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NO. 52493-7

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

MICHAEL MCHATTON,

Respondent,

v.

STATE OF WASHINGTON,

Appellant.

SUPPLEMENTAL BRIEF OF RESPONDENT

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I. INTRODUCTION

An order revoking a sexually violent predator's conditional release to a less restrictive alternative placement ("LRA") is not appealable as a matter of right under Rule of Appellate Procedure (RAP) 2.2(a). An LRA revocation order is not an "order of commitment" under RAP 2.2(a)(8) because that provision applies only to orders of commitment following a full evidentiary hearing where an individual is adjudicated to be a sexually violent predator. An LRA revocation order is also not a "final order after judgment" under RAP 2.2(a)(13) because the trial court retains jurisdiction over the sexually violent predator until the person's unconditional release and an LRA revocation order "achieves no final disposition of the sexually violent predator." *See In re Petersen*, 138 Wn.2d 70, 88, 980 P.2d 1204 (1999). Further, none of the other provisions enumerated in RAP 2.2(a) apply. Accordingly, this Court should conclude that an LRA revocation order is subject only to discretionary review under RAP 2.3(b).

II. ISSUE PRESENTED FOR REVIEW

> Where an LRA revocation order neither alters a sexually violent predator's commitment status nor impacts the court's continuing jurisdiction over the case, is a revocation order appealable as a commitment order or final judgment or is it more appropriately appealed through a motion for discretionary review?

III. RELEVANT FACTS

This Court can obtain a full factual history of this case in the State's Response to Brief of Appellant, filed on July 24, 2019. The facts relevant to the

revocation of McHatton's LRA are set forth below.

In 2002, McHatton stipulated to civil commitment as a sexually violent predator, and the trial court entered an order committing him to the custody of the Department of Social and Health Services at the Special Commitment Center for control, care, and treatment. CP 26. By statute, the trial court retains jurisdiction over McHatton until he is unconditionally discharged. RCW 71.09.090(5).

Following McHatton's civil commitment, the Department conducted annual evaluations of McHatton's mental condition as required by RCW 71.09.070. *See* CP 26-27, 45-75, 227-60, 304-38. In 2012, following an annual evaluation, the trial court conditionally released McHatton from the Special Commitment Center to a Secure Community Transition Facility. *Id.* at 26, 853-64. While conditionally release, McHatton remained a "sexually violent predator." *Id*. at 26, 854.

The Department continued to conduct annual evaluations while McHatton was on conditional release. *See* CP 45-75, 227-60, 304-38. In 2017, following an annual review that opined that a different LRA would be appropriate for McHatton, the trial court entered an order conditionally releasing McHatton to a different LRA. *Id.* at 25-45-75. Among the many stringent conditions imposed were that McHatton was subject to a curfew, was not permitted to leave his residence without the permission of his Community Corrections Officer, wearing a GPS monitor, and an accompanying trained chaperone to escort him. *Id*. at 31-

32, 34. McHatton was also required to engage in sex offender treatment and to submit to random searches of his person, bedroom, computer, cellphone, and personal property. *Id*. at 32, 34-35. Additionally, the LRA order prohibited McHatton from possessing any sexually explicit materials. *Id*. at 37-38.

McHatton admitted that he had violated his LRA order by possessing 71 photographs of and 51 sexually explicit writings about very young children, including infants. CP 388, 392-431. McHatton created these materials for the sole purpose of sexual gratification. *Id.* McHatton further admitted that he used these items to masturbate at least two to three times every week. *Id.* He acknowledged his obligation to report deviant masturbation to his treatment provider and admitted that he purposefully failed to report this behavior. *Id.*

The Department of Corrections submitted a Notice of Violation to the trial court detailing these violations and recommending revocation of McHatton's LRA. CP 386-90. The notice stated, "[F]or the majority of his LRA supervision, Mr. McHatton has amassed a disturbing collection of handmade pornography." *Id.* at 389. It stated that McHatton "made every effort to obfuscate the truth of his deep rooted deviant fixation on infants and minor aged children." *Id.* at 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." *Id.* at 389.

