provided to McHatton. Regarding Aacres, "[t]here was not a lot of integrity between what was promised and what was delivered." RP 26. Regarding treatment, its delivery fell below professional standards. RP 30-32, 38-40. Dr. van Pul became complacent and lenient and "lost her way." RP 38. Generally, the accountability system envisioned by the LRA was not delivered in practice. RP 42. Blasingame thus testified that, as executed, McHatton's placement at Aacres and his treatment with Dr. van Pul were not in McHatton's best interest. RP 44, 46. McHatton, however, could be safely managed in the community with appropriate conditions in place, i.e., an LRA that was implemented as planned. RP 44-45. The court's finding that Blasingame agreed "the LRA ordered by the Court was not in the Respondent's best interest" is therefore unsupported by substantial evidence. Blasingame essentially opined that

McHatton did not receive the LRA ordered by the court. He received a lesser, corrupted version of the LRA that he was supposed to receive.

Second, Dr. Blasingame did not testify that "as executed, [the LRA] had been inadequate to protect the community." When asked "Is that LRA adequate to protect the community?," Blasingame responded "Well, the community was protected, so I have to give sort of a minimal yes. He doesn't have a new hands-on crime. What he did was a significant risk issue and a potential precursor, but he's not AWOL and that sort of thing, so that's why I'm sort of equivocate." RP 45-46. He was then asked "So you would say that there is some ways in which there were lapses in community protection, but for the most part he did not, in fact, create any victims and didn't have the opportunity?" RP 46. He answered "Correct." RP 46. Blasingame testified the community was protected, despite lapses. He also testified there was no evidence of any effort by McHatton to contact children, no effort to turn fantasy into enactment, and no report of him going AWOL or leaving supervision. RP 50-51. On this record, the court's finding that Blasingame agreed the LRA as executed "had been inadequate to protect the community" is unsupported by substantial evidence.

The court entered two conclusions of law that are challenged on appeal: (1) "The Court considered each of the five factors it is to consider

under RCW 71.09.098(6)(a) and finds that each factor weighs in favor of revocation." (CP 636 (CL 6)); and (2) "The Court finds, after considering the five factors of RCW 71.09.098(6)(a) that the ordered LRA is no longer in Mr. McHatton's best interest and conditions cannot be imposed to adequately protect the community." CP 637 (CL 7). Conclusions of law are reviewed de novo. In re Detention of Belcher, 196 Wn. App. 592, 608, 385 P.3d 174 (2016), aff'd, 189 Wn.2d 280, 399 P.3d 1179 (2017).

As alluded to above, the conclusion that conditions cannot be imposed to adequately protect the community is infirm. Dr. Blasingame's opinion does not support the conclusion. RP 25, 44-45. Although the court was not required to credit his opinion on the matter, the evidence before the court does not support the court's contrary conclusion. Aacres staff chaperoned McHatton on excursions outside the house. RP 27. There was no evidence that McHatton tried to contact children or attempted to leave the house without supervision. RP 45-46, 50-51.

b. The court abused its discretion in failing to take into account the lack of proper implementation of the court-ordered LRA.

Attention is now turned to RCW 71.09.098, the statute governing revocation motions. The State bears "the burden of proving by a preponderance of the evidence that the person has violated or is in violation of the court's conditional release order or that the person is in

need of additional care, monitoring, supervision, or treatment." RCW 71.09.098(5). If the court determines that the State has met its burden,

> the court shall consider the evidence presented by the parties and the following factors relevant to whether continuing the person's conditional release is in the person's best interests or adequate to protect the community:
> (i) The nature of the condition that was violated by the person or that the person was in violation of in the context of the person's criminal history and underlying mental conditions;
> (ii) The degree to which the violation was intentional or grossly negligent;
> (iii) The ability and willingness of the released person to strictly comply with the conditional release order;
> (iv) The degree of progress made by the person in community-based treatment; and
> (v) The risk to the public or particular persons if the conditional release continues under the conditional release order that was violated.

RCW 71.09.098(6)(a).

"Any factor alone, or in combination, shall support the court's determination to revoke the conditional release order." RCW 71.09.098(6)(b).

