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NO. 52493-7

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

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL MCHATTON,

Appellant.

RESPONSE TO BRIEF OF APPELLANT

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I. INTRODUCTION

In 2017, Michael McHatton, an adjudicated sexually violent predator, was conditionally released from total confinement to a less restrictive alternative placement (LRA) in a Spanaway, WA group home called Acres. In 2018, it was discovered that for seven of the ten months he was conditionally released, McHatton had been stockpiling a trove of self-made child pornography that consisted of self-written sexual fantasies and storylines along with corresponding photographs of infants he had collected.

Based on these violations, the State petitioned to revoke McHatton's LRA. It was undisputed at the revocation hearing that McHatton had violated the provisions of the conditional release order, but the parties disagreed as to whether the court should revoke or modify the order. The court ultimately revoked McHatton's LRA because the severity of the intentional violation indicated that McHatton had made no progress in the community-based treatment and put community safety at risk.

On appeal, McHatton claims that the trial court's findings of fact are unsupported by the record. Further, he alleges that the trial court violated his right to due process and abused its discretion by failing to consider alleged shortcomings of the LRA housing and treatment provider. These arguments are meritless. The trial court properly revoked McHatton's conditional release upon finding egregious and intentional violations of the

conditional release order indicating that McHatton posed a serious public safety risk. This Court should affirm.

II. ISSUES PRESENTED

- A. **Where Mchatton's Expert Witness Testified That the Ordered LRA was Not in Mchatton's Best Interest and Caused a "Significant Risk" to the Community, is the Trial Court's Finding of Fact that the LRA was Not in His Best Interest or Adequate to Protect the Community Supported by the Record?**
- B. **Did the Trial Court Properly Apply RCW 71.09.098(6) To Revoke Mchatton's LRA After Finding that Mchatton Made No Progress in Treatment in Light of His Concealment of Self-Made Pornographic Erotic Material About Infants?**
- C. **Did the Statutory LRA Revocation Procedure Violate Mchatton's Due Process Rights When he Benefitted From an Evidentiary Hearing and Expert Testimony, and the Court Considered the Nature of His Alleged Violations in Relation to His Specific Personal Circumstances?**

III. STATEMENT OF THE CASE

- A. **McHatton's Sexual Offense History and Civil Commitment as a Sexually Violent Predator**

From 1991 to 1995, McHatton molested and attempted to molest several young boys and girls between the ages of two and five years old. CP 717-20. In August 1991, he molested and attempted to rape a three-year-old boy and was arrested. CP 718. In October 1991, before the trial stemming from the August arrest, McHatton attempted to molest two brothers who were two and five years old. CP 718. As a result of his actions with the brothers, McHatton was placed in juvenile detention pending trial. CP 718. While in

detention, McHatton was caught cutting out pictures of young children from a magazine. CP 718, 656. In December 1991, McHatton pleaded guilty to Attempted Child Molestation in the First Degree and was sentenced to Special Sex Offender Disposition Alternative (SSODA). CP 718.

In May 1992, while under SSODA supervision, McHatton attempted to molest a five-year-old boy after bribing him with candy. CP 718. In June 1992, McHatton went to the home of the five-year-old victim from the May incident and sat on the boy's lawn with children's toys and disposable diapers. CP 719. In September 1992, McHatton stole from the nurse's office at his school children's clothing and baby magazines. CP 719. In November 1992, McHatton's SSODA was revoked based on those three incidents. CP 718. Also in November 1992, McHatton pleaded guilty to Assault in the Fourth Degree with Sexual Motivation, Criminal Trespass in the Second Degree, and Theft in the Third Degree. CP 719. He received a manifest injustice sentence of 78 weeks, and was in juvenile detention from November 1992 until April 1994. CP 719. While in detention, McHatton admitted to molesting at least 12 other children between the ages of three and four when he was 14 years-old. CP 720. He was ordered to serve 30 weeks of parole after he was released in April 1994. CP 719.

In August 1995, McHatton sexually molested a two-year-old boy in a church. CP 719. In May 1996, he pleaded guilty to Attempted Child

Molestation in the First Degree and in June 1996 he was sentenced to 66 months in prison. CP 719. In 1998, while in the Sex Offender Treatment Program through the Department of Corrections, McHatton received several infractions, including for hiding pictures of young children under his mattress. CP 720.