Based on these violations, the State petitioned to revoke McHatton's LRA. *Id.* at 649-71. The revocation hearing took place over the course of one day, and with the exception of one testifying witness, the parties relied on their pleadings as evidence to support their arguments. *Id*. Both parties and the expert who testified on behalf of McHatton all agreed that McHatton's LRA placement was not appropriate for him. *Id*. at 57. At the conclusion of the hearing, the trial court found that McHatton violated the terms of his LRA and concluded that revocation was warranted. CP 634-37. Accordingly, it entered an order revoking McHatton's LRA placement and ordering his continued commitment at the Special Commitment Center. *Id.* at 638, 646.

McHatton filed a notice of appeal of the order revoking his LRA. CP 639. Thereafter, the State moved to redesignate the notice of appeal as a notice for discretionary review, arguing that the order was not appealable under RAP 2.2(a). *See* Respondent's Mot. For Redesignation. The Commissioner agreed that the order was not a "commitment order" under RAP 2.2(a)(8), but it concluded that the order was a "final order after judgment" under RAP 2.2(a)(13) and was appealable as a matter of right. The State subsequently moved this Court to modify the Commissioner's ruling. This Court granted the State's motion to modify and requested supplemental briefing on the appealability of an LRA revocation order. *See* Order Granting Respondent's Mot. to Modify.

McHatton submitted his supplemental brief on November 27, 2019.[1]

IV. ARGUMENT

A. RAP 2.2(a) Provides an Exclusive List of Decisions That Are Appealable, and It Does Not Include LRA Revocation Orders

RAP 2.2(a) provides an exclusive list of decisions that are appealable. Under that rule, a party may appeal from *only* the following superior court decisions: (1) Final Judgment; (2) (Reserved.); (3) Decision Determining Action; (4) Order of Public Use and Necessity; (5) Juvenile Court Disposition; (6) Termination of All Parental Rights; (7) Order of Incompetency; (8) Order of Commitment; (9) Order on Motion for New Trial or Amendment of Judgment; (10) Order on Motion for Vacation of Judgment; (11) Order on Motion for Arrest of Judgment; (12) Order Denying Motion to Vacate Order of Arrest of a Person; or (13) Final Order after Judgment.

This list does not include LRA revocation orders. This omission is significant. "Failure to mention a particular proceeding in RAP 2.2(a) indicates this court's intent that the matter be reviewable solely under the discretionary review guidelines of RAP 2.3." *In re Dependency of Chubb*, 112 Wn.2d 719, 721, 773 P.2d 851 (1989). Thus, the omission of LRA revocation orders from RAP 2.2(a) indicates that the Court intended for such orders to be reviewable solely at the Court's discretion.

[1] McHatton's supplemental brief appears to be written as an answer to the State's Motion to Modify, as it responds to arguments made by the State in that motion.

B. An LRA Revocation Order Is Not an "Order of Commitment" Under RAP 2.2(a)(8)

An order revoking an LRA placement is not an "order of commitment" under RAP 2.2(a)(8). That provision applies only to orders of commitment following a full evidentiary hearing where an individual is adjudicated to be a sexually violent predator. By contrast, a conditionally released sexually violent predator has already been committed as such, and a revocation order simply revokes the sexually violent predator's conditional release and returns him to confinement at the Special Commitment Center, where he is able to petition for conditional release in the future. A revocation order does not re-commit the individual as a sexually violent predator because conditional release does not alter the individual's status as a sexually violent predator. Accordingly, McHatton's reliance on this provision is misguided.

The Supreme Court has repeatedly held that only *initial* commitment orders fall under RAP 2.2(a)(8). In 1994, the Supreme Court amended RAP 2.2(a)(8) to allow for direct appeals from commitment orders "after a sexual predator hearing." *Petersen*, 138 Wn.2d at 85. The Court reasoned that there should be a right to appeal such an order "[b]ecause it can result in a person's indefinite commitment." *Id.*

Following this amendment, our Supreme Court confirmed that RAP 2.2(a)(8) applies only to orders of commitment following a full evidentiary hearing where an individual is adjudicated to be a sexually violent predator.