Statutory interpretation is a question of law reviewed de novo. State v. Sandholm, 184 Wn.2d 726, 736, 364 P.3d 87 (2015). "[S]tatutes that involve a deprivation of liberty must be strictly construed." In re Detention of Marcum, 189 Wn.2d 1, 8, 403 P.3d 16 (2017) (quoting In re Detention of Hawkins, 169 Wn.2d 796, 801, 238 P.3d 1175 (2010)). "Strict construction requires that, 'given a choice between a narrow,

restrictive construction and a broad, more liberal interpretation, we must choose the first option.'" Hawkins, 169 Wn.2d at 801 (quoting Pac. Nw. Annual Conference of United Methodist Church v. Walla Walla County, 82 Wn.2d 138, 141, 508 P.2d 1361 (1973)).

Under a strict construction, the revocation statute requires that the failure of the court-ordered LRA to be properly implemented and its effect on the person's behavior be considered in deciding whether revocation is warranted. Under the revocation statute, the court is tasked with determining whether it is appropriate to revoke the LRA when its recipient fails to live up to its conditions. In the usual case, the LRA requirements are carried out in the real world. In that context, it makes sense to hold the LRA recipient exclusively accountable when a violation occurs, and to decide whether revocation is accordingly warranted.

But where, as here, the LRA ordered by the court is not in fact successfully implemented in the community due to defects in the provision of its requirements, the LRA recipient has not received the LRA he was ordered to receive. In that circumstance, the LRA recipient is set up for failure. McHatton's counsel presented unrebutted evidence that Dr. van Pul's treatment was deficient and that Aacres failed to implement the LRA order. There was no dispute about this. The State agreed Dr. van Pul "did fail in his [sic] duty" and "Aacres is not a correct facility" for McHatton.

RP 55. The statutory factors are broad enough to take shortcomings of the implemented LRA into account.

One factor is "[t]he degree of progress made by the person in community-based treatment." RCW 71.09.098(6)(a)(iv). All agreed McHatton's progress in treatment was lacking. The quality of treatment he received from Dr. van Pul, however, was itself lacking. CP 501-04, 530-31, 539; RP 31-32, 38-40. The reason for lack of progress should be considered. Whether an LRA is in a person's "best interests" involves consideration of whether it adequately serves his treatment needs as an SVP. In re Detention of Bergen, 146 Wn. App. 515, 531, 195 P.3d 529 (2008), review denied, 165 Wn.2d 1041, 205 P.3d 132 (2009). The LRA recipient has no ability control the quality of treatment he receives. If the treatment provider fails to fulfill his or her obligations to provide the treatment envisioned by the LRA order, it is not fair to lay the blame for failure exclusively on the LRA recipient.

Another factor is the nature of the violation. RCW 71.09.098(6)(a)(i). The violation was related to McHatton's mental illness and offense cycle. The court was impressed by the number of images of children and stories about children that were kept in McHatton's room, the duration of the violation, and McHatton's secrecy about the ongoing violation. It's worth remembering that those on LRA are mentally ill and

at risk of reoffense if unconditionally released. Whether an LRA provides "adequate community safety" necessarily assumes an SVP is likely to reoffend. Bergen, 146 Wn. App. at 533. The question is whether the LRA will prevent an otherwise-likely offense, which requires focus "on the plan, not the person." Id. It is for this reason that close monitoring of the LRA recipient and the provision of conditions that support compliance are essential, especially for a mentally disabled person.

Here, Aacres staff permitted McHatton to buy magazines that contained images of children during community outings, in direct violation of the LRA order. CP 518-19, 536-37. Although tasked with reporting violations, Aacres staff never searched the room. CP 197-98, 499, 524, 531, 537-38. The LRA order authorized the CCO to search McHatton's room. CP 32. But there was only a single visual inspection of the room between McHatton's release to Aacres in July 2017 up until the search that led to his arrest in May 2018, leading McHatton to believe he could get away with his behavior. CP 520, 526. No searches were conducted for months on end, allowing McHatton to horde the images and create the stories in the isolation of his room. Further, Aacres was supposed to provide vocational training and day programming activities. CP 195. These conditions were not implemented, which provided fertile ground for the violation behavior to occur and endure. CP 540, 559.

Catalysts for the violation, embedded in a systemic problem with LRA implementation, should be considered in deciding whether revocation is warranted.