In April 2002, McHatton stipulated to civil commitment as a sexually violent predator. CP 694. He was placed in the custody of the Department of Social and Health Services at the Special Commitment Center on McNeil Island for control, care, and treatment. CP 694.

In October 2012, following a petition for an LRA that referenced a Department of Social and Health Services annual review recommending him for an LRA, the court entered an order conditionally releasing him to the Department of Social and Health Services Secure Community Transition Facility (SCTF) in Pierce County. CP 853-64.

In September and November 2016, McHatton violated the conditional release order. CP 901-03. First, McHatton was caught searching for photographs of children in magazines and was dishonest about his behavior when confronted. CP 901-03. Second, another resident reported that McHatton had asked him for an adult diaper, and again, McHatton was not forthright about the incident when initially confronted by staff. CP 901-03.

In June 2017, following a Department of Social and Health Services annual review that recommended McHatton be moved to a community-based LRA, the court entered an order conditionally releasing McHatton to a privately run group home in Spanaway, WA called Aacres. CP 672-91. Among the conditions imposed in the order was a directive that he “not possess images of children.” CP 689.

McHatton was unable to comply with the release conditions. In May 2018, during a room check, McHatton’s Community Corrections Officer discovered a trove of photographs and sexual stories that McHatton had been collecting since October 2017. CP 729. McHatton had amassed 76 photographs of children and child-related products, including diapers. CP 729. Most of the children depicted in the photographs appeared to be toddlers and infants, and McHatton identified one of the children as being five months old. CP 729, 733. Additionally, McHatton had written 51 “storylines” regarding his sexually explicit fantasies that corresponded to the images he possessed. CP 729. McHatton admitted that “he alone created the material” and that he created and used it “for the purposes of sexual arousal and gratification.” CP 729. McHatton also admitted that he recognized that this behavior violated his treatment obligations, but that he purposefully was not forthcoming. CP 729.

On June 1, 2018, McHatton's Community Corrections Officer authored a notice of violation detailing these numerous and prolonged violations of the LRA order. CP 386-431, 727-772. The notice stated, "for the majority of his LRA supervision, Mr. McHatton has amassed a disturbing collection of handmade pornography." CP 389. It stated that McHatton "made every effort to obfuscate the truth of his deep rooted deviant fixation on infants and minor aged children." CP 388. Further, it noted that McHatton "only confessed to possession of the pornography when he was faced with the certainty that [the Department of Corrections] would find it." CP 389. At the conclusion of the notice of violation, the Community Corrections Officer recommended that McHatton's LRA be revoked as a result of these violations. CP 730.

B. The LRA Revocation Proceedings

On July 12, 2018, the State filed a petition to revoke McHatton's conditional release, citing the June 1, 2018 violation report. CP 649-71. In its motion, the State argued that McHatton's creating and concealing sexually deviant material, which went on for seven of the ten months of his LRA placement, warranted a revocation of McHatton's conditional release. CP 660, 663-70.

On July 13, 2018, one day after the State moved for revocation, McHatton's treatment provider, Dr. Paula van Pul, filed a petition to modify

his conditional release. CP 482-86. Dr. van Pul conceded that McHatton had violated his release conditions and was “of course, primarily responsible for his violations.” CP 483. She indicated that McHatton “knowingly hid[] his struggles and use of deviant arousal,” and that he knew that possessing and secreting images of young children violated both the conditions of the LRA order and her treatment requirements. CP 483. Nevertheless, Dr. van Pul asked the court to consider modification of the conditional release plan. She opined that it was no longer in McHatton’s best interest to reside at his current LRA, and recommended that he instead be moved back to the SCTF. CP 485-86.

On August 22, 2018, McHatton filed a response to the State’s petition for revocation. CP 491-511. He acknowledged that the only matter before the court at the upcoming hearing would be the State’s motion to revoke, but asked the court to deny the motion and instead follow the recommendations in Dr. van Pul’s modification petition. CP 492. McHatton admitted the violations and his lack of treatment progress, but shifted blame to his group home and its staff. CP 510. Citing no authority, McHatton concluded that it was “appropriate to decline to revoke the LRA and instead consider modifications to the LRA Order” CP 510.

On August 24, 2018, the trial court held a hearing on the State’s motion to revoke McHatton’s LRA. VRP 1, 3-5. At the outset of the

proceedings, McHatton's counsel told the court that it was "important to note that the only motion that is noted for this afternoon is the [S]tate's motion to revoke" and he did not anticipate addressing Dr. van Pul's petition for modification at that hearing. VRP 5-6.

