NO. 46319-9

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

In re the Detention of:

RICHARD HATFIELD,

Petitioner.

AMENDED OPENING BRIEF OF RESPONDENT

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II. STATEMENT OF THE CASE

Richard Hatfield, now 63 years old, is a repeat sex offender with a long history of sexual offenses against children age 13 and under. He has reported having had over 100 victims (VRP at 175) and has been convicted of two sexually violent offenses as that term is defined in RCW 71.09.020(17). In 1992, he was convicted of Attempted Lewd and Lascivious Conduct With A Minor Under 14 in Fresno County, California. CP at 158. This crime is the equivalent of Washington's Attempted Child Molestation Second Degree, a sexually violent offense pursuant to RCW 71.09.020(17). CP at 158. In that incident, he encountered a group of boys in a residential neighborhood. VRP at 180. He isolated one of the boys, 13, by offering to take him to play pinball. *Id.* Once alone with the boy, he pushed him to the ground, attempted to grab the boy's testicles and unzip his pants, and stated that he was going to fellate the boy "whether you like it or not." *Id.*

Six years later, in 1998, he was convicted of his second sexually violent offense, based on a sexual assault of a boy in Clark County, Washington. CP at 158. In that incident, Hatfield started a conversation with a group of young boys about the size of their penises, taunting them that they "don't have anything yet." VRP at 196. He rubbed his hand back and forth over the genitals of one of the boys, who was 10. *Id.* In addition, he gave the boys candy and paid one of them $2.00 to try to get an erection. *Id.* This incident was reported to the police, and Hatfield was convicted of Child Molestation First Degree. CP at 158. In February of 2012, shortly before Hatfield was scheduled to be released following the 1998 conviction for Child Molestation, the State filed a petition in Clark County Superior Court asserting that Hatfield was a sexually violent predator pursuant to RCW 71.09. CP at 1. Hatfield was taken into custody and has been confined since that time.

On October 10, 2013, the parties appeared before the trial court indicating that, since the initiation of the sex predator action, concerns had developed regarding Hatfield's competency. Supplemental VRP ("Supp. VRP") at 828-854. The parties indicated that, based on a recent evaluation by the State's forensic expert, Dr. Henry Richards, they would be making a joint motion for the appointment of a guardian ad litem (GAL) for Hatfield. *Id.* at 833-35. In response to the trial court's questions regarding

the scope of the GAL's appointment, his attorneys indicated that their primary concern related to the question of Hatfield's presence at trial. *Id.* at 837. Hatfield's attorneys stated that they believed that his presence at trial, including being housed at the jail, "would be extremely distressful to him," and that for that reason they wanted the guardian ad litem "to consider whether or not Mr. Hatfield's presence can be waived at trial." *Id.* at 837-38. The appointment was intended to be limited in nature, and Hatfield's trial counsel went on to tell the court that "we wouldn't agree that the guardian ad litem could revisit issues that we have already made, decisions we've made while Mr. Hatfield was clearly competent..." *Id.* at 838. Trial counsel indicated that they had contacted Pete Macdonald, an attorney, "who's a practitioner in 71.09 cases," to serve as the GAL in this case. *Id.* at 837, 876.

A hearing on the competency issue took place the following day. Supp.VRP at 854-878. All parties, including Hatfield, appeared telephonically. *Id.* at 855. Dr. Richards, testifying at the request of the State, indicated that there had been a "tremendous change" in Hatfield's behavior and demeanor since the interviews he had conducted with Hatfield in December of 2009. *Id.* at 862. According to Dr. Richards, SCC records indicated that this change had occurred sometime between March and May of 2013, and that by May of 2013, Hatfield was "actively

psychotic." *Id.* at 862. The court also heard from Dr. Brian Abbott, one of Hatfield's two trial experts, who agreed that Hatfield was not competent to understand the significance of the SVP legal proceedings. *Id.* at 870. Upon conclusion of testimony, the trial court agreed that appointment of a GAL was appropriate, and signed an order appointing Pete MacDonald as GAL for Hatfield. *Id.* at 874; CP at 176. The Order states that the GAL "is subject to any and all orders of this court pertaining to Mr. Hatfield and this appointment shall continue until released from this appointment by further order of this Court or the RCW 71.09 petition regarding Mr. Hatfield is dismissed." CP at 176.