Regarding "[t]he ability and willingness of the released person to strictly comply with the conditional release order," RCW 71.09.098(6)(a)(iii), McHatton has the ability to comply when adequate monitoring supports are in place. RP 25. Regarding the degree to which the violation was intentional, RCW 71.09.098(6)(a)(ii), there is no dispute it was intentional, but this too comes with context. The intentional violation was carried out in a situation where McHatton did not receive the supports needed to avoid the behavior. As argued by counsel below, McHatton's culpability needed to be viewed through the prism of his intellectual disability and the negligence of those around him. His vulnerabilities were known before he transitioned to Aacres. CP 508-09.

Regarding "[t]he risk to the public or particular persons if the conditional release continues under the conditional release order that was violated, RCW 71.09.098(6)(a)(v), McHatton's behavior presented no risk to the community. It took place in his room, there were no attempts to access anyone in the community, and he was supervised when he was outside the house, which prevented him from reoffending. Risk comes with any community LRA, which is why external controls are necessary to

safely manage the risk. Risk can be managed when the LRA order is properly carried out.

The court found each of factor favored revocation without treating the poor implementation of the LRA as a relevant consideration informing those factors. CP 636; RP 61-63; RP 21 ("certainly in hindsight any program could be judged and found to be flawed and may not have been ideal," but "[i]f he's not in a program that is meeting his needs or the community needs at this point, then the rest of it really isn't relevant."). The court found the factors supported revocation without applying the correct legal standard.

c. The revocation statute should be interpreted in a manner that complies with due process protection.

Statutes are construed to avoid constitutional problems, if at all possible. State v. Chester, 133 Wn.2d 15, 21, 940 P.2d 1374 (1997). There is no explicit statutory requirement that the court consider that the LRA that was ordered failed to be executed as anticipated before revoking the LRA. But it is possible and necessary to read such a requirement into the statute to avoid the due process problem that arises if a constitutionally protected liberty interest in the LRA is taken away because it was not properly implemented.

"If a statute does not contain all of the process which is due, this court will impose the requirements necessary to satisfy due process. This court has inherent authority to supplement statutory provisions by requiring additional procedures to satisfy the requirements of procedural due process." State v. Thorne, 129 Wn.2d 736, 769, 921 P.2d 514 (1996). As an exercise of inherent judicial power, courts will read a requirement into a statute, even where it is not explicitly present, to save a statute from constitutional infirmity.[11]

The due process clause of the Constitution requires that no person shall be deprived of life, liberty, or property without due process of law.

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[11] See In re Pers. Restraint of Young, 122 Wn.2d 1, 46-47, 857 P.2d 989 (1993) (imposing additional procedures to ensure the SVP statute is fairly enforced); State v. Bao Dinh Dang, 178 Wn.2d 868, 880, 312 P.3d 30 (2013) (interpreting RCW 10.77.190(4), the insanity acquittee statute, to require a dangerousness finding for revocation); In re Detention of Harris, 98 Wn.2d 276, 284-85, 654 P.2d 109 (1982) (while involuntary commitment under RCW 71.05.020 does not explicitly require that evidence of dangerous behavior be recent, statute interpreted as requiring a showing of a substantial risk of physical harm as evidenced by a recent overt act to comport with substantive due process); In re Dependency of K.R., 128 Wn.2d 129, 141-42, 904 P.2d 1132 (1995) (although Washington's termination statute, RCW 13.34.180(1), does not explicitly require evidence of current parental unfitness, statute interpreted to implicitly contain the requirement and thus "comports with the constitutional due process requirement that unfitness be established by clear, cogent, and convincing evidence."); In re Welfare of A.B., 168 Wn.2d 908, 920, 232 P.3d 1104 (2010) (although not explicitly required by statute, holding parent has constitutional due process right not to have relationship with a natural child terminated in the absence of a trial court finding of fact that the parent is currently unfit to parent the child).

U.S. Const. amends. XIV; Wash. Const. art. I, § 3. McHatton has a protected liberty interest in his LRA. In re Detention of Wrathall, 156 Wn. App. 1, 6, 232 P.3d 569 (2010). "Once it is determined that due process applies, the question remains what process is due." Morrissey v. Brewer, 408 U.S. 471, 481, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972). As set forth below, due process required the trial court to consider whether the LRA conditions that were ordered were actually implemented before the LRA can be revoked for lack of compliance.