The court admitted into evidence the documentation and affidavits submitted by the parties through their pleadings. VRP 4. Among the documents submitted were the conditional release order at issue, the June 1, 2018 notice of violation (including the photographs and storylines discovered in McHatton's room), and the deposition testimony of Dr. van Pul. CP 512-629, 672-975.

McHatton called Dr. Gerry Blasingame, a psychologist McHatton retained for the hearing, to testify on his behalf. VRP 8-52. Dr. Blasingame cited many reasons he believed McHatton violated the conditional release order. However, he opined that McHatton violated the order due to a lack of room searches, untrained or inappropriately trained staff, "caseload management issues," and a lack of effort at providing vocational training or community integration for McHatton. VRP 33-38. Dr. Blasingame also believed that Dr. van Pul "became complacent and lenient" in her treatment with McHatton. VRP 38. While Dr. Blasingame did testify that the violations were McHatton's responsibility, he qualified that by stating that McHatton's "intellectual disabilities and mental illnesses . . . undermine[d]

his thinking and [made] him likely to make these kinds of behavioral mistakes.” VRP 42.

Nonetheless, Dr. Blasingame agreed that placement at the Aacres LRA was not in McHatton’s best interest. VRP 46. Dr. Blasingame acknowledged that McHatton’s behavior “was a significant risk issue and a potential precursor” to sexual re-offense. VRP 46-47. Dr. Blasingame stated that McHatton “[a]bsolutely” violated the conditions of his conditional release order, and did so “intentionally” and knowing that the behavior was a violation. VRP 47. Dr. Blasingame found that McHatton did not “make much progress in his community-based treatment” because he “knew he was required to discuss his sexual urges” but did not. VRP 47. The violations “were intimately connected with his mental abnormality” and “were tied fairly close[ly] to his criminal history.” VRP 48. He also suggested that, had Dr. van Pul been less lenient or had there been more room searches, that “[p]erhaps” it would have “just led to an earlier violation.” VRP 52-53.

At the conclusion of the hearing, the court revoked McHatton’s conditional release. VRP 61-63. The trial court found that the State had met its burden to prove by a preponderance of the evidence that release conditions were violated, and determined, based on the required factors to

consider outlined in RCW 71.09.098(6), that revocation was warranted.

VRP 61. The trial court explained:

The nature of the condition that was violated in this case in terms of Mr. McHatton's criminal history and his underlying mental conditions shows that he was creating, stockpiling, using photos of young children [and] infants, that he was collecting from magazines and other materials to use for masturbatory purposes. He was writing and authoring pornographic erotic material that he would also use outlining what his fantasies were, what he would like to do with certain children in a degree that is extremely concerning, and I think clearly indicates that he's made no progress in his sex offender treatment to the extent that everyone believed that he had. I think his violation was intentional. . . I think everyone up to the point of this violation believed that he had made significant progress in treatment, . . . [b]ut I think that was an ill-conceived idea that he had made progress. I think Mr. McHatton was very coy with Dr. van Pul, and whether or not she gave him more leniency than she should have I think is a different issue. . . [H]e manipulated his treatment provider into believing that he was complying when, in fact, he wasn't. . . I do think that he put the public at significant risk. I also believe that continuing him in his current treatment is not in his best interest or in the public's best interest, so I do believe that it is appropriate to revoke his [LRA].

VRP 61-63.

The trial court also declined McHatton's request for the court to consider modification of the LRA, explaining:

I don't think it's as simple as just shifting gears and saying I'm going to substitute this new [LRA], because there are a number of things that have to go into even creating a new [LRA] order, including having DOC review and render an opinion regarding any potential placement to take a look at that, evaluating the treatment plan and treatment goals that

Mr. McHatton would have. All of those things still need to be not only addressed by the Court, but also vetted by the Department of Corrections prior to submitting a proposed LRA placement, so I will revoke him to the Special Commitment Center.

VRP 63.

On September 7, 2018, the court issued its findings of facts, conclusions of law, and order revoking the LRA. CP 632-38. The court's oral findings and ruling were incorporated by reference into the written order. CP 637. The court concluded that all five RCW 71.09.098(6) factors it is required to consider "weigh[ed] in favor of revocation." CP 636.

McHatton appeals the revocation order.