Specifically, in *In re Petersen*, 138 Wn.2d 70, 85, 980 P.2d 1204 (1999), the Court stated, "[T]here can be no dispute that our initial intent was to provide an appeal as of right *only* from the *initial* commitment order *that followed the full evidentiary adjudication of an individual as a sexually violent predator*." *Id.* (emphasis added). The Supreme Court reaffirmed this conclusion in *In re Detention of Turay*, 139 Wn.2d 379, 393 n. 8, 986 P.2d 790 (1999), when it acknowledged that sexually violent predators "may, as of right, appeal their *initial order of commitment* pursuant to RAP 2.2(a)(8)." (Emphasis in original).

The Supreme Court has also soundly rejected arguments to expand the scope of RAP 2.2(a)(8). In *Petersen*, the Court rejected an argument that an order denying a release trial and continuing Petersen's commitment following an annual review show cause hearing was an "order of commitment" under RAP 2.2(a)(8). In reaching that conclusion, the Court analogized to a dependency case, *In re Dependency of Chubb*, 112 Wn.2d 719, 724, 773 P.2d 851 (1989). In *Chubb*, the Supreme Court determined that a dependency review order entered after a six-month review hearing was not a "disposition decision following a finding of dependency" that was appealable as a matter of right. *Id.* The Court reasoned that the order was simply a continuation of the status quo; it was not a new determination of dependency. *Chubb*, 112 Wn.2d at 724. Pointing to that analysis, *Petersen* rejected the argument that an order denying a release trial and continuing

a sexually violent predator's commitment is "tantamount to [an] order[] of recommitment." *Petersen*, 138 Wn.2d at 84-87.

Here, there is no dispute that the LRA revocation order is not the initial commitment order. McHatton stipulated to his commitment as a sexually violent predator in 2002. CP 26. Further, like the orders in *Petersen* and *Chubb*, the LRA revocation order did not change McHatton's status as a committed sexually violent predator or amount to a new disposition on that issue. At a revocation hearing, the court does not determine if the person is a sexually violent predator. *See In re Det. of Jones*, 149 Wn. App. 16, 30, 201 P.3d 1066 (2009) ("an SVP's commitment status is not at issue at an LRA revocation hearing"); *In re Det. of Bergen*, 146 Wn. App. 515, 528, 195 P.3d 529 (2008) ("[t]he LRA determination is a separate inquiry and is focused on whether the SVP—who has already been found to be dangerous and mentally ill—should be transferred to an LRA"). Accordingly, McHatton's commitment as a sexually violent predator still flows from the original commitment order, and the LRA revocation order does not "result in a person's indefinite commitment." *Petersen*, 138 Wn.2d 85; *see also Bergen*, 146 Wn. App. at 528 ("his continued commitment is still supported by findings of mental illness and dangerousness and his unchallenged status as an SVP"). In short, an LRA revocation order is not tantamount to a new commitment order.

McHatton makes several attempts to avoid application of *Petersen*. All of his arguments fail. McHatton distinguishes LRA revocation orders from the order at issue in *Petersen* by arguing that an LRA revocation proceeding is not a summary proceeding. *See* Appellant's Supplemental Br. at 2-4.[2] But an LRA revocation proceeding is a summary proceeding in that it is a nonjury proceeding and carries a lower evidentiary standard and lower burden of proof. *See* RCW 71.09.098(5); *see also* Black's Law Dictionary (8th Ed.) ("[a] summary proceeding is a nonjury proceeding that settles a controversy or disposes of a case in a relatively prompt and simple manner"). More importantly, this argument oversimplifies *Petersen*'s analysis. *Petersen*'s conclusion did not depend solely on the fact that a show cause hearing is a summary proceeding. Rather, the Court's analysis hinged on the fact that the show cause hearing did not amount to a new disposition of the sexually violent predator's commitment status. *See Petersen*, 138 Wn.2d at 85-88. Thus, this distinction is immaterial to the analysis of whether an LRA revocation order is an "order of commitment." And, McHatton's revocation order did not amount to a new

