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STATE OF WASHINGTON
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Division I
State of Washington
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NO. 85652-9

Case #: 1030541

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

IN RE THE DETENTION OF

RANDY ROSS, Appellant.

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Randy Ross, appellant below and petitioner here, seeks review of the Court of Appeals decision cited in Section II.

II. COURT OF APPEALS DECISION

Petitioner seeks review of the Court of Appeals decision In *re the Detention of Randy Ross,* No. 85652-9-I, slip opinion filed April 29, 2024. Appendix 1.

III. ISSUES PRESENTED FOR REVIEW

Does RCW 71.09.060(2) grant the right to have a jury decide whether Petitioner committed the sexually violent acts charged because "all constitutional rights available to defendants at criminal trials, other than the right not to be tried while incompetent, shall apply"?

Does the statute permit the indefinite detention of the most vulnerable respondents –those who cannot understand the proceedings against them or assist counsel—without the opportunity for a jury to determine if they committed the predicate sexually violent acts where every other respondent

subject to commitment under RCW 71.09 has had the predicate offense adjudicated in the criminal justice system?

Does the use of the word "court" in RCW 71.09.060(2) -- as opposed to "court or jury" in RCW 71.09.060(1)-- override the express grant of "all constitutional rights" where the right to a jury is not specifically excluded?

Do the statutory findings on the impact of Petitioner's incompetency preclude the right to a jury?

Does due process require the right to a jury trial in this case?

IV. INTRODUCTION

In RCW 71.09.060(2), the Legislature created a unique proceeding for a unique group of respondents who, like Mr. Ross, were incompetent to stand trial on the predicate sexually violent offense. The statute's core purpose is to require the State to prove the predicate sexually violent offense beyond a reasonable doubt at a hearing that provides all constitutional

criminal trial rights.[1] This statute protects incompetent respondents like Mr. Ross from a massive curtailment of liberty based on conduct that has never been tested in the crucible of the courts.

The State seeks to indefinitely commit Randy Ross as a sexually violent predator. But, unlike all other respondents, Mr. Ross has never been convicted of or found to have committed a sexually violent offense.[2] He was charged with such offenses

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[1]*See In re the Detention of Stout,* 159 Wn.2d 357, 376, 150 P.3d 86 (2007) ("An incompetent SVP detainee has not yet stood trial for the underlying criminal offense that predicates the SVP petition against him . . . the incompetent detainee has not yet been afforded an opportunity to exercise his criminal trial rights. It is rational, then to allow him or her to do so at the SVP commitment proceeding . . . .").

[2]The State may only file an SVP petition against someone who falls within one of the five classes of persons who have been ***charged with or convicted of*** sexually violent offenses. RCW 71.09.030(1)(a)-(e). The persons described in (a), (b) and (e) have all been convicted of a sexually violent offense. (Juvenile adjudications are considered convictions. *In re Detention of Anderson*, 185 Wn.2d 79, 86, 368 P.3d 162 (2016)). Subsection (d) applies to persons found not guilty by reason of insanity and, thus, were found to have committed the charged offense. RCW 10.77.040; WPIC 20.03 Insanity –Order of Consideration. Subsection (c) only applies to persons, like Mr.

in 2015 and 2022 and found incompetent to be prosecuted. As a result, the charges were dismissed and never adjudicated.

After the 2022 charge was dismissed, the State filed a sexually violent predator petition against Mr. Ross. In this situation, prior to the commitment trial, the State must prove beyond a reasonable doubt that Mr. Ross committed the acts charged in the 2022 information in the proceeding prescribed in RCW 71.09.060(2). Appendix 2. The statute directs "the court" to hold a hearing and hear evidence on this issue. The procedure and scope of the rights at this hearing are clearly stated.

> The hearing on this issue ***must comply*** with all the procedures specified in this section. In addition, the rules of evidence applicable in criminal cases shall apply, and ***all constitutional rights available to defendants in criminal trials***, ***other than the right not to be tried while incompetent***, ***shall apply***.