IV. ARGUMENT

The trial court properly relied on evidence in the record to support its decision to revoke McHatton's conditional release and appropriately considered the required statutory factors to come to the conclusion that revocation was warranted. Specifically, the trial court found that McHatton had egregiously violated the terms of the conditional release order by creating pornography from collected photographs of infants and authoring sexually explicit storylines to correspond to the images. VRP 61-63; CP 632-38. The parties did not dispute that these violations occurred and were intentional. CP 483. The court also found that concealing his deviancy from

his treatment team showed McHatton had made no progress in treatment.
VRP 61-63; CP 632-38.

Based on all the evidence at the hearing, including the testimony of McHatton's expert witness, the court properly concluded that for McHatton to remain at the LRA would create a risk to the community and determined that revocation was necessary and appropriate. Thus, the trial court did not abuse its discretion in revoking McHatton's LRA, and McHatton was afforded the due process protections delineated by the revocation statute.

A. RCW 71.09.098 Governs the LRA Revocation Process.

RCW 71.09.098 sets forth the procedure and standards to be applied during an LRA revocation hearing. The process is initiated when the conditionally released person's housing or treatment provider, supervising corrections officer, prosecutor, or the Department of Social and Health Services Secretary's designee "petition the court for an immediate hearing for the purpose of revoking or modifying the terms of the person's conditional release." RCW 71.09.098(1). As was the case here, the person may be taken into custody and returned to the Special Commitment Center pending the outcome of the hearing. RCW 71.09.098(2), (3)(a). Prior to the hearing, either the person or the prosecutor may request an immediate mental examination be conducted by a "qualified expert or professional person." RCW 71.09.098(4).

The involved prosecuting agency is granted the authority to “determin[e] whether to proceed with revocation or modification of the conditional release order.” RCW 71.09.098(5)(a). At the hearing, “[t]he state shall bear 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)(c). Proof by a preponderance of the evidence establishes that “the proposition at issue is more probably true than not true.” *Mohr v. Grant*, 153 Wn.2d 812, 822, 108 P.3d 768, 773 (2005). Hearsay is admissible if the court finds that it is otherwise reliable. RCW 71.09.098(5)(b).

If the court finds the state met this burden, and the issue before the court is whether to revoke the LRA, the court must consider the evidence presented by the parties and apply “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)(i)-(v).

Any single factor or any combination of the factors can be sufficient support for a court's decision to revoke an LRA. RCW 71.09.098(6)(b).

Here, two parties independently "petitioned" the court for a hearing concerning McHatton's LRA: the prosecuting agency and McHatton's treatment provider. CP 482-86, 649-71. Ultimately, given the nature and extent of McHatton's violations, the prosecution chose to proceed with a revocation request. McHatton retained an expert, Dr. Gerry Blasingame, who testified at the hearing. VRP 8-52; CP 632. The trial court considered the evidence presented, found that the State proved McHatton violated the LRA conditions, determined that all five of the RCW 71.09.098(6) factors implicated that revocation was warranted, and revoked the LRA. VRP 61-63.

B. McHatton's LRA was Properly Revoked Given the Ample and Undisputed Evidence that He Intentionally Violated the Conditional Release Order By Secreting Self-Made Child Pornography and Repeatedly Lying to His Treatment Providers.

McHatton claims that the court erred by relying on "a fact unsupported by the record" and therefore abused its discretion in revoking his conditional release. Br. at 17. Specifically, McHatton maintains that the

trial court's tenth finding of fact mischaracterized the record. Br. 16-20.¹ McHatton argues this finding is flawed because, he claims, Dr. Blasingame never testified that the court ordered LRA was not in McHatton's best interest or adequate to protect the community. Br. 17-19. McHatton's claim is without merit.

"A trial court abuses its discretion only where the trial court's decision is manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *State v. Miller*, 159 Wn. App. 911, 918, 247 P.3d 457 (2011) (internal quotations and citation omitted). Here, there was nothing manifestly unreasonable about the court's findings of fact, as they were based on substantial evidence and testimony presented at the hearing.