In determining whether commitment procedures satisfy due process, this Court must balance: (1) the private interest affected, (2) the risk of erroneous deprivation of that interest through existing procedures and the value of additional procedural safeguards, and (3) the governmental interest, including costs and administrative burdens of additional procedures. In re Detention of Morgan, 180 Wn.2d 312, 320-21, 330 P.3d 774 (2014) (citing Mathews v. Eldridge, 424 U.S. 319, 335, 96 S. Ct. 839, 47 L. Ed. 2d 18 (1976)). "The process due depends on what is fair in a particular context." Morgan, 180 Wn.2d at 320.

The Matthews factors support the necessity for the trial court to consider and weigh the extent to which an LRA order was not implemented as envisioned and its effect on the recipient's violation in determining whether revocation is warranted. The first Mathews factor —

the private risk affected — weighs in McHatton's favor because he has a significant interest in his physical liberty. Morgan, 180 Wn.2d at 321.

Second, the premise of McHatton's argument is that an LRA recipient is erroneously deprived of his LRA when the LRA ordered by the court was never implemented in important respects. The value of the proposed safeguard reduces the risk of an erroneous deprivation of the LRA recipient's liberty interest by requiring the court to consider shortcomings in the LRA as implemented in determining whether the draconian outcome of revocation is appropriate. The significance of the violation cannot be determined in a factual vacuum. Relevant facts include the failure to provide LRA conditions that would avoid or mitigate violation behavior.

Third, the burden of the additional procedure is minimal. The court is already required to consider the evidence presented by the parties. RCW 71.09.098(6)(a). The court accordingly allowed McHatton to present evidence regarding the shortcomings in how the LRA was implemented. What was missing was any finding of fact or conclusion of law showing consideration of the lack of implementation of court ordered LRA requirements and its effect on McHatton's actions. The requirement that the court actually treat this as a relevant consideration would burden the government relatively little and foster effective appellate review.

In sum, "[d]ue process requires the government to treat its citizens in a fundamentally fair manner." In re Detention of Ross, 114 Wn. App. 113, 121, 56 P.3d 602 (2002), review denied, 149 Wn.2d 1015, 69 P.3d 875 (2003). It is unfair to revoke a court ordered LRA in which the recipient has a protected liberty interest without considering all the circumstances that led to a violation, including circumstances that are beyond the control of the recipient.

It is clear the trial court, faced with an inadequate LRA as executed, needed to do something. But even where the factors support revocation, the decision to revoke is still discretionary. Nothing in the statute *requires* the trial court to revoke. The court here, had it understood that the poor implementation of the LRA was a relevant consideration, could have chosen not to revoke and instead entertained a petition to modify the LRA at a subsequent hearing.[12] The court did not pursue that option because it labored under a mistaken belief that the poor implementation of the LRA was irrelevant to its decision. The revocation statute can and should be interpreted to require the court to consider the

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[12] Under RCW 71.09.098(7), "[t]he court has authority to modify its conditional release order by substituting a new treatment provider, requiring new housing for the person, or imposing such additional supervision conditions as the court deems appropriate."

extent to which the LRA that was ordered was not the LRA that was implemented.

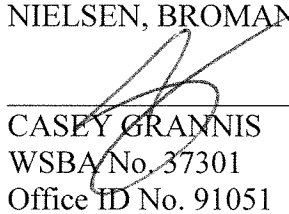
D. CONCLUSION

For the reasons stated, McHatton requests that this Court reverse the trial court's revocation order.

DATED this 11th day of July 2019.

Respectfully submitted

NIELSEN, BROMAN & KOCH, PLLC



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APPENDIX A

01-2-06282-0 51999003 ORRV 09-11-18

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By DEPUTY

STATE OF WASHINGTON
PIERCE COUNTY SUPERIOR COURT

In re the Detention of: MICHAEL MCHATTON, Respondent.	NO. 01-2-06282-0 FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER REVOKING LESS RESTRICTIVE ALTERNATIVE

THIS MATTER came before the Court on August 24, 2018, on the Petitioner's Motion to Revoke this Court's Order releasing the Respondent, MICHAEL MCHATTON, to a Less Restrictive Alternative. The Court also heard argument to determine whether Respondent is entitled to a trial to determine whether he should be unconditionally released or released to a less restrictive alternative. The Petitioner, State of Washington, was represented by Assistant Attorney General ELISE ABRAMSON CONSTANTINE. The Respondent was present and was represented by his counsel, ANDREW MORRISON. The Court heard testimony from Dr. Gerry Blasingame, Mr. McHatton's expert. In reaching its decision, the Court considered the pleadings filed by the parties, the evidence presented at the hearing, the arguments of counsel, and the files and records herein. Based upon this, the Court enters the following Findings of Fact, Conclusions of Law, and Order.