Ross, who were charged with a sexually violent offense but found incompetent to stand trial.

(Emphasis added.) RCW 71.09.060(2).[3] Appendix 2. This clear, mandatory grant of ***all*** constitutional criminal trial rights (with only one exception) guarantees Mr. Ross the right to have a jury decide beyond a reasonable doubt whether he committed the predicate sexually violent acts charged in the 2022 information. This core issue is one juries routinely decide in our justice system.

V. STATEMENT OF THE CASE

In 2015, Mr. Ross was charged with three sexually violent offenses alleged to have occurred between July 2011 and July 2014. CP 64-72. Mr. Ross was found incompetent and not restorable, the charges were dismissed, and Mr. Ross was committed to Western State Hospital (WSH) on February 10, 2016. CP 22-25, 54. The State did not file a sexually violent predator petition when Mr. Ross was released from WSH in September 2016.

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[3] Both the Washington and federal constitutions guarantee a defendant the right to a jury at a criminal trial. Art. 1, sec. 21 and 22. U.S. Const. Amend. 6.

On November 29, 2022, Mr. Ross was charged with Attempted Child Molestation, First Degree alleged to have occurred on August 7, 2022. CP 2, 49. A competency evaluation was ordered. The evaluator found Mr. Ross to be incompetent and not restorable. CP 50-62. The court adopted these findings and dismissed the charge on June 8, 2023. CP 48-49.

That same day, the State filed a petition to commit Mr. Ross as a sexually violent predator pursuant to RCW 71.09.030(1)(c).[4] The parties agreed to a date for the RCW 71.09.060(2) trial. Appendix 4.[5] Mr. Ross demanded a jury trial. CP 82-88. The trial judge denied the motion, reading the statute to designate the judge as the sole trier of fact to decide

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[4]The trial court made a preliminary finding that probable cause exists to believe Mr. Ross is a sexually violent predator. RCW 71.09.040(2). Mr. Ross was then transferred to the Special Commitment Center on McNeil Island and will be detained there until trial. RCW 71.09.040(4).

[5]The trial was continued to June 3, 2024. Appendix 5. The parties are conducting discovery and preparing for trial.

beyond a reasonable doubt whether Mr. Ross committed the predicate sexually violent offense. CP 94-95. The Court of Appeals granted Mr. Ross's motion for discretionary review but affirmed the trial judge. Mr. Ross seeks review in this Court.

VI. ARGUMENT

A. The Court of Appeals decision conflicts with decisions of this Court and the Court of Appeals on statutory construction. RAP 13.4(b)(1), (2). Specifically, the decision renders superfluous the plain statutory language, fails to apply the rule on exceptions and strictly construe the statute, undermines the legislative intent, and violates due process.

Statutory interpretation is a question of law reviewed *de novo*. *In re Detention of Williams*, 147 Wash.2d 476, 486, 55 P.3d 597 (2002).

1. The Court of Appeals erroneously carved out the right to a jury from the scope of rights available at the hearing.

The Court of Appeals erroneously held that the right to a jury is not available at the hearing where "all constitutional rights available to defendants at criminal trials, other than the

right not to be tried while incompetent, shall apply." RCW 71.09.060(2). Appendix 2. The Court did not address the meaning of this clear, mandatory language –except to say that the phrase does not include the right to a jury.[6] Instead, the Court characterized RCW 71.09.060(2) as a "preliminary hearing" on a "specific evidentiary issue" comparable to a motion to dismiss under CrR 8.3(c) or to admit evidence under ER 404(b). Slip op. at 11. From this framework, Court concluded the following.

> Because juries do not determine motions to dismiss or motions to exclude certain evidence and thus such hearings do not involve a "constitutional right available to defendants at criminal trials," the preliminary hearing in RCW 71.09.060(2) likewise does not implicate the constitutional right to a jury determination.