Trial began on April 7, 2013. Before trial began, counsel and the GAL, Mr. MacDonald, appeared before the trial judge. Hatfield's GAL indicated that, "as the guardian ad litem for Mr. Hatfield, we are asking to waive his presence." VRP at 12. He stated that he had met with Hatfield the preceding week, and "basically he's in no condition to be in jail; he's certainly in no condition to sit in a courtroom...." *Id.* Mr. MacDonald stated that in his opinion, Hatfield "is not capable of sitting safely in a jail, and by that I mean he has some assaultive issues with staff at the SCC," and wished to avoid the possibility of Hatfield's "being charged with Assault 3 while in the jail." *Id.* at 13. Nor did Mr. MacDonald believe that Hatfield could "sit at counsel table and not draw undo [sic] attention to

himself...." *Id.* After some discussion regarding how the trial court intended to explain his presence to the jury, Mr. MacDonald determined that there was "no reason for [him] to remain during the trial." *Id.* at 16.[1]

The State presented only one witness, Dr. Richards. Dr. Richards assigned a primary, or "central," diagnosis of Pedophilia, or pedophilic disorder (VRP at 145-146, 223) and described Hatfield's roughly 20-year history of sexual contacts and attempted sexual contacts with young (11-13 years old) males. VRP at 173-206. In addition, Dr. Richards assigned diagnoses of psychotic disorder, cyclothymic disorder,[2] bipolar disorder II, avoidant personality disorder, other specified personality disorder with mixed antisocial and passive-aggressive negativistic traits, alcohol dependence in a controlled environment, rapid eye movement sleep behavior disorder, attention deficit hyperactivity disorder, and generalized anxiety disorder. *Id.* at 157-66. Dr. Richards testified that each of these various conditions contributed to the Hatfield's mental abnormality to some extent, and that these disorders "predispose Mr. Hatfield to the commission of sexual acts in a degree constituting Mr. Hatfield a menace

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[1] Both parties appear to have assumed that the trial would be by jury. VRP at 4. After having determined that, in fact, neither side had filed a jury demand as is required by RCW 71.09.050, the trial court determined that the case would be tried to the bench. *Id.* at 20-28.

[2] Dr. Richards explained that cyclothymic disorder is "a dysregulation of mood that is pretty much background, ongoing, rapid changes in mood, extreme depression, highs and lows that are disruptive to the individual." VRP at 158.

to the health and safety of others." *Id.* at 224. After considering a variety of factors, Dr. Richards concluded that Hatfield was likely to engage in predatory acts of sexual violence if not confined. *Id.* at 294.

After hearing testimony from Hatfield's two experts, Dr. Brian Abbott, Ph.D. and Dr. Fabian Selah, M.D., the trial court entered Findings of Fact, Conclusions of Law, and an Order committing Hatfield to the custody of DSHS as a sexually violent predator. Hatfield timely appealed.

III. ARGUMENT

A. Neither Hatfield's Statutory Nor Constitutional Rights Were Violated By His Guardian Ad Litem's Decision Not To Remain Physically Present Throughout Trial

Hatfield argues that his GAL's absence "violated the GAL statute as interpreted by the Washington Supreme Court and resulted in fundamental unfairness that violated Hatfield's due process rights," requiring reversal. App. Br. at 15. This argument fails. Hatfield points to nothing that supports his contention that a GAL appointed in an SVP case, for what appears to be the limited purposes of allowing Hatfield to waive his presence at trial, is required to remain physically present throughout a bench trial at which the respondent is represented by two competent counsel and where the GAL could play no meaningful role. Nor is Hatfield's attempt to argue ineffective assistance of counsel persuasive. Not only can he not demonstrate that counsels' performance was deficient,

but he points to nothing in the trial record that suggests that, but for their alleged deficiencies, the outcome of the trial would have been different.

1. RCW 4.08.060 Does Not Mandate GAL's Physical Presence At Trial

Hatfield argues that "RCW 4.08 mandates the presence of a court-appointed GAL at all times during trial" and that "when a trial court violates RCW 4.08.060 by permitting proceedings in the absence of ***the*** court-appointed GAL, the error requires reversal." App. Br. At 15-16 (Emphasis added). Hatfield, however, misapprehends both RCW 4.08.060, which provides in pertinent part as follows"

> When an incapacitated person is a party to an action in the superior courts he or she shall appear by guardian, or if he or she has no guardian, or in the opinion of the court the guardian is an improper person, the court shall appoint one to act as guardian ad litem...

This broad statutory language contains nothing that might limit the discretion of the trial court to permit the appointed GAL to absent himself from a particular proceeding if the GAL's presence is not required. There is clearly nothing in the language of RCW 4.08 that mandates that a guardian (or guardian ad litem in this case), once appointed, must physically appear at every proceeding. Indeed, there is nothing in the language of the statute itself that in any way delineates the specific duties of the GAL.