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I. FINDINGS OF FACT

1. On April 15, 2002, Respondent stipulated to civil commitment as a sexually violent predator. Pursuant to that finding, Respondent was committed to the care and custody of the Department of Social and Health Services (DSHS) for control, care and treatment until such time as his condition has so changed that he no longer meets the definition of a sexually violent predator; or conditional release to a less restrictive alternative is in his best interest and conditions can be imposed that would adequately protect the community.

2. On October 12, 2012, this Court entered an Order conditionally releasing the Respondent to the Secure Community Transition Facility-Pierce County (SCTF-PC) with treatment provided by Paula G. van Pul, M.A., a State-Certified Sex Offender Treatment Provider (SOTP).

3. On June 9, 2017, this Court entered an Order conditionally releasing the Respondent to a new LRA at a home managed by Aacres WA, LLC, located at 4108 200th Street E., Spanaway, WA 99387 and continuing treatment with Paula G. van Pul, M.A. This Order superseded the prior LRA Order rendering it void.

3. A copy of the LRA Order and the appendices attached thereto was provided to Mr. McHatton and his attorney.

4. Mr. McHatton read and understood all of the conditions imposed by the Court and outlined in the LRA Order.

5. On April 20, 2018, DSHS submitted a written annual review of Respondent's mental condition to this Court. The annual review submitted by DSHS and relied upon by Petitioner at the show cause hearing provides prima facie evidence that Respondent continues to suffer from a mental abnormality and/or personality disorder which makes him likely to engage in predatory acts of sexual violence if not confined in a secure facility. The annual review also considered whether an LRA was in the Respondent's best interest and whether conditions could be ordered to adequately protect the community. The DSHS annual review concluded that the Respondent's

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current LRA to the home managed by Aacres with treatment with Dr. van Pul was in his best interest and appropriate at this time. At the time the DSHS annual review was completed, the violations detailed below were unknown.

6. On May 4, 2018, Mr. McHatton admitted that he had violated his LRA Order and his Community Corrections Officer (CCO), Marcus Miller, returned Mr. McHatton to total confinement at the Special Commitment Center (SCC). On June 1, 2018, Mr. Miller authored a Notice of Violation describing how Mr. McHatton committed the following violations and providing his evidence:

- Violation 1: Possessing up to 76 images of minor-aged children and items related to minor-aged children from about October 2017, to May 4, 2018. The pictures were mostly of very young children, some of them infants (the Respondent noted one of them as five months old), children's clothing, and diapers. A couple pictures have hand-written notes giving the children in the pictures a name and age. This action violated Special Condition No. 2 that specifically forbade the Respondent from possessing images of children or media directed toward or focused on children without permission from his Transition Team. In addition, this action violated Treatment Condition No. 2 that requires him to follow his treatment contract and plan along with his SOTP's verbal instructions. Dr. van Pul's treatment contract and her verbal discussions with him during treatment were very clear that collecting such images was a violation of his treatment conditions.
- Violation 2: Writing and possessing up to 51 "storylines" about him encountering minors with varying levels of explicitly sexualized content from about October 2017 to May 4, 2018. These storylines were about children of a very young age. This action violated Special Condition No. 2 that specifically forbade the Respondent from possessing media directed toward or focused on children without permission from his Transition Team. In addition, this action violated Treatment Condition No. 2 that requires him to follow his treatment contract and plan along with his SOTP's verbal instructions.

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Dr. van Pul's treatment contract and her verbal discussions with him during treatment were very clear that writing and keeping such materials were a violation of his treatment conditions.

7. Mr. McHatton admitted the violations to Mr. Miller, Dr. van Pul, and to his expert, Dr. Blasingame. He does not dispute to the Court that he committed the violations.

8. Mr. McHatton admitted to Mr. Miller, Dr. van Pul, and Dr. Blasingame that he knew that his actions were violations of his LRA Order at the time he committed them.

