Supreme Court No. 101695-6
Court of Appeals No. 83255-7-I

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

DWIGHT D. BENSON,
Appellant.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

On appeal, the State made a strategic decision not to address the issues raised in Mr. Benson's Statement of Additional Grounds (SAG), even though the State had obtained multiple month-long extensions of time for its responsive briefing *after* the SAG was filed, and even though the issues raised in the SAG had been extensively briefed and argued before the trial court. Seeking a do-over on that failed strategy, the State now asks this Court to create mandatory language in Rule of Appellate Procedure 10.10(f) where there is none[1]; and to hold that the Court of Appeals committed reversible error based solely on the State's novel interpretation of the rule, which conflicts with both the rule's plain language and the drafters' intent.

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[1] RAP 10.10(f) states: "The appellate court may, in the exercise of its discretion, request additional briefing from counsel to address issues raised in the defendant's pro se statement."

The Court of Appeals noted as much in its order denying the State's Motion for Reconsideration, explaining that the State not only misunderstands RAP 10.10(f), but that the prosecuting attorney had "over a month" to respond to the issues in the SAG but simply chose not to address them. As the Court of Appeals noted—and contrary to the State's representations before this Court—"the State was not denied an opportunity to brief the issues the panel deemed dispositive."

The State's failed strategy before the Court of Appeals echoes its failures before the trial court, where it offered only two witnesses—both of whom directly undermined its argument that Mr. Benson's predicate conviction was constitutionally sound—and not even a single exhibit to support its position. Nevertheless, the Court of Appeals considered the full record, including the parties' briefing and argument before the trial court, "the supplemental [appellate] filings, [and] the procedural history" of the case in reaching a thorough and well-reasoned opinion. Once again, the State offers nothing to undermine the Court of Appeals'

sound conclusion: Mr. Benson succeeded in making a colorable, fact-specific claim that his predicate conviction was invalid, and the State failed to meet its burden of proving beyond a reasonable doubt that the conviction was valid. This Court should decline review.

II. IDENTITY OF RESPONDENT

Mr. Benson, respondent herein and petitioner below, respectfully asks that this Court decline review of the Court of Appeals' unpublished decision vacating his conviction.

III. STATEMENT OF THE CASE

Mr. Benson provides the below response to the State's incomplete statement of the case. A full presentation of the procedural history of the case is set forth in Mr. Benson's opposition to the State's motion for reconsideration before the Court of Appeals.

A. The State had every opportunity to address the issues raised in Mr. Benson's Statement of Additional Grounds.

The main premise of the State's petition for review is that the Court of Appeals is to blame for—and committed reversible error

based on—the State's failure to address the issues raised in Mr. Benson's SAG. The record contains no support for such an assertion. Instead, the State had every opportunity and over two months to respond to Mr. Benson's SAG, which was filed long before the State's own responsive briefing and raised the same issues the parties had already briefed and argued extensively before the trial court. The State made a strategic decision not to address the SAG, and the Court of Appeals is hardly to blame for that decision.

Mr. Benson's SAG was filed on June 24, 2022. A little over two weeks later, on July 11, the State filed a motion for a one-month extension of time to complete its responsive briefing, as the case presented a "relatively unusual and complicated procedural history that will require careful review of the record." Mr. Benson did not object, and the Court of Appeals granted the request without limiting or restricting the scope of the State's responsive briefing in any way.

About a month later, on August 4, the State sought a second one-month extension of time to complete its responsive briefing, noting that the case had an "unusually lengthy record." Mr. Benson did not object to the extension, and the Court of Appeals again granted the request without placing any restrictions on the State's response.

On August 16—almost a full two months after Mr. Benson's SAG was filed—the State filed its responsive brief. Although the issues raised in Mr. Benson's SAG had been fully briefed and argued before the trial court, the State's responsive brief ignored them entirely and did not reference the SAG.

Contrary to the State's argument, the State was never denied an opportunity to respond to the SAG. Far from it, the Court of Appeals granted every extension of time the State requested and did not restrict the State's response in any way—all long *after* Mr. Benson's SAG had already been filed. The State's argument—that the Court of Appeals was somehow required to urge the State to respond to the SAG before it could rule on any issues raised

therein—is meritless, as RAP 10.10(f) is by its plain terms discretionary, which is fully consistent with the drafters' intent.