[2] Much of McHatton's supplemental brief is written as an answer to the State's motion to modify. For example, McHatton claims that "the State contends the LRA revocation hearing is a summary procedure akin to denial of an evidentiary hearing at the annual show cause stage." Appellant's Supplemental Br. at 3. But the State never claimed that revocation hearings are *akin* to show cause hearings. In the State's motion to modify, it characterized LRA revocation and modification hearings as "summary proceedings" as a way to distinguish such proceedings from initial commitment trials and release trials, in light of the fact that they have different burdens of proof and different evidentiary rules. Here, the revocation hearing took place in less than one day, and with the exception of one testifying witness, the parties relied on their pleadings as evidence to support their arguments. VRP 1-69. The show cause and revocation orders are similar in that neither one amounts to a new determination of whether an individual is a sexually violent predator, and neither one is a final disposition of the sexually violent predator *See Petersen*, 138 Wn.2d at 85-88.

disposition of his status as a sexually violent predator because his status as one will not change until he is determined to no longer be a sexually violent predator.

Next, McHatton distinguishes *Petersen* by claiming that an LRA revocation order is different from an order continuing commitment because an LRA "change[s] the indefinite nature of the [sexually violent predator's] commitment." Appellant's Supplemental Br. at 4-5, 10. He further claims that an LRA "releases the person from indefinite confinement." *Id.* at 10. This claim fails because it completely misapprehends the sexually violent predator statutory scheme. A person remains indefinitely committed as a sexually violent predator while on conditional release. *See Jones*, 149 Wn. App. at 30 ("[w]hether or not the court decides to revoke the LRA, the SVP remains a 'committed person'"); *see also* RCW 71.09.020(18), (16). An LRA is simply a less restrictive setting than total confinement. RCW 71.09.020(6). And *Petersen* did not hold to the contrary. The quotations from that case on which McHatton relies are merely summaries of the statutory scheme, particularly RCW 71.09.060(1). In relevant part, that statute simply stands for the proposition that a sexually violent predator shall be committed to a "secure facility operated by the department of social and health services" until the person is unconditionally released or conditionally released to an LRA. RCW 71.09.060(1). It does not support McHatton's claim that an LRA "releases the person from indefinite confinement." Appellant's Supplemental Br. at 10. Even when conditionally released, McHatton's LRA

order imposed strict conditions that included a curfew, GPS monitor, chaperone, random searches, and mandatory sex offender treatment. CP at 32-38. Because McHatton remains indefinitely committed while conditionally released, he fails to show that the LRA order "once again" subjected him to indefinite commitment. *Id.* at 11.

McHatton also distinguishes the orders in *Petersen* and *Chubb* on the basis that his removal from the LRA and return to total confinement resulted in a change in the status quo. Appellant's Supplemental Br. at 5-6. But this argument misapprehends *Petersen*'s analysis. The relevant inquiry is not whether there has been any change. Rather, it is whether the change, in effect, amounts to a new disposition on the issue of whether the person should be committed as a sexually violent predator. *See Petersen*, 138 Wn.2d at 86-87. Here, as discussed above, while the LRA revocation order changed McHatton's placement, it did not amount to a new determination of the issue of his commitment. At all times during these proceedings, McHatton has been indefinitely committed as a sexually violent predator and subject to the court's jurisdiction as such. *See* RCW 71.09.090(5). For these reasons, this distinction does not support McHatton's argument that an LRA revocation order is an "order of commitment."

Lastly, McHatton points out that *Petersen* acknowledged that orders of commitment following release trials are "arguably" appealable as a matter of right. Appellant's Supplemental Br. at 7-8. He also points out that the State does not

challenge appeals from orders following release trials. *Id.* at 8. But *Petersen* reasoned that such orders are arguably reviewable as a matter of right because "[s]uch hearings appear to be the equivalent to whole new trials with the same procedural protections as the initial commitment trial," the "State "must again prove [the person] to be a sexually violent predator beyond a reasonable doubt," and the person's "continuing commitment would flow from this new, subsequent determination, rather than from the original order of commitment." *Petersen*, 138 Wn.2d at 87 n.13. None of those factors apply to an LRA revocation order. Thus, while *Petersen* supports a conclusion that an order following an unconditional release trial is an "order of commitment," it does not support a conclusion that an LRA revocation order falls within that same category.