9. The Respondent did not disclose these behaviors to or seek help from any member of his Transition Team including his sex offender treatment provider (SOTP) and Community Corrections Officer (CCO). The Respondent lied to his SOTP about his masturbation, fantasies, and habits, and hid the materials he compiled despite him providing regular "check-ins" as part of treatment. Only once he was in a situation where he knew his violations would be imminently discovered did he admit to his CCO that he had been committing violations.

10. During his testimony, the Respondent's expert, Dr. Blasingame, agreed that the Respondent's violations were highly related to his criminal history and underlying mental condition. Dr. Blasingame testified that the Respondent intentionally violated the conditions of his LRA and knew they were violations at the time he committed them. Dr. Blasingame stated that it was clear that there had not been much if any progress made between Dr. van Pul and the Respondent in community-based treatment. While Dr. Blasingame opined that the Respondent could be safely managed in a community-based LRA, he also agreed that the LRA ordered by the Court was not in the Respondent's best interest and that, as executed, it had been inadequate to protect the community.

~~11. DSHS stated in a declaration that they would not agree to house the Respondent at the SCTP.~~

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II. CONCLUSIONS OF LAW

1. The Court has jurisdiction over the parties and subject matter herein.

2. Once the State has moved to revoke an LRA, they must prove by a preponderance of the evidence that the Respondent has violated the Court's LRA Order. If the Court finds the State has proved a violation or violations, the Court shall consider "the following factors relevant to whether continuing the person's conditional release is in the person's best interests or adequate to protect the community:

(i) The nature of the condition that was violated by the person or that the person was in violation of in the context of the person's criminal history and underlying mental conditions;

(ii) The degree to which the violation was intentional or grossly negligent;

(iii) The ability and willingness of the released person to strictly comply with the conditional release order;

(iv) The degree of progress made by the person in community-based treatment; and

(v) The risk to the public or particular persons if the conditional release continues under the conditional release order that was violated.

3. The Court does not have to find all five factors weigh in favor of revocation in order to revoke; one or all may make revocation appropriate.

4. The Court may consider hearsay evidence admissible if the Court finds that it is otherwise reliable. The Court finds the attachments to both the Petitioner and Respondent's pleadings in this matter reliable and considered them as evidence along with the testimony provided during the hearing.

5. The Court finds by a preponderance of evidence that Mr. McHatton violated his LRA Order.

6. The Court considered each of the five factors it is to consider under RCW 71.09.098(6)(a) and finds that each factor weighs in favor of revocation.

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7. The Court finds, after considering the five factors of RCW 71.09.098(6)(a) that the ordered LRA is no longer in Mr. McHatton's best interest and conditions cannot be imposed to adequately protect the community.

8. The DSHS annual review of Respondent's mental condition provides prima facie evidence that Respondent continues to meet the statutory definition of a sexually violent predator.

9. The DSHS annual review concluded that the Respondent's ordered LRA was in his best interest and contained conditions adequate to protect the community. However, the evidence before the Court as part of the revocation hearing, along with the Court's decision at that hearing, provide prima facie evidence that the ordered LRA is not in the Respondent's best interest and conditions cannot be ordered to adequately protect the community. Therefore, the State has met its burden pursuant to RCW 71.09.090(2) and no trial shall be ordered.

10. At the hearing, there was no proposed LRA before the Court other than the LRA the Court ordered on June 09, 2017. ~~While there was some allusion to a potential LRA by the Respondent - that he could be returned to the SCTF with a new treatment provider until a new community LRA could be found - the SCC has not agreed to house the Respondent at the SCTF.~~

11. The Respondent has not proposed a new LRA. Respondent has not demonstrated probable cause for a new trial to be ordered pursuant to RCW 71.09.090(2)(c).

Oral rulings incorporated by reference.

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III. ORDER

IT IS HEREBY ORDERED that Mr. McHatton's release to a Less Restrictive Alternative ordered on June 9, 2017, is **REVOKED**.

IT IS FURTHER ORDERED that Mr. McHatton shall remain confined at the Special Commitment Center on McNeil Island for control, care, and treatment, until further order of the Court.

DATED this 7 day of September, 2018.

THE HONORABLE JAMES ORLANDO
Judge of the Superior Court

Presented by:

ROBERT W. FERGUSON
Attorney General

Approved by phone
ELISE A. CONSTANINE, WSBA #45173
Assistant Attorney General
Attorney for State of Washington

Copy received; Approved as to form:

ANDREW MORRISON, WSBA #39230
Attorney for Respondent

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