Nor do the cases he cites stand for the proposition that the GAL was required to attend trial, or that the trial court erred in permitting him to leave. Hatfield cites *In re the Matter of the Welfare of Dill*, 60 Wn.2d 148, 159, 372 P.2d 541 (1962) and *Flaherty v. Flaherty,* 50 Wn.2d 393, 12 P.2d 205 (1957) in support of his argument that reversal is required. In both cases, incapacitated parties were involved in litigation and, although extremely serious interests were at stake, neither had been appointed a guardian ad litem. Thus while both stand for the proposition that, where an incapacitated person is a party to litigation, that person must be appointed a guardian or guardian ad litem, neither addresses the issue here. The question here is not whether a GAL must be appointed for an incompetent person. Such appointment was made. The question, rather, is whether a GAL—appointed pursuant to RCW 4.08.060 in a proceeding pursuant to RCW 71.09 and for the limited purpose of determining whether the respondent should waive his presence at trial-- is required to remain present throughout trial where his ward had made a valid waiver of his own presence at trial and where the GAL—whose effectiveness is not contested here—has determined that the best interests of his ward do not require his physical presence.

A guardian ad litem has complete statutory power to represent the interests of the ward. *Rupe v. Robison,* 139 Wash. 592, 595, 247 P. 954,

(1926). *See also In re Miller*, 26 Wn.2d 202, 173 P.2d 538 (1946). Here, the GAL determined that it was not in Hatfield's interests to participate in—or indeed even attend—trial. Hatfield's attorneys had previously indicated to the trial court that it would be extremely stressful for Hatfield to attend trial or to be housed at the jail during trial. Supp. VRP at 837-38. This decision was within the scope of the GAL's authority. Having made this determination, the GAL—himself an attorney experienced in SVP matters and as such thoroughly familiar with the matters that would be dealt with at trial-- then determined that Hatfield's best interests did not require his own presence. VRP at 16. There is nothing in RCW 4.08.060 or case law interpreting that statute that suggests that this decision was improper, much less requires reversal.

2. The Superior Court's Guardian Ad Litem Rules, By Their Clear Terms, Do Not Apply To Sex Predator Proceedings

Hatfield next argues that the Superior Court Guardian Ad Litem Rules (GALR) "provide persuasive guidance regarding the mandatory presence of GALs in all court proceedings," "illustrate that our supreme court expects GALs appointed under RCW 4.08.060 to attend the entirety of their wards' trials," and "strongly suggest that MacDonald was required to attend every hearing related to his appointment." App. Br. at 19-20.

This argument ignores the explicit language of the GALR regarding the Rules' scope and effect. As Hatfield concedes, the GALR, by their clear terms, apply only to certain specified types of proceedings:

GALR 1 states:

> (a) **Statement of Purpose and Scope of Rule**. The purpose of these rules is to establish a minimum set of standards applicable to all superior court cases where the court appoints a guardian ad litem or any person to represent the best interest of a child, an alleged incapacitated person, or an adjudicated incapacitated person **pursuant to Title 11, 13 or 26 RCW.**[3]
>
> These rules shall also apply to guardians ad litem appointed pursuant to RCW 4.08.050 and RCW 04.08.060, **if the appointment is under the procedures of Titles 11, 13 or 26 RCW**.

(Emphasis added). In case there were any doubt as to the scope of the rules under GALR 1, reference to Titles 11, 13 and 26 are repeated throughout the rules. *See e.g.* GALR 2, 2(d), 3, 4(h) and 4(j).

Despite the fact that the scope of the GALR are clear on their face, Hatfield argues that this Court should interpret the Rules as applying to the context of sex predator proceedings, and reverse his commitment because they were not followed. App. Br. at 15-16. Generally, courts apply rules of statutory construction when interpreting court rules. *State v. Blilie,* 132

[3] Title 11 deals with probate and trust law; Title 13 deals with juvenile courts and juvenile offenses, and Title 26 deals with domestic relations.

Wn.2d 484, 492, 939 P.2d 691 (1997). The courts do not, however, resort to statutory construction if a rule is unambiguous; rather, they determine its meaning from the language of the rule itself. *Leson v. State,* 72 Wn.App. 558, 562, 864 P.2d 384 (1993), *review denied,* 124 Wn.2d 1009, 879 P.2d 292 (1994). There is nothing in the GALR that suggests that they were intended to apply to guardians appointed outside certain of enumerated proceedings that do not include sex predator proceedings, and as such his argument fails.

Even if this Court were to resort to rules of statutory construction, Hatfield's argument fails. Numerous other statutory schemes provide for the appointment of a GAL: RCW 8.25.270 (eminent domain); RCW 12.04.150 (civil action against minor in district court); RCW 65.12.145 (registration of land titles); RCW 74.20.310 (action to determine parentage); RCW 90.03.150 (determination of water rights); and RCW 91.08.230 (eminent domain). None of these, however, are referenced in the Superior Court's GAL rules. Under the statutory canon of *expressio unius est exclusio alterius,* the express inclusion in a statute (or, in this case, a rule) of the situations in which something applies implies that other situations are intentionally omitted. *In re Detention of Strand,* 167 Wn.2d 180, 191, 217 P.3d 1159 (2009). Thus it is clear that, the specific inclusion of certain proceedings in the GALR means that those proceedings not

included—including proceedings pursuant to RCW 71.09—are excluded, and do not come within their scope.