C. An LRA Revocation Order Is Not a "Final Order After Judgment" Under RAP 2.2(a)(13)

An LRA revocation order is also not a "final order after judgment" under RAP 2.2(a)(13). Because an LRA revocation order is not a "final order" within the scope of that rule, RAP 2.2(a)(13) is inapplicable.

A right to appeal under RAP 2.2(a)(13) requires "'a showing of (1) effect on a substantial right and (2) finality.'" *State v. Coleman*, 6 Wn. App. 2d 507, 518, 431 P.3d 514 (2018) (quoting *State v. Howland*, 180 Wn. App. 196, 201 n. 3, 321 P.3d 303 (2014)). The State does not dispute that an LRA revocation order affects a substantial right. As McHatton notes, the revocation order placed him back in total confinement. Appellant's Supplemental Br. at 12; *see also In re Det.*

of Wrathall, 156 Wn. App. 1, 6-7, 232 P.3d 569 (2010). However, an LRA revocation order does not satisfy the "finality" prong. "A final judgment or order 'leaves nothing else to be done to arrive at the ultimate disposition of the petition.'" *Id.* (internal quotation marks omitted) (quoting *State v. Gossage*, 138 Wn. App. 298, 302, 156 P.3d 951 (2007)). Because the trial court retains jurisdiction over McHatton until his unconditional discharge pursuant to RCW 71.09.090(5) and because an LRA revocation order "achieves no final disposition of the sexually violent predator," the LRA revocation order is not a "final order." Indeed, once back in total confinement, McHatton will continue to receive annual reviews which entitle him to annual show cause hearings at which the issue of his conditional release may be litigated. *See* RCW 71.09.098(8), RCW 71.09.090.

The Washington Supreme Court has repeatedly determined that post-commitment orders in sexually violent predator cases are not appealable under RAP 2.2(a) because the trial court retains jurisdiction until the person's unconditional release. The Supreme Court's reasoning in those cases applies equally to LRA revocation orders.

For example, in *Petersen*, the Supreme Court held that the order continuing Peterson's commitment following a show cause hearing was not appealable under RAP 2.2(a)(13) because it was not a final order "in light of the court's continuing jurisdiction over the committed persons until their unconditional release." 138 Wn.2d at 88. It explained that the order disposed

"only of the petition before the trial court and achieve[d] no final disposition of the sexually violent predator." *Id.* Accordingly, the order was an interlocutory order subject to discretionary review. *Id.*

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

In the same way, the trial court retains jurisdiction over McHatton's case even after his conditional release was revoked. The revocation order did not alter McHatton's status as a sexually violent predator, it merely altered the status of his confinement. McHatton will continue to receive annual reviews and corresponding show cause hearings until it is determined that he no longer meets criteria as a sexually violent predator. *See* RCW 71.09.098(8), RCW 71.09.090. Unless and until he is determined not to be a sexually violent predator, the court retains jurisdiction over his case, and therefore a revocation of his conditional release is not a final judgment.

Three cases outside the sexually violent predator context further support the conclusion that when a trial court retains jurisdiction following the entry of an order,

that order is not a final disposition and, therefore, cannot be appealed under RAP 2.2(a)(13).

First, in *State v. Howland*, this Court concluded that an order denying a petition for conditional release from commitment under chapter 10.77 RCW was not a "final order" within the meaning of RAP 2.2(a)(13). 180 Wn. App. at 202-03. It reasoned that the trial court had continuing jurisdiction over Howland under the statute, and the order did not settle all the issues in the case, but instead "disposed only of the petition before the court at that time." *Id.* Additionally, Howland, like McHatton, could continue to petition for conditional release. *Id.*

Second, in *State v. Smits*, this Court concluded that an order denying a defendant's motion to terminate legal financial obligations (LFOs) originally imposed as part of a judgment and sentence was not appealable as a "final judgment" under RAP 2.2(a)(1). 152 Wn. App. 514, 523-24, 216 P.3d 1097 (2009). It noted that "the court retains jurisdiction to enforce that obligation 'until the obligation is completely satisfied . . . .'" *Id.* at 522 (quoting RCW 9.94A.760(4)). It further reasoned that the order cannot be "final" because the initial order to pay LFOs is conditional and because RCW 10.01.160(4) allows a defendant to petition to modify or waive LFOs at any time. *Id.* at 524.