Here, it is undisputed that McHatton intentionally violated the conditions of his LRA order by secreting a trove of self-made child pornography. CP 483, 663-70. This behavior continued his lengthy history of molesting young children and creating masturbatory material using photographs of infants. CP 656, 718-20, 901-03. In addition, he continued this behavior while under the strict supervision inherent in the LRA placement. CP 727. He began collecting the images and writing the

¹ McHatton takes issue with the final sentence of finding of fact 10 which states: "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." Br. 17-20; CP 635.

storylines only three months after arriving at his community-based group home. CP 729. He hid his deviancy from his treatment team for seven months, and only confessed once confronted. *Id.*

For these and other reasons, Dr. Blasingame testified that McHatton made little to no progress in treatment while on the LRA. VRP 47. He noted that even if McHatton's supervision had been intensified, this added scrutiny merely would have resulted in an earlier violation. VRP 52-53. Relevant to this appeal, when asked if the placement was in McHatton's best interest, Dr. Blasingame unequivocally opined that it was not. VRP 46. On cross-examination, the State asked, "*The LRA as ordered by this Court to that placement with that therapist, is that in Mr. McHatton's best interest?*" and Dr. Blasingame replied, "No." *Id.* (emphasis added). He did not qualify or expand on that answer. *Id.*

When Dr. Blasingame was asked if the LRA was adequate to protect the community, he testified that his answer was a "minimal yes" since there was no "new hands-on crime." VRP 46. He then said his answer was "equivocate" since McHatton was not "AWOL." VRP 47. But, Dr. Blasingame testified that what McHatton did to violate the order "was a significant risk issue and a potential precursor" to reoffending. VRP 47.

Given the longevity and severity of the violation, which mirrored his history of sexual deviance, the court correctly found substantial evidence that

the ordered LRA was not in McHatton's best interest or adequate to protect the community. CP 635-37. That evidence included testimony from Dr. Blasingame that McHatton's violating behavior was a "significant risk" and "potential precursor" to new sexual offending if his placement on the LRA were to continue. VRP 47. Thus, the court's finding that Dr. Blasingame's testimony indicated that McHatton's LRA was not adequate to protect the community was not an abuse of discretion or mischaracterization of the evidence at the hearing. His claims should be denied.

C. The Trial Court Appropriately Considered the Five Statutory Factors Governing LRA Revocation and Properly Concluded That the Factors Weighed in Favor of Revoking Mchatton's Conditional Release.

At a revocation hearing, the court must review the evidence through a two-pronged analysis. First, the State bears the burden to prove by a preponderance of the evidence that a sexually violent predator violated the terms and conditions of the LRA order. RCW 71.09.098(5)(c). Next, if the violation is proven and the State is seeking revocation, the court considers the factors enumerated in RCW 71.09.098(6)(a)(i)-(v), delineated above in section IV(A). Any of these factors, separately or in combination, is sufficient to support the court's decision to revoke the LRA. RCW 71.09.098(6)(b).

At the hearing, the parties agreed that McHatton had intentionally violated the terms and conditions of the LRA order. CP 483; *see* RCW 71.09.098(5)(c). Therefore, the only issue for the court to decide was whether the five factors weighed in favor of revocation. RCW 71.09.098(6).

The State argued that all five factors weighed in favor of revoking McHatton's LRA. CP 664. McHatton suggested that his violating behavior implicated the five factors, but that the court should additionally consider his low IQ and the failures of the LRA, and instead consider modifying the order. CP 508-10.

At the close of the hearing, the court concluded that the evidence indicated all five factors had been met. CP 636. In particular, the court found it "extremely concerning" that McHatton was stockpiling photographs and creating "pornographic erotic material" about young children in the same ways he had done in the past, and thus the nature of the violation was intertwined with McHatton's criminal history and underlying mental conditions. VRP 61-63. In regard to his willingness to comply with the order, the court found that McHatton "manipulated his treatment provider into believing that he was complying when, in fact, he was[not]." VRP 62-63.

Additionally, the fact that the violating behavior went on for the majority of the time McHatton was on his LRA, combined with McHatton's lies about his behavior to his treatment provider, indicated to the court that

McHatton had not made any meaningful advancements in his treatment. VRP 62-63. Based on the evidence of the violation and Dr. Blasingame's testimony that there had been a "significant risk" to the community, the court concluded that McHatton "put the public at significant risk." VRP 63. Given the totality of the evidence presented, viewed in light of McHatton's history, the court therefore properly found that revocation was appropriate.

D. The RCW 71.09.098 LRA Revocation Procedure Satisfies Due Process.

McHatton argues that the trial court violated his right to due process by failing to consider the LRA's alleged shortcomings. Yet, McHatton provides no evidence that the court failed to do so in this case. Nevertheless, RCW 71.09.098 is constructed to require the court to consider the context of a violation, which the court did in reviewing the five factors as they applied to McHatton's violation. That the trial court focused on McHatton's intentional deceit and the flagrancy of the violation instead of the lack of room inspections or vocational training does not indicate that the trial court failed to consider the context in which the violation occurred.