Having been granted every extension of time requested and with full awareness of Mr. Benson's SAG and the issues it raised, the State made a strategic decision not to address the SAG in its responsive briefing. That the State now regrets this decision is hardly grounds for this Court to grant discretionary review, much less to reverse the Court of Appeals.

B. The Court of Appeals issued a thorough and well-reasoned opinion addressing the issues presented in Mr. Benson's SAG.

Mr. Benson's SAG raised an issue the parties had already thoroughly briefed and argued extensively before the trial court: Whether Mr. Benson had succeeded in making a colorable, fact-specific claim that a predicate conviction was invalid, and, if so, whether the State successfully rebutted that showing beyond a reasonable doubt. *See, e.g.*, CP 49–633 (Mr. Benson's Motion in Limine to Exclude Prior Convictions, with supporting exhibits); RP 384–500, 505–515 (oral argument and ruling).

Under this Court's ruling in *State v. Summers*, 120 Wn.2d 801, 812, 846 P.2d 490 (1993), a defendant may challenge the underlying constitutionality of a predicate conviction forming an element of the charged offense. As this Court explained, "the defendant bears the initial burden of offering a colorable, fact-specific argument supporting the claim of constitutional error in the prior conviction." *Id.* at 812. If the defendant succeeds in making a colorable, fact-specific claim, the burden then shifts to the State, which "must prove *beyond a reasonable doubt* that the predicate conviction is constitutionally sound." *Id.* (emphasis added) (citing *State v. Gore*, 101 Wn.2d 481, 681 P.2d 227 (1984)).

As the Court of Appeals' decision recounts with extensive factual and legal support, Mr. Benson succeeded in making a colorable, fact-specific showing that his prior 2011 felony conviction was constitutionally invalid to serve as a predicate for his current felony charge. Critical to that finding was Mr. Benson's 2006 misdemeanor charge in Mount Vernon Municipal Court (MVM), which served as a predicate conviction necessary to

elevate his 2011 charge to a felony, which conviction then served to elevate his current charge to a felony. *See* RCW 42.61.502(6).

The Court of Appeals noted that Mr. Benson succeeded in making a colorable, fact-specific claim based on numerous facts, including among other things:

- The U.S. District Court for the Western District of Washington made extensive factual findings regarding his prior MVM attorney's specific and systemic failures to provide constitutionally adequate representation. *See* CP 254-276; *see also Wilbur v. City of Mount Vernon*, 989 F. Supp. 2d 1122, 1124 (W.D. Wash. 2013) (finding that "the appointment of [Mr. Witt] was, for the most part, little more than a formality," and "adversarial testing of the government's case was so infrequent that it was virtually a non-factor in the functioning of [MVM's] criminal justice system").
- Consistent with the federal court's criticism, Mr. Benson's MVM attorney not only failed to cite even a

single legal authority in his opening brief, *see* CP 73–75, 216–224, but completely failed to preserve the record for appeal, depriving Mr. Benson of any opportunity to submit the trial record to adversarial testing and constituting a breakdown of the adversarial process and a denial of counsel at a critical stage of the proceedings. *See* CP 55 (counsel's motion and declaration), 71–73, 169–173 (trial counsel's correspondence with clerk); *see also* RALJ 6.3.1 (requiring counsel to transcribe the relevant proceedings and file the transcription with the appellant's brief); *State v. Thomas*, 70 Wn. App. 296, 298, 852 P.2d 1130 (1993) ("A criminal defendant is constitutionally entitled to a 'record of sufficient completeness' to permit effective appellate review of his or her claims."); *State v. Larson*, 62 Wn.2d 64, 67, 381 P.2d 120 (1963) (holding defendant entitled to new trial where, because of lack of 'record of sufficient completeness,' "counsel representing the defendant on appeal . . . was unable to

determine satisfactorily what errors to assign for the purpose of obtaining an adequate review on appeal.").

- Mr. Benson's trial and appellate attorneys for his 2011 felony conviction—notably, the *only* two witnesses the State offered to rebut Mr. Benson's colorable, fact-specific claim—both testified they were unaware that challenging the underlying constitutionality of his predicate conviction was possible. RP 77, 97, 112–113, 123–125. For example, Mr. Benson's trial counsel for the 2011 conviction testified he did not know of any "recorded case that addresses the issue" of challenging a predicate conviction's underlying constitutionality and that doing so "never occurred to [him] as an option." *See* RP 112–113; *but see Summers*, 120 Wn.2d at 812 (decided in 1993).