Lastly, in *State v. Coleman*, this Court emphasized the significance of the trial court's continuing jurisdiction when determining an order's finality. 6 Wn. App. 2d at 511-15. It concluded that orders on petitions for *final* release from

commitment under chapter 10.77 RCW are appealable under RAP 2.2(a)(13). *Id.* at 515. But it distinguished such orders from those on petitions for *conditional* release, where the person remains under the trial court's jurisdiction, explaining:

> [F]inal release and conditional release are drastically different. A petition for final release carries the possibility of finality, whereas a petition for conditional release does not. A person petitioning for conditional release remains under the court's jurisdiction regardless of the petition's disposition. A person on conditional release is subject to regular court monitoring, modification of her release conditions, and limitations on her liberties. But a successful petition for final release necessarily results in termination of any court jurisdiction over the person, leaving nothing else to do.

Id. at 512.[3]

Here, the sexually violent predator statute provides that "the jurisdiction of the court over a person civilly committed pursuant to this chapter continues *until such time as the person is unconditionally discharged*." RCW 71.09.090(5) (emphasis added). Release to an LRA is a form of conditional release. *See* RCW 71.09.096; RCW 71.09.020(6). A conditionally released sexually violent predator is often subject to stringent requirements, including submitting to drug, alcohol, and physiological testing, wearing a GPS monitor, and participating in sex offender treatment. *See* RCW 71.09.096(4). While the person is conditionally released, the trial court receives monthly reports from the person's sex offender

[3] So too did the legislature distinguish the appealability of RCW 10.77 petitions for final release by specifying in RCW 71.09.060(2) that RCW 10.77 orders were appealable, though the legislature notably did not extend the appealability to LRA revocation orders.

treatment provider and retains the authority to review the case to determine whether conditional release should continue. RCW 71.09.096(6), (7).

In addition, the trial court has the authority to modify or revoke the LRA. RCW 71.09.098. In the event of revocation, the trial court *continues* to retain jurisdiction until the person is unconditionally discharged. RCW 71.09.090(5). In light of the trial court's continuing jurisdiction over McHatton, the LRA revocation order is not a "final order" under RAP 2.2(a)(13).

McHatton claims that an LRA revocation order is appealable as a matter of right because it affects a substantial right, similar to the revocation of parole. Appellant's Supplemental Br. at 12 (citing *In re Det. of Wrathall*, 156 Wn. App. 1, 6-7, 232 P.3d 569 (2010)). Although McHatton is correct that "*Wrathall* equated the revocation of an LRA with the revocation of parole," McHatton fails to acknowledge that the court's equating of the two was only in the context of due process protections at a revocation hearing. The court did not discuss the appealability of revocation orders. Appellant's Supplemental Br. at 12; *See Wrathall*, 156 Wn. App. at 6-7 ("[l]ike a parolee, an SVP on conditional release enjoys liberty that . . . requires at least minimal due process protections in the face of revocation").

Then, citing *State v. Pilon*, 23 Wn. App. 609, 611, 596 P.2d 664 (1979), McHatton alleges "revocation of parole has long been reviewed as appealable as a matter of right." Appellant's Supplemental Br. at 12. However, *Pilon* made no such holding regarding parole revocation, instead holding that a *probation* revocation was

appealable as a matter of right under RAP 2.2(a)(13). *Pilon*, 23 Wn. App. at 611. Moreover, since the 1979 decision in *Pilon*, the legislature enacted the Sentencing Reform Act (SRA) in 1981, making wholesale changes to Washington State's criminal sentencing procedures, including those concerning probation. *See* RCW 9.94A. Under the SRA, the authority to sanction most offenders on criminal supervision rests with the Department of Corrections or Indeterminate Sentence Review Board, not the courts. RCW 9.94A.6332. If Pilon's conviction for possession of a controlled substance had been governed by the SRA, his trial court would have lacked sanctioning authority. RCW 9.94A.6332(7); see also *State v. Bigsby*, 189 Wn.2d 201, 214-216, 399 P.3d 540 (2017). Therefore, McHatton's current reliance on *Pilon* is misplaced.