Even in matters within the explicit scope of the GALR, the requirement that the GAL be present at particular proceedings is not absolute: Pursuant to GALR 2(l), the guardian ad litem "shall appear at any hearing for which the duties of a guardian ad litem or any issues ***substantially within a guardian ad litem's duties and scope of appointment are to be addressed.***" (Emphasis added). Only in proceedings under RCW 11 is the guardian ad litem required to appear at "all hearings," and even then can be "excused by court order." GALR 2(l).

Hatfield argues that the language "substantially within a guardian ad litem's duties and scope of appointment" would extend to any and all hearings. App. Br. at 19-20. He provides no basis, however, to interpret the role of the GAL so broadly. First, Hatfield does not challenge the good faith or competence of his court-appointed GAL, and as such it is to be assumed that the GAL, mindful of his duty to ensure that the best interests of his ward were protected, knew whether any particular proceeding would be "substantially within" his duties and scope of appointment and as such would require his attendance.

In order to understand the limitations to the GAL's role at trial, it is helpful to refer to the Rules of Professional Conduct ("RPC"), which

outline the respective roles of the attorney and the client in legal proceedings, because it allows consideration what role Hatfield would have played in his trial had he not been appointed a GAL. Pursuant to RPC 1.2 ("Scope Of Representation And Allocation Of Authority Between Lawyer And Client"),[4] the lawyer must abide by a client's decision concerning "the objectives of representation...and the means by which they are to be pursued," and whether to settle a matter. Beyond that, "a lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation."

By virtue of the fact that the parties, including the GAL, appeared for trial on April 7, 2014, it is clear that decisions regarding those matters had already been reached: Regarding the "objectives of representation," Hatfield, apparently long before the appointment of his GAL,[5] had determined that his attorneys would assist him in opposing the State's Petition to have him involuntarily committed. Likewise, "the

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[4] RPC 1.2 provides, in pertinent part, "A lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify."

[5] This case was initiated in February of 2012. CP at 1. The GAL was not, however, appointed until October of 2013 (CP at 176); trial ultimately began six months later, in April of 2014.

means by which [the objectives] are to be pursued" had been determined as well: that Hatfield would go to trial, and that he would not settle—that is, he would not stipulate to commitment. In addition, counsel for Hatfield had vigorously represented Hatfield prior to trial, both before and after the appointment of the GAL, conducting discovery, arranging for appointment of not one but two experts (Drs. Abbott and Selah) including arguing strenuously in support of the need for that second expert (CP at 238-284), deposing the State's expert (CP at 181-186), and filing various motions and trial memoranda related to the issues at trial. CP at 187, 190-210, 211-220, 221-237, 238-284. Critical trial decisions, such as what witnesses to call on Hatfield's behalf, had also already been made by the time of trial, presumably either while Hatfield was competent or in consultation with the GAL. CP at 188. At the point at which the GAL absented himself, what remained were only strategic decisions relating to the conduct of trial, decisions properly reserved to the attorneys. *State v. Cross,* 156 Wn.2d 580, 606, 132 P.3d 80 (2006), citing *State v. Piche,* 71 Wn.2d 583, 590, 430 P.2d 522 (1967) ("[T]he choice of trial tactics, the action to be taken or avoided, and the methodology to be employed must rest in the attorney's judgment."). As such, it was not unreasonable for the GAL, or for Hatfield's attorneys, to determine that there was nothing the GAL's physical presence at trial would accomplish. Had such an issue arisen that

required consultation with the GAL, there is nothing in the record suggesting that counsel, with a strong presumption of competence, would not have contacted the GAL and, if necessary, brought him to court.

Hatfield does not point to a single example at trial where the input of the GAL might have been appropriate or changed the result of trial. His argument fails.

3. The GAL's Physical Absence From Trial Did Not Violate Hatfield's Right To Due Process

Hatfield next argues that his right to due process was violated by the GAL's physical absence from trial. Rather than identifying a single instance in which the physical presence of the GAL would or even might have made any difference in the outcome of the proceedings, he argues simply that the GAL's absence "undermined the overall fairness of the proceedings." App. Br. at 20.