Once Mr. Benson succeeded in making a colorable, fact-specific claim, the burden shifted to the prosecution, which then had to "prove beyond a reasonable doubt that the predicate

conviction [was] constitutionally sound." *Summers*, 120 Wn.2d at 812, 822. Here, the Court of Appeals reasonably concluded the State failed to meet that burden. For example, the State did not offer a single exhibit in support of its position before the trial court, despite making numerous unsupported allegations in its briefing.[2] Instead, the State offered only speculation and conjecture based on the same evidence Mr. Benson had already submitted, as well as the testimony of two witnesses who, as discussed above, directly undermined the State's arguments and bolstered Mr. Benson's claim. The Court of Appeals thoroughly and carefully addressed

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[2] The State references its trial court brief numerous times throughout its petition, noting that—even after Mr. Benson had filed his SAG—the State did not seek to designate its trial brief for inclusion in the appellate record until after the Court of Appeals issued its decision. What the State fails to mention is that the State's trial court brief did not include a single exhibit to support its speculative assertions, *see* CP 921–956, and the brief was essentially no different in substance from the arguments the State presented in oral argument, the full transcript of which was already in the appellate record. *See* RP 384–500, 505–515. In any event, the Court of Appeals granted the State's motion to supplement the record and determined the supplemental materials did not change the Court's conclusion that the State failed to meet its burden.

these issues in its opinion, and this Court should decline the State's request for review.

IV. LAW & ARGUMENT

The State assigns error based on two primary issues: (1) the State argues the Court of Appeals erred by applying the plain language of RAP 10.10(f) and resolving the issues raised in the SAG without the need to request additional briefing from the parties; and (2) the State contends this Court should reverse the Court of Appeals because a public defender assisted Mr. Benson in filing his SAG. Neither of these issues warrants review, much less reversal, and the State does not specifically assign error to the substantive decision of the Court of Appeals. This Court should decline review.

A. The Court of Appeals appropriately considered and resolved the issues raised in Mr. Benson's Statement of Additional Grounds.

Many of the State's assignments of error relate to the fact the Court of Appeals applied the plain language of RAP 10.10(f) and exercised its discretion to resolve the issues in Mr. Benson's SAG

without requesting additional briefing from the parties. This Court should also apply the plain language of RAP 10.10(f) to decline the State's invitation to create mandatory language in the rule where none exists nor was intended.

Rule of Appellate Procedure 10.10 governs the filing of a Defendant's Statement of Additional Grounds. As the Rule explains, "[i]n a criminal case on direct appeal, the defendant may file a pro se statement of additional grounds for review to identify and discuss those matters related to the decision under review that the defendant believes have not been adequately addressed by the brief filed by the defendant's counsel." RAP 10.10(a). Rule 10.10(d) *requires* that "the clerk *will* advise all parties if the defendant files a statement of additional grounds." *See* RAP 10.10(d) (emphasis added). Further, Rule 10.10(f) provides that "[t]he appellate court **may**, in the exercise of its discretion, request additional briefing from counsel to address issues raised in the defendant's pro se statement." *See* RAP 10.10(f) (emphasis added). Where a rule uses mandatory language in one sub-part and

discretionary language in another, it can be presumed that the use of the discretionary language is intentional and deliberate. *See Durland v. San Juan Cty*., 182 Wn.2d 55, 79, 340 P.3d 191 (2014) ("The use of different terms within the same statute implicates the 'basic rule of statutory construction that . . . different terms used within an individual statute [are intended] to have different meanings.'" (quoting *State v. Roggenkamp*, 153 Wn.2d 614, 625, 106 P.3d 196 (2005)).

Disregarding not only the plain language of RAP 10.10(f), but also the drafters' comments and the specific procedural history of Mr. Benson's case, the State urges this Court to hold that the Court of Appeals committed reversible error by not requesting responsive briefing from the State before resolving the issues raised in Mr. Benson's SAG. The State, however, cannot point to any language anywhere in the rule or elsewhere to support its interpretation. Far from it, the plain language of the Rule, the drafters' comments, and the specific procedural history of this case

all undermine the State's argument. The Court of Appeals acted well within its discretion, and this Court should decline review.