In addition, McHatton fails to cite to any case decided after 1981 that holds that parole revocation remains appealable as a matter of right given these reforms. In fact, since 1981, parole revocations have been appealed as habeas corpus "personal restraint" petitions, and not appealed as a matter of right. *See e.g.*, *In re Personal Restraint of Dyer*, 164 Wn.2d 274, 189 P.3d 759 (2008); *In the Matter of the Personal Restraint Petition of McCarthy*, 161 Wn.2d 234, 164 P.3d 1283 (2007); *In the Matter of the Personal Restraint Petition of Mines*, 146 Wn.2d 279, 45 P.3d 535 (2002); *Cashaw*, 123 Wn.2d 138.

McHatton also claims that the revocation order satisfies the finality prong because there was a final disposition of the State's petition to revoke McHatton's

LRA. Appellant's Supplemental Br. at 12-13. But as the Supreme Court made clear in *Petersen*, an order is not appealable under RAP 2.2(a)(13) if it "disposes only of the petition before the trial court and achieves no final disposition of the sexually violent predator." *Petersen*, 138 Wn.2d at 88; *see also Coleman*, 6 Wn. App. 2d at 512 ("[a] person petitioning for conditional release remains under the court's jurisdiction regardless of the petition's disposition. . . But a successful petition for final release necessarily results in termination of any court jurisdiction over the person, leaving nothing else for the court to do"). Here, there is no dispute that the order did not achieve final disposition of the sexually violent predator's status. Indeed, a sexually violent predator's "commitment status is not at issue at an LRA revocation hearing." *Jones*, 149 Wn. App. at 30 (citing *In re Det. of Bergen*, 146 Wn. App. 515, 533-34, 195 P.3d 529 (2008)). Thus, the fact that the order disposed of the State's revocation petition is immaterial.

McHatton next attempts to distinguish the cases cited above. He first attempts to distinguish *Petersen* and *Chubb* by claiming that in those cases there was a "certainty of future, regularly occurring proceedings mandated by statute at which the same issue could be litigated." Appellant's Supplemental Br. at 14. He claims that a revocation order is different because it is "a one-time event." *Id.* at 14. However, this case is thus no different than *Petersen* and *Chubb*, and it is distinguishable from the case on which McHatton relies, *State v. Gossage*, 138 Wn. App.298, 302, 156 P.3d 951 (2007), where future proceedings were a "mere

potentiality" in light of the fact that the court "did not have continuing jurisdiction over the offender." *See* Appellant's Supplemental Br. at 14. This argument overlooks the fact that in light of the trial court's continuing jurisdiction over McHatton, he will continue to have regularly occurring proceedings at which the issue of conditional release may be litigated. *See* RCW 71.09.098(8), RCW 71.09.090.

McHatton next attempts to distinguish *Howland* by arguing that "unlike *Howland*, where the petitioner could bring the same claim again and again, McHatton does not enjoy the luxury of undoing the revocation at some future proceeding." Appellant's Supplemental Br. at 15. But this argument misses the mark. While McHatton cannot "undo" revocation, the petitioner in *Howland* could not "undo" the denial of the conditional release petition. Nonetheless, that was not dispositive on the on the issue of appealability due to the fact that the trial court retains jurisdiction and the issue of conditional release could be litigated in future proceedings.

McHatton also distinguishes *Howland* and *Coleman* on the basis that he did not bring the petition at issue in this case, but rather defended against the State's petition for revocation. Appellant's Supplemental Br. at 15, 16. But the holdings in *Howland* and *Coleman* do not hinge on which party brought the petition, rather, they focus on the finality prong of RAP 2.2(a)(13). *See Howland*, 180 Wn. App. at 202-03; *Coleman*, 6 Wn. App. 2d at 511-15.