For the first time on appeal, McHatton argues that the court applied the wrong legal standard by not considering the alleged failings of his LRA treatment team. However, "[a] trial court's authority is limited to that found in the statute," and the statute does not require—explicitly or implicitly—

that the court consider the failures of the LRA in order to find that the violations required revocation. *In re Detention of Skinner*, 122 Wn. App. 620, 632, 94 P.3d 981 (2004). McHatton's due process arguments are without merit.

1. The LRA Revocation Procedure Is Unambiguous and Accounts for the Case Specific Circumstances of the Violation, the Person, and the Release Conditions.

“Statutory interpretation is a question of law reviewed de novo.” *In re Det. of Hawkins*, 169 Wn.2d 796, 800, 238 P.3d 1175, 1177 (2010). Moreover, “statutes that involve a deprivation of liberty must be strictly construed.” *Matter of Det. of Marcum*, 189 Wn.2d 1, 8, 403 P.3d 16, 19 (2017) (internal quotations and citation omitted). As an RCW 71.09.098 hearing may result in the revocation of a sexually violent predator's conditional release and return to total confinement, this Court must “narrowly construe” the statute. *Id.* “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 (internal quotations and citation omitted).

Statutory interpretation first requires this Court to review the statute's plain language, and “[i]f the plain language is subject to only one interpretation, [the Court's] inquiry is at an end.” *In re Det. of Martin*, 163 Wn.2d 501, 508, 182 P.3d 951, 954 (2008). Here, the statute explicitly and

plainly states that at a revocation hearing, the court “shall” consider the five factors delineated above. RCW 71.09.098(6)(a).

In reviewing the statute, the “fundamental objective is to ascertain and carry out the legislature’s intent.” *Hawkins*, 169 Wn.2d at 801. Here, the plain language of the statute allows the court to consider “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.” RCW 71.09.098(6)(a)(i). It also specifically permits the court to consider whether the violation was intentional or not. RCW 71.09.098(6)(a)(ii). The clear implication of this provision is that violations that occur for reasons outside the person’s control should be treated differently than those that are intentionally committed. Although consideration of alleged failings of the housing or treatment providers is not specifically listed among the factors, such circumstances could be properly included in an analysis of “the nature of the violation.”

Thus, these statutory factors protect against an erroneous deprivation of McHatton’s liberty interest while also safeguarding the government’s interest in protecting the public from an adjudicated sexually violent predator.

2. The LRA Revocation Procedures Satisfy Due Process.

“Washington’s due process clause does not afford broader protection than that given by the Fourteenth Amendment to the United States Constitution.” *State v. McCormick*, 166 Wn.2d 689, 699, 213 P.3d 32, 36 (2009). Regarding due process challenges to the sexually violent predator statute, courts recognize “that the State has a compelling interest both in treating sex predators and protecting society from their actions.” *In re Det. of Bergen*, 146 Wn. App. 515, 527, 195 P.3d 529 (2008), *citing In re Young*, 122 Wn.2d 1, 26, 857 P.2d 989 (1993).

“The threshold question in any due process challenge is whether there has been a deprivation of a protected interest in life, liberty, or property.” *Bergen*, 146 Wn. App. at 524. Indeed, “the due process clause does not create a liberty interest in a conditional release” because sexually violent predators do “not have a liberty interest in being released before a court determines that the [sexually violent predator] is entitled to such release.” *Id.* at 526. Yet, “a [sexually violent predator] on conditional release enjoys liberty that, while ‘indeterminate,’ requires at least minimal due process protections in the face of revocation.” *In re Wrathall*, 156 Wn. App. 1, 6-7, 232 P.3d 569 (2015).

The revocation procedures in RCW 71.09.098 satisfy due process. In considering this, courts apply the *Mathews* test. Under *Mathews*, the

court balances three factors: “[f]irst, the private interest that will be affected by the official action; second, 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, finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.” *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893 (1976).