Although it is not entirely clear, it appears that Hatfield is asserting that his right to procedural, as opposed to substantive, due process was violated. *See* App. Br. at 20-25. At its core, procedural due process is a right to be meaningfully heard. *In re Det. of Stout,* 159 Wn.2d 357, 370, 150 P.3d 86 (2007). Unlike some legal rights, due process "is not a technical conception with a fixed content unrelated to time, place and circumstances." *Mathews v. Eldridge*, 424 U.S. 319, 334, 96 S. Ct. 893, 47

L. Ed. 2d 18 (1976). It is "flexible, and calls for such procedural protections as the particular situation demands. " *Id.*, citing *Morrissey v. Brewer,* 408 U.S. 471, 481, 92 S. Ct. 2593, 2600, 33 L. Ed. 2d 484 (1972). To determine whether a particular procedural protection is required in a given context, the court must consider "three distinct factors: First, 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*, 424 U.S. at 335. Application of these factors demonstrates that Hatfield's rights to procedural due process were not violated.

In *In re Detention of Morgan*, 180 Wn.2d 312, 330 P.3d 774 (2014), our supreme court applied the *Mathews* factors to the case of a schizophrenic sex offender who had been civilly committed after a jury trial. On appeal, Morgan argued that his civil commitment while incompetent violated both procedural and substantive due process. The court rejected both arguments. After conceding his "substantial" interest in liberty, the court concluded that the second *Mathews* factor "weighs heavily in favor of the State." *Id.,* 180 Wn.2d at 321. "Robust statutory

guaranties in chapter 71.09 RCW," the court wrote, "provide substantial protection against an erroneous deprivation of liberty." *Id.* The court then described these "robust statutory guaranties:"

> Before commitment proceedings may even be initiated, the State must show probable cause. *In re Young,* 122 Wash.2d at 48, 857 P.2d 989 (citing RCW 71.09.040(1)). At the probable cause hearing, the respondent facing potential SVP proceedings has the right to counsel at public expense, to present evidence on his or her own behalf, to cross-examine adverse witnesses, and to view and copy all petitions and reports in the court file. RCW 71.09.040(3). For the SVP determination, the respondent has the right to a jury of 12 peers. RCW 71.09.050(3). At trial, the State carries the burden of proof beyond a reasonable doubt, and in a jury trial, the verdict must be unanimous. RCW 71.09.060(1). Throughout, the respondent has the right to counsel, including appointed counsel, to meaningfully access this panoply of rights and procedural protections. RCW 71.09.050(1). Here, the trial court's appointment of a GAL for Morgan provided an additional safeguard.

Id. at 321-22. These protections, the court noted, continue after commitment: The State must "justify continued incarceration through an annual review." *Id.* at 322. The SVP has the right the right to "a show cause hearing, at which he or she has the right to counsel and to present responsive affidavits or declarations." *Id.* If the State fails to make its prima facie case upon annual review, or if the SVP makes a showing of

change, the SVP is entitled to an evidentiary hearing at which he or she is again entitled to a "panoply of procedural protections." *Id.*

Morgan, the court concluded, "had an opportunity to meaningfully contest facts in a criminal trial; he had a full SVP trial with many protections guaranteed to criminal defendants; and he was represented by counsel throughout the proceedings." 180 Wn. 2d. at 322. Although, as Hatfield points out, the court noted that Morgan's participation was "potentially diminished due to incompetency" and noted that a GAL had been "charged with representing his best interests," the court did not base its decision on this fact. Indeed, the court found "***the existing protections nevertheless robust.***" *Id.* (Emphasis added). All of these "robust" procedural protections provided by the statutory framework were extended to Hatfield, and as such the risk of erroneous deprivation of his liberty was minimal.

Finally, the third *Mathews* factor, as the *Morgan* court noted, weighs in favor of the State as well. 180 Wn.2d at 322. The State's interest in protecting the public and in treating a dangerous sex offender is "compelling." *Id.,* citing *Young,* 122 Wn.2d at 26, 42. Moreover, these interests could not be satisfied by pursuing civil commitment proceedings under the general civil commitment statute, RCW 71.05, instead of RCW 71.09, in that such placement would be "insufficiently secure," or require

"release of incompetent suspected SVPs who do not satisfy the requirement of chapter 71.05 RCW." *Id.* Pointing to cases from other states in which the courts had reached the same conclusion, the *Morgan* court concluded that it could "find no additional protections that would minimize the risk of error without significantly undermining compelling State interests." *Id.* at 323. Hatfield's right to due process was not violated when the State followed all of the procedures outlined by the *Morgan* court.