1. The language of the rule is plain and unambiguous.

When interpreting a court rule, this Court "will apply the principles of statutory construction, beginning with the plain meaning of the rule." *See Stout v. Felix*, 198 Wn.2d 180, 184, 493 P.3d 1170 (2021). "A court rule must be given its plain meaning, and when the language is clear a court cannot construe it contrary to its plain language." *In re Carlstad*, 114 Wn. App. 447, 455, 58 P.3d 301 (2002), *aff'd*, 150 Wn.2d 583, 80 P.3d 587 (2003). "Plain language 'does not require construction.'" *State v. Punsalan*, 156 Wn.2d 875, 879, 133 P.3d 934 (2006) (*quoting State v. Delgado*, 148 Wn.2d 723, 727, 63 P.3d 792 (2003)).

Here, the language of RAP 10.10 could not be any clearer or more unambiguous: The Court of Appeals "*may, in in the exercise of its discretion*, request additional briefing from counsel to address issues raised in the defendant's pro se statement." RAP 10.10(f) (emphasis added). Not only does RAP 10.10(f) use the plainly

discretionary word "may," but it then underscores the deliberate use of that word by expressly referring to the Court of Appeals' "exercise of its discretion." *Id.* Such plain, clear, and unambiguous language "does not require construction." *Punsalan*, 156 Wn.2d at 879. There is simply nothing in the Rule to support the State's argument that the Court of Appeals abused its discretion by *not* requesting supplemental briefing.

2. The drafters' comments provide further support for applying the unambiguous language of the rule.

The plain and unambiguous language of Rule 10.10(f) finds further support in secondary sources such as the drafters' comments, which provide helpful guidance in interpreting the rule. *See State v. Stump*, 185 Wn.2d 454, 460, 374 P.3d 89 (2016) ("When we interpret a court rule, like when we interpret a statute, we strive to determine and carry out the drafter's intent."). Here, the State cites repeatedly to the Washington Practice Series for support, but it tellingly omits any reference to the drafters' comments, which are included in the treatise and underscore the discretionary nature of the rule. *See* 3 Wash. Prac., Rules Practice

RAP 10.10 (9th ed.) ("Drafters' Comment to RAP 10.10"). Importantly, the drafters' comments provide a non-exhaustive list of potential options an appellate court may decide to pursue in addressing a defendant's statement of additional grounds:

> If the statement is sufficiently specific and raises sufficiently meritorious issues, the court may, in its discretion, pursue the matter by *resolving the issue*, asking counsel to brief it, asking the State to respond, ordering production of the necessary record on its own initiative, etc.

See id. (emphasis added).

As these comments make clear, the drafters intended that an appellate court presented with a "sufficiently specific" statement "may, in its discretion," simply "resolv[e] the issue" without requesting additional briefing. *See id.* That is precisely what happened here: The Court of Appeals received a sufficiently specific statement; the appellate record included the relevant witness testimony and the parties' extensive oral argument before the trial court; and, despite having more than ample notice, opportunity, and time to respond, the State chose not to address the

issue in its responsive briefing.[3] At that point, nothing prevented the Court of Appeals from exercising its discretion to resolve the issue, and this Court should reject the State's attempt to disregard the drafters' intent and ignore the plain language of the Rule.

B. The State's references to Mr. Benson's criminal history, his counsel, and the filing of his SAG are distractions that do not warrant review.

Without any language in the rule to support its interpretation, the State resorts to allegations regarding Mr. Benson's criminal history, *see* Petition at 6, n.2, his counsel, *see* Petition at 12–13 (comparing typefaces between documents)[4], and the filing of his

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[3] The State also argues that RAP 10.10(f) cannot be interpreted according to its plain language and the plain language of the drafters' comment, as under that interpretation the State may not have been permitted to submit an entirely separate brief to address Mr. Benson's SAG. Of course, the State's argument ignores that the State had ample time and opportunity to address the SAG in its responsive briefing in this case but *affirmatively chose not to do so*. The Court of Appeals was fully within its authority to exercise its discretion and resolve the issues raised in the SAG based on the facts of the case.