Regarding the first *Mathews* factor, it is undisputed that McHatton has a liberty interest in his LRA. However, he is a previously adjudicated sexually violent predator, and therefore has a reduced liberty interest given his status as such. *See Wrathall*, 156 Wn. App. at 6. As a result of the adjudication, a sexually violent predator is not entitled to conditional release unless and until he demonstrates through treatment progress that an LRA is in his best interest and conditions can be imposed that would adequately protect the community. *See* RCW 71.09.090(4)(b)(ii).

Under the second *Mathews* factor, there is little risk of erroneous deprivation of McHatton’s liberty interest because of the safeguards built into the sexually violent predator act and the revocation procedures. *See State v. McCuiston*, 174 Wn.2d 369, 393, 275 P.3d 1092 (2012) (the risk of erroneous deprivation of liberty is low “[g]iven the extensive procedural

safeguards in chapter 71.09 RCW”). “Robust statutory guaranties in chapter 71.09 RCW provide substantial protection against an erroneous deprivation of liberty.” *In re Det. of Morgan*, 180 Wash. 2d 312, 321, 330 P.3d 774, 779 (2014), citing *In re Stout*, 159 Wn.2d 357, 370-71, 150 P.3d 86 (2007). There is a minimal risk of erroneously depriving an adjudicated sexually violent predator of his liberty under this factor because these individuals have a comprehensive set of rights already built into the statute. *See Stout*, 159 Wn.3d at 370.

Moreover, in 2009, the legislature was careful to add additional due process protections in the revocation procedure by requiring the trial court to consider five statutory factors that account for the specific circumstances of the individual under review. The statute specifies that before the court may revoke a conditional release, it consider the nature of the violation in the context of the person’s criminal history, the intentionality of the conduct, whether the person is even capable of complying with the order, how much progress that person had made before the violation, and what risk to the public was created by the violation. RCW 71.09.098(6)(a).

This comprehensive list affords sexually violent predators protection from erroneous deprivation of their liberty by requiring an open and complete discussion of the severity of the violation as well as the appropriate consequence. *See Stout*, 159 Wn.3d at 370. Moreover, if a

conditional release order is revoked, the “the State [is required to] justify continued incarceration through an annual review.” *McCouston*, 174 Wash.2d at 388, *citing* RCW 71.09.070. And, the sexually violent predator may again petition for an LRA alternative upon a showing of treatment progress. RCW 71.09.098(8).

Contrary to McHatton’s claim, due process does not require that the court read additional requirements into this extensive statute. Instead, by requiring the procedural safeguard that a court vet the *nature* of the violation and *ability* of the person to progress in treatment, in the context of the person’s underlying mental conditions, RCW 71.09.098 satisfies due process. *See Mathews*, 424 U.S. at 335.

For example, where a sexually violent predator released to an LRA violates the court’s order but had made some progress in treatment before his violation, the court recognizes the potential for the sexually violent predator to continue to improve in treatment, and therefore revocation may not be appropriate in that context. *See* RCW 71.09.098(6)(a)(iv). This statutory consideration affords due process by requiring the court to consider the sexually violent predator’s best interest in the context of his treatment progress before determining if revocation is the best solution.

However, in a situation where, as here, the conditionally released person proactively lies and hides his deviance, he cannot merely shift the

blame to the treatment team in an effort to circumvent the statutory considerations for revocation. It is incumbent upon the person to make continued efforts at treatment—including acting with transparency—while conditionally released. McHatton admitted to intentionally violating the LRA order for the majority of the time he was at the LRA, evidencing that he made no effort in his treatment. CP 483, 729. The trial court found that McHatton manipulated his treatment team into believing that he had made progress instead of “seek[ing] help from any member of his” treatment team. VRP 62; CP 635. Therefore, it was impossible that McHatton had actually made treatment progress, so to remain in that LRA was not in his best interest. *See* VRP 62-63.

Moreover, the statute prevents the erroneous deprivation of the sexually violent predator’s liberty interest by requiring the court to review the person’s willingness and ability to comply with the LRA order. RCW 71.09.098(6)(a)(iii); *see Mathews*, 424 U.S. at 335. Where a sexually violent predator is willing to complying with a directive, but for reasons entirely out of his control, cannot (*e.g.*, the GPS monitoring device breaks and the individual appears to be in violation despite all efforts to comply), then revocation may not be warranted. *See* RCW 71.09.098(6)(iii).