While the *Morgan* Court twice references the trial court's appointment of a GAL for Morgan as providing "an additional safeguard," the court does not suggest that, but for that appointment, Morgan's commitment would have been reversed. Nor does it address the question of whether that GAL is required to remain physically present throughout trial—indeed, the opinion does not indicate whether Morgan's GAL was physically present throughout trial at all. In rejecting Morgan's due process argument, the court cited, *inter alia*, a case in which the Massachusetts State Supreme Court had concluded that the requirements of due process may be satisfied by the appointment of counsel without need for a guardian ad litem at all. 180 Wn.2d at 323, citing *Commonwealth v. Nieves*, 446 Mass 583, 846 N.E. 379, 385-86 (2006). What is clear, in any case, is that the "[r]obust statutory guaranties in

chapter 71.09 RCW provide substantial protection against an erroneous deprivation of liberty." 180 Wn.2d at 321.

Hatfield also cites *State v. Ransleben*, 135 Wn.App.535, 144 P.3d 397 (2006) in support of his argument that a GAL must be physically present at trial. *Ransleben,* however, does not stand for this principle. Ransleben, in addition to suffering from pedophilia, had been diagnosed with a "mental disorder not otherwise specified due to head trauma and seizure disorder," as well as borderline intellectual functioning due to mild mental retardation. *Id.,* 135 Wn.App. at 537. He argued that the right to be competent inheres in the right to effective assistance of counsel, and that, because he was not competent, he could not have received effective assistance of counsel. In rejecting his argument, the court relied primarily on the fact that Ransleben's interpretation was in conflict with RCW 71.09.060(2), which specifically sets forth procedures to be used when the respondent has previously been determined to be incompetent. *Id.* at 540. While the court also discussed Ransleben's appointment of a GAL, and noted that, in his case, "the GAL was also required to appear at all court hearings and conferences," (*Id.,* 135 Wn.App. at 537) there is nothing in the opinion that indicates that this fact was dispositive. Nor can the opinion be read to ***hold*** that such presence is universally required, in that it appears that the court was simply taking note of the fact that, for whatever

reason and by whatever mechanism, this was a requirement in Ransleben's case.

Hatfield cites *In re the Dependency of P.H.V.S.*, --Wn. App. --, 339 P.3d 225 (2014) for the proposition that this Court "undoubtedly would have concluded there was a due process violation had the GAL absented himself from the entire proceedings rather than for just a half-day." App. Br. at 23. This conclusion is unwarranted. First, *P.H.V.S.*, like other cases cited by Hatfield, involves a situation in which the incompetent person personally appeared in court without his or her GAL. It does not address situations such as the one presented in Hatfield's case in which the incapacitated person has executed a valid waiver of his or her presence at trial. Secondly, the court's conclusion that the GAL's appearance was "mandatory" was based in part on the fact that a juvenile dependency is explicitly a type of case to which the GALR apply. 339 P.3d at 232. As previously discussed, this is not the case here. Finally, in rejecting the father's due process argument, the court turned, as the State urges this Court to do, to the actual record in the case, and concluded that "the record establishes little or no risk of error related to the absence of Smith's GAL...." *Id.* Likewise, in this case, Hatfield points to absolutely nothing in the record suggesting a risk of error because of the GAL's physical absence.

Hatfield attempts to argue that the third *Mathews* factor weighs in his favor because the State's "burden in ensuring Hatfield was represented by a GAL during the trial was extremely minimal" and urges that "the State should not be heard now to complain of the negligible burden it was willing to take on to ensure fundamental fairness in these proceedings." App. Br. at 24. Hatfield ignores the fact that, but for his ineffective assistance claim, this entire argument would be precluded by the doctrine of invited error. *State v. Gentry,* 125 Wn.2d 570, 647, 888 P.2d 1105 (1995). What Hatfield is essentially arguing is that, where Hatfield waived his appearance at trial through his GAL (and the validity of that waiver is not contested here), and where his GAL determined that, considering the best interests of his ward and where his attorneys had no objection to his GAL leaving, it was incumbent upon the State to ensure that the GAL, presumably over the objections of the GAL and Hatfield's counsel, remained present. This argument fails. There is no statutory or constitutional requirement that the GAL remain present throughout trial once the GAL has determined there is no need for his presence. This is particularly true where, as here, it is clear that all parties understood that the appointment of the GAL was intended for the limited purposes of allowing Hatfield to waive his presence at trial. Supp. VRP at 837-38.

Hatfield has failed to demonstrate that his right to due process was violated by the procedures used at his commitment trial.

4. Hatfield Did Not Receive Ineffective Assistance Of Counsel At Trial

In order to prevail on an ineffective assistance of counsel claim, the claimant must show that counsel's performance fell below an objective standard of reasonableness and that the deficient performance prejudiced the defendant, "i.e., that there is a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed." *Stout*, 159 Wn.2d at 377. In applying this two-part test, the court presumes counsel was effective. *Id.* In addition, the court presumes that defense counsel's decisions are strategic. *In re Stout*, 128 Wn. App. 21, 28, 114 P.3d 658 (2005). The defendant alleging ineffective assistance of counsel "'must show in the record the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel.'" *In re Pers. Restraint of Hutchinson,* 147 Wn.2d 197, 206, 53 P.3d 17 (2002) (quoting *State v. McFarland,* 127 Wn.2d 322, 336, 899 P.2d 1251 (1995)). The question, then, is whether Hatfield's attorneys failure to insist that his GAL remain present throughout trial "fell below an objective standard of reasonableness" and whether the outcome of trial would have been any different had he remained. A review of the case demonstrates that counsel

were not ineffective and that Hatfield was not prejudiced by the absence of his GAL.