McHatton acknowledges that he can petition for conditional release in the future, but he claims that obtaining an LRA in the future involves "formidable barriers." Appellant's Supplemental Br. at 15. He fails to explain how this is relevant to the determination of whether a revocation order is a "final order." While there may be barriers to McHatton's ability to obtain conditional release in the future, this does not avoid the application of the cases cited earlier, which center on the fact that the trial court retains jurisdiction to consider petitions for conditional release in the future.

Lastly, McHatton claims that policy considerations weigh in favor of concluding that LRA revocation orders are appealable as a matter of right. Appellant's Supplemental Br. at 17-19. In general, he claims that direct review is appropriate because of the nature of the proceedings and the fact that the order has "tremendous consequence." *Id.* But appealability under RAP 2.2(a)(13) is more than a determination of whether an order has significant consequences. McHatton's policy arguments, in effect, eliminate the finality prong of RAP 2.2(a)(13). And such a ruling would drastically expand the number of orders that are appealable as a matter of right. For example, it could even encompass orders granting or denying petitions for modification of LRAs, which are brought under the same statute as petitions for revocation. RCW 71.09.098(5), (7). If LRA modification or revocation orders were appealable as a matter of right, it would require the appeal to be perfected, for briefs must be filed, and arguments to be

heard, all the while annual reviews would continue to be conducted with evaluations following. Such "would result in an endless chain, which would involve an absurdity in the administration of the law that would justly bring it into disrepute and totally destroy its efficacy." *State v. Campbell*, 112 Wash. 2d 186, 190, 770 P.2d 620, 622 (1989). Finally, when considering policy arguments, it is important to note that discretionary review does not provide an inferior process for seeking review. *Petersen*, 138 Wn.2d at 88-89. As our Supreme Court recognized, "[F]or meritorious claims, the discretionary review screening should prevent no great obstacle to obtaining review by an appellate court under RAP 2.3(b)."

In short, an LRA revocation order is not appealable because it is not a "final order" within the scope of RAP 2.2(a)(13). It is the final disposition of McHatton's sexually violent predator status—not his LRA status—that is relevant to determining finality. *See Petersen*, 138 Wn.2d at 88. And it is undisputed that McHatton's sexually violent predator status is wholly unaffected by the LRA revocation order. Further, McHatton can continue to petition for conditional or unconditional release following his annual evaluations. RCW 71.09.070; RCW 71.09.090. For these reasons, McHatton's LRA revocation order is not a final order and is thus not appealable under RAP 2.2(a)(13).

V. CONCLUSION

For the foregoing reasons, this Court should conclude that an LRA revocation order is not appealable as a matter of right, but rather is subject to discretionary review.[4]

RESPECTFULLY SUBMITTED this 10th day of January, 2020.

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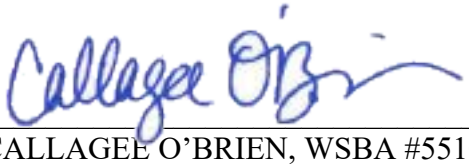

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[4] Because this supplemental brief is solely about the appealability of LRA revocation orders, the State does not address the RAP 2.3(b)(2) criteria in detail. However, for reasons argued in the Brief of Respondent, discretionary review of this case is unwarranted because the trial court did not commit probable error when it revoked McHatton's LRA.

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NO. 52493-7-II

WASHINGTON STATE COURT OF APPEALS, DIVISION II

In re the Detention of: MICHAEL MCHATTON, Appellant.	DECLARATION OF SERVICE

I, Allison Martin, declare as follows:

On January 10, 2020, I sent via electronic mail, per service agreement, a true and correct copy of Supplemental Brief of Respondent and Declaration of Service, addressed as follows:

Casey Grannis
sloanej@nwattorney.net

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

DATED this 10th day of January, 2020, at Seattle, Washington.

ALLISON MARTIN

WASHINGTON STATE ATTORNEY GENERAL'S OFFICE - CRIMINAL JUSTICE DIVISION

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