However, by intentionally and repeatedly violating the order not to possess photographs of children, McHatton demonstrated that he was

unwilling to comply with the LRA directives. For the first three months at the LRA, McHatton abided by the rules—demonstrating that he was capable of complying. But, when it was apparent to him that he might be able to evade the rules undetected, McHatton began stashing photographs and writing pornography. CP 729. Therefore, McHatton alone was responsible for his choice to violate the LRA order, and cannot now claim that due process entitled him to remain in an LRA where he was uninterested in abiding by its rules.

Regarding the third *Mathews* factor, Washington courts have long recognized the government's interest in civilly committing and treating persons found to meet the statutory sexually violent predator definition. *See Young*, 122 Wn.2d at 26 (“it is irrefutable that the State has a compelling interest both in treating sex predators and protecting society from their actions”). This factor weighs heavily in favor of the State's interest in protecting the public from a conditionally released sexually violent predator. This is evidenced by the legislature's prerequisite that a sexually violent predator not be released to an LRA until he can demonstrate that conditions can be imposed that would adequately protect the community and the that the court consider, among other factors, the risk to the public during a revocation hearing. RCW 71.09.090(2)(a)(ii), RCW 71.09.098(6)(a)(v).

Therefore, this Court should decline to add additional due process rights to the sexually violent predator revocation statute. McHatton, a conditionally released sexually violent predator, was afforded the due process rights delineated by the legislature's list of five factors. Had McHatton made efforts to abide by the order, had he made any progress in treatment, or had his violation been trivial, the trial court may not have decided to revoke his LRA. Yet, McHatton's egregious violation was intentional, and instead of making any effort to abide by the order, he lied about it to his treatment team. By hiding his deviance, which transpired for the majority of the time he was released to the LRA, he was unable to make any treatment progress. He cannot now claim that due process required the court to consider that the blame for his failings be shared with the treatment team to whom he lied and that due process entitled him to continue at an LRA where he had no intention of abiding by the rules.

3. The Trial Court Correctly Declined to Place McHatton in a New, Uninvestigated LRA.

Finally, McHatton maintains that the trial court should have declined to revoke his conditional release and instead entertained his request to modify the LRA. Br. at 30. However, this argument ignores the fact that the trial court was statutorily barred from hearing the modification request, and ignores McHatton's assertion at the hearing that it was "important to

note that the only motion that is noted for this afternoon is the [S]tate's motion to revoke" VRP at 5-6.

Procedurally, a modification of the LRA was not legally possible because under the statute, it is the State who has the discretion to determine "whether to proceed with revocation or modification of the conditional release order." RCW 71.09.098(5)(a). Although the statute allows treatment providers, like Dr. van Pul, to petition for an immediate hearing, treatment providers are not permitted to intervene as a party to the hearing. RCW 71.09.098(1).

Indeed, even if somehow the court could have entertained McHatton's request to modify the LRA, the court below correctly acknowledged that it was not as simple as substituting one LRA for another. VRP 63. The modification would have to be vetted, reviewed, and approved by the Department of Corrections and the Department of Social and Human Services before the court could impose a new order. VRP 63; *see also* RCW 71.09.092.

Since the statute requires the prosecuting authority to decide whether to proceed with modification or revocation, and revocation was chosen here, the issue of modification was not before the trial court. However, once a conditional release is revoked, a person who makes treatment progress is entitled to petition for conditional release once again. RCW 71.09.090(2); RCW 71.09.098(8).

McHatton's request for a different LRA was premature, and not properly before the court. Thus, it was properly denied.

V. CONCLUSION

For the foregoing reasons, the State requests that this Court affirm the trial court's order revoking McHatton's conditional release.

RESPECTFULLY SUBMITTED this 24th day of July, 2019.

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NO. 52493-7-II

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

In re the Detention of:

MICHAEL MCHATTON,

Appellant.

DECLARATION OF
SERVICE

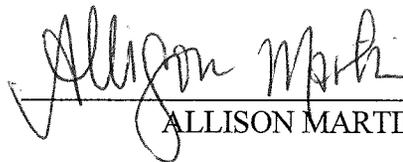
I, Allison Martin, declare as follows:

On July 24, 2019, I sent via electronic mail, per service agreement,
a true and correct copy of the Response to Brief of Appellant and
Declaration of Service, addressed as follows:

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

DATED this 24th day of July, 2019, at Seattle, Washington.


ALLISON MARTIN

WASHINGTON STATE ATTORNEY GENERAL'S OFFICE - CRIMINAL JUSTICE DIVISION

July 24, 2019 - 3:31 PM

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