As previously noted, the joint motion for appointment of a GAL was made shortly before trial, which at that point was scheduled to begin within several weeks. Supp. VRP at 840. Based on their client's recent decompensation, counsel had developed serious concerns regarding Hatfield's ability to attend trial, or to stay at the jail during the trial. Supp. VRP at 837-38. When questioned by the trial judge as to the scope of the GAL's appointment, his attorneys made clear that they sought appointment of a GAL for a limited purpose, that is, to determine whether Hatfield could waive his presence at trial. *Id.* It was for good reason, then, that nothing in the language of the Order appointing the GAL mandated the GAL's physical presence at trial or suggested in any way that the parties expected that his physical presence would be required, and states only that the GAL "is subject to any and all orders of this court pertaining to Mr. Hatfield and this appointment shall continue until released from this appointment by further order of this Court or the RCW 71.09 petition regarding Mr. Hatfield is dismissed." CP at 176-77. Under the circumstances of the case and the purpose for which the GAL was appointed, the parties' subsequent failure to object to the GAL's physical absence at trial was entirely reasonable.

Nor does Hatfield point to anything in the trial record suggesting that, had the GAL remained physically present throughout trial, the trial's outcome would have been different. Following trial, detailed Findings of Fact and Conclusions of Law were entered. CP at 154-159. These findings set forth Hatfield's criminal convictions (*Id.*, Findings Nos. 2&3), identify and describe his mental abnormality (a "pedophilic disorder," that is "a chronic and lifelong condition...based on Respondent's desire to be sexually active with children under the age of 13.")(*Id.*, Finding No. 6), describe his lengthy history of seeking out sexual contact with males under the age of 13 and find that his mental abnormality is "current" (*Id.*, Finding No. 10), find that "there was no evidence presented that the presence of psychosis wipes out an individual's sexual proclivities" (*Id.*, Finding No. 13), and find that Respondent, although he needs treatment, "would not engage in treatment if released," "does not like taking medications that reduce his sex drive," and "recognized that his resulting sexual inabilities were the result of the medications he was prescribed." *Id.*, Finding No. 16. Hatfield does not assign error to any of these Findings, or suggest that, had his GAL been physically present throughout trial, these Findings would have been any different. Nor does he assign error to or in any way suggest that any of the trial court's Conclusions of Law (CP at 157-58) would have been any different had the GAL been

present. Hatfield has failed to show that his trial counsel were ineffective, and this claim must be rejected.

B. Issues Relating To The Conditions Of Hatfield's Confinement Are Beyond The Scope Of A Sex Predator Trial

Hatfield argues that his commitment under RCW 71.09 violates substantive due process because the treatment offered at the SCC does not provide him a realistic opportunity for improvement. App. Br. at 29. Essentially, Hatfield argues that, because he is presently psychotic, he cannot possibly benefit from sex-offender-specific treatment, and because he cannot benefit from sex-offender-specific treatment, his detention at the SCC is unconstitutional. The State did not and does not concede that the treatment that has been or will be offered to Hatfield upon commitment is in any way inadequate. In any case, the treatment available to Hatfield and the conditions of his confinement after commitment are not relevant to the question of whether he does or does not meet criteria for commitment at the present time. Nor does the constitutionality of his commitment depend upon whether he can successfully be treated or cured. Hatfield's constitutional challenge fails.

Our supreme court has determined that attempts to invalidate commitment by arguing that conditions of confinement at the SCC are inadequate "demonstrate a fundamental misunderstanding of the purpose

of an SVP commitment proceeding." *In re Detenion of Turay,* 139 Wn.2d 379, 404. 986 P.2d 790 (1999). There, Turay had attempted to introduce evidence of the conditions of confinement at the SCC as well as the verdict in his federal litigation relating to those conditions.[6] *Id.* Upholding the trial court's decision to exclude such testimony, the *Turay* Court, citing RCW 71.09.060(1), stated that "[t]he trier of fact's role in an SVP commitment proceeding, as the trial judge correctly noted, is to determine whether the defendant constitutes an SVP; *it is not* to evaluate the potential conditions of confinement." (Emphasis in original). [7] "The particular DSHS facility to which a defendant will be committed," the court continued, "should have no bearing on whether that person falls