[4] As it did before the Court of Appeals, the State again suggests that undersigned counsel personally assisted Mr. Benson in filing

SAG. For example, the State argues that review is necessary because a public defender assisted Mr. Benson in the process of filing of his SAG. As an initial matter, it is entirely unclear how the manner of filing a SAG has any material effect whatsoever on how the State chooses to respond (or not respond) to the issues raised therein. Here, for example, the State affirmatively chose not to respond to Mr. Benson's SAG, and the State's decision was entirely unrelated to the manner in which the SAG was filed. In other words, this issue should be of no consequence to the State, but the State appears to be using it as an after-the-fact justification for revisiting its failed litigation strategy.

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his SAG. The State's unfortunate assertion is puzzling, irrelevant, and quickly disproven with even a cursory web search. Both during Mr. Benson's trial and when his SAG was filed, undersigned counsel Mr. Bays was employed by the Washington Attorney General's Office as Section Chief of the AGO's Complex Litigation Division. Mr. Bays was not, as the State suggests, secretly assisting Mr. Benson in that capacity. The State should hold itself above such misrepresentations.

In any event, nothing in RAP 10.10 prevents an indigent, incarcerated defendant from receiving assistance in the process of filing a SAG on appeal. It is unsurprising—and fully consistent with the rule—that such a defendant, when presented with a meritorious legal issue their appellate counsel refuses to raise, may choose to submit what their public defender already thoroughly briefed to the trial court.[5] The State again attempts to create additional limitations and restrictive language not actually contained in RAP 10.10, and this Court should decline the State's invitation.

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[5] Given that Mr. Benson's SAG was largely similar to what his public defender had previously submitted to the trial court, it is unclear why the State argues that responding would have required significant additional effort or resources. The parties, including the State, had already fully briefed the issues before the trial court, and the State's briefing did not include any exhibits. *See* CP 921–56. The parties also engaged in extensive oral argument before the trial court, the full transcript of which was already in the appellate record. *See* RP 384–500, 505–15. The State had all the resources necessary to respond; it chose not to.

C. The Court of Appeals issued a thorough, well-reasoned opinion upon full consideration of the record.

The State focuses its assignments of error on RAP 10.10(f) and the filing of Mr. Benson's SAG and does not specifically assign error to the Court of Appeals' substantive decision. *See Ortblad v. State*, 85 Wn.2d 109, 111–12, 530 P.2d 635 (1975) ("[F]or consideration by this court, an alleged error must be included in the assignments of error in the appellant's brief [and] must be supported by argument in the brief."); *Rutter v. Rutter's Est.*, 59 Wn.2d 781, 788, 370 P.2d 862 (1962) ("[A]rgument unsupported by an assignment of error does not present an issue for review."); *Boyle v. King Cnty.*, 46 Wn.2d 428, 433, 282 P.2d 261 (1955) ("The argument in regard to express warranty is unsupported by any assignment of error; therefore, the question is not before us for consideration.").

Nevertheless, as set forth above, the Court of Appeals issued a thorough, well-reasoned opinion based on full consideration of the record, holding that Mr. Benson succeeded in making a colorable, fact-specific claim which the State failed to rebut beyond

a reasonable doubt. The Court of Appeals then granted the State's motion to supplement the record and reasonably concluded, after yet another full review, that nothing the State had identified in its motion for reconsideration or supplemental materials called that holding into question. This Court should deny review.

V. CONCLUSION

The State may prefer that the Court of Appeals handled this matter differently, but that does not mean the Court of Appeals abused its broad discretion, and it is not grounds for this Court to disregard the plain language of RAP 10.10(f) or the drafters' intent by creating mandatory language where none exists. The State has failed to identify any basis for accepting review. For these reasons and those set forth above, Mr. Benson respectfully requests the Court deny the State's petition for review.

RESPECTFULLY SUBMITTED this 9th day of March, 2023.

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VI. CERTIFICATE OF COMPLIANCE WITH RAP 18.17

I certify that the word count for this brief, as determined by the word count function of Microsoft Word, and pursuant to Rule of Appellate Procedure 18.17, excluding title page, tables, certificates, appendices, signature blocks and pictorial images is 3,901.

RESPECTFULLY SUBMITTED this 9th day of March, 2023.

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CERTIFICATE OF SERVICE

I hereby certify that on March 9, 2023, I filed the foregoing brief via the Washington Court Appellate Portal, which will serve one copy of the foregoing document by email on all attorneys of record.

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