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[6] Turay filed a lawsuit in the United States District Court for the Western District of Washington against several officials at the SCC. In this suit, which he maintained under 42 U.S.C. § 1983, Turay alleged that the conditions of his confinement at the SCC were unconstitutional and thus violated his civil rights under the United States Constitution. A federal court jury found that the officials at the SCC had violated Turay's constitutional right to access to adequate mental health treatment and awarded him $100.00 in compensatory damages. Following receipt of the verdict, the United States District Court placed the SCC under an injunction "narrowly tailored to remedy this constitutional violation." *Turay,* 139 Wn.2d at 386. The injunction was dismissed in 2007, the federal court concluding that DSHS had "worked long and hard to meet the constitutional requirements identified by this Court, and there is no longer any basis or the Court's continued oversight." http://seattletimes.nwsource.com/ABPub/2007/03/26/2003637061.pdf

[7] RCW 71.09.060(1) provides, in pertinent part, "[t]he court or jury shall determine whether, beyond a reasonable doubt, the person is a sexually violent predator.... If the court or jury determines that the person is a sexually violent predator, the person shall be committed to the custody of the department of social and health services [DSHS] for placement in a secure facility operated by the department of social and health services for control, care and treatment...."

within [the] definition of an SVP." *Id.* Moreover, the court noted, a person committed under RCW 71.09 "may not challenge the actual conditions of their confinement, or the quality of the treatment at the DSHS facility until they have been found to be an SVP and committed under the provisions of RCW 71.09." *Id.,* citing *In re Detention McClatchey,* 133 Wn.2d 1, 5, 940 P.2d 646 (1997). This holding, "applies with equal force" where it is the State, rather than the respondent, who seeks to introduce testimony relating to the conditions of confinement. *In re Detention of Post*, 170 Wn.2d 302, 311, 241 P.3d 1234 (2010).

The United States Supreme Court has likewise rejected the idea that civil commitment is constitutional only for those for whom treatment is available. In *Kansas v. Hendricks* 521 U.S. 346, 117 S.Ct. 2072, 2084 (1997), the Court considered the constitutionality of a SVP scheme modeled on and almost identical to that of Washington State. There, Hendricks argued that Kansas' SVP Act "is necessarily punitive because it fails to offer any legitimate 'treatment.'" *Id.* 521 U.S. at 365. "Without such treatment," Hendricks alleged, "confinement under the Act amounts to little more than disguised punishment." *Id.* This argument is virtually identical to that made by Hatfield, who claims that, because "there is no available effective treatment at the SCC," his commitment to the SCC "is nothing more than an indefinite confinement without a realistic

opportunity for Hatfield's condition to improve." App. Br. at 38. The *Hendricks* Court soundly rejected this argument, noting that, while it had "upheld state civil commitment statutes that aim both to incapacitate and to treat, we have never held that the Constitution prevents a State from civilly detaining those for whom no treatment is available, but who nevertheless pose a danger to others." 521 U.S. at 365.

> A State could hardly be seen as furthering a "punitive" purpose by involuntarily confining persons afflicted with an untreatable, highly contagious disease. Similarly, it would be of little value to require treatment as a precondition for civil confinement of the dangerously insane when no acceptable treatment existed. To conclude otherwise would obligate a State to release certain confined individuals who were both mentally ill and dangerous simply because they could not be successfully treated for their afflictions.

Id. (internal citations to authority omitted).

This does not mean that Hatfield is without an avenue for relief. As noted by the *Turay* Court, the remedy for unconstitutional conditions of confinement at the SCC is an injunction action and/or an award of damages. 139 Wn.2d at 420. *See also Young v. Seling*, 531 U.S. 250, 266, 148 L.Ed.2d 734, 121 S.Ct. 727 (2001) (outlining potential remedies for "the alleged conditions and treatment regime at the Center.") The remedy, however, is not reversal or dismissal of the SVP petition. *Id.*

IV. CONCLUSION

For the aforementioned reasons, this Court should affirm the trial court's order committing Hatfield as a sexually violent predator.

RESPECTFULLY SUBMITTED this 2nd day of March, 2015.

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NO. 46319-9- II

WASHINGTON STATE COURT OF APPEALS, DIVISION II

In re the Detention of: RICHARD HATFIELD, Appellant.	DECLARATION OF SERVICE

I, Allison Martin, declare as follows:

On March 3, 2015, I sent via electronic mail a true and correct copy of Respondent's Amended Opening Brief, postage affixed, addressed as follows:

Kevin A. March
MarchK@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 3 day of March, 2015, at Seattle, Washington.

Allison Martin
ALLISON MARTIN

WASHINGTON STATE ATTORNEY GENERAL

March 03, 2015 - 11:49 AM

Transmittal Letter

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