This reading of the statute renders superfluous key statutory language, conflicts with decisions of this Court and the Court of appeals on the rule on exceptions, fails to give effect to the

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[6]The Court spent the bulk of its opinion discussing the language and role of "the court" in RCW 71.09.060(1) and (2) vis-à-vis a jury. Those arguments are discussed below.

intent of the Legislature and fails to strictly construe the statute.

The Legislature clearly and specifically delineated the scope of the rights at the hearing provided in RCW 71.09.060(2): ***all*** constitutional rights available to defendants at criminal ***trials***, other than the right not to be tried while incompetent, ***shall apply.*** By carving out the right to a jury, the Court of Appeals decision renders superfluous the words "all," "trials" and "shall apply" and conflicts with appellate decisions on this point.[7]

To carve out the jury right from "all constitutional rights available . . . at criminal trials" the court disregarded the descriptor "all," the single exception (the right not to be tried while incompetent), the rights granted are "trial" rights (rather than those in preliminary hearings), and the mandatory directive "shall apply." This is not a reasonable reading of the plain

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[7] "Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous." *Whatcom Cy. V. City of Bellingham,* 128 Wn.2d 537, 546, 909 P.2d 1303 (1996).

language. Excluding the right to a jury undermines the clear legislative intent to create a process where incompetent individuals are provided the opportunity to exercise all their constitutional trial rights to challenge the sexually violent acts charged. *See In re the Detention of Stout, supra.* This process provides an "additional safeguard" designed to "protect incompetent individuals." *In re Detention of Greenwood,* 130 Wn.App. 277, 285, 122 P.3d 747 (2005).

Assuming for the sake of argument that the hearing in RCW 71.09.060(2) is a preliminary evidentiary hearing (in so far as it occurs prior to the civil commitment trial), the Legislature clearly stated that ***all*** criminal ***trial*** rights ***shall apply at the hearing*** on the issue of whether the person did commit the acts or acts charged. RCW 71.09.060(2). This grant of rights does not turn on whether the proceeding is characterized as a trial versus a hearing, a preliminary

determination of facts[8] versus the ultimate question of commitment, or civil versus criminal.[9]

The Court of Appeals' decision also conflicts with appellate decisions on the rule on exceptions. When the Legislature includes one exception, but not others, the courts presume that any omissions were intended. *State v. Taylor*, 97 Wn.2d 724, 728, 649 P.2d 633 (1982); *In re PRP of Acron*, 122 Wn.App. 886, 890, 95 P.3d 1272 (2004); *Khandelwal v. Seattle*

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[8]Moreover, the issue at this hearing--whether Mr. Ross committed the acts charged in the 2022 information-- is not comparable to the pretrial hearings listed by the Court of Appeals. This issue is akin to the ultimate issue at a criminal trial –whether the defendant committed the crime charged in the information—where the defendant has the right to a jury. Also, preliminary hearings at criminal trials do involve constitutional criminal trial rights –the rights against self-incrimination, to be present, to counsel, and others.

[9]The civil nature of RCW 71.09 is also not dispositive. RCW 71.09 is civil, not criminal or punitive. *In re Detention of Young*, 122 Wash.2d 1, 18–25, 857 P.2d 989 (1993). Yet, the Legislature chose to provide jury trials at various stages of the commitment process in RCW 71.09, even though the verdicts do not result in punishment. Civil commitment, while not punishment, involves a massive curtailment of liberty.

Municipal Court, 6 Wn.App. 233, 332, 431 P.3d 506 (2018).[10] The Legislature allowed only a single exception to the grant of all constitutional criminal trial rights –the one necessary to allow the matter to proceed --the right not to be tried while incompetent.[11] There are no other exceptions. The Court of Appeals disregards the inherent contradiction in asserting the Legislature conferred all constitutional criminal trial rights, expressly excluded one fundamental right (not to be tried while incompetent), and silently implied the exclusion of another fundament right (to a jury). This seems even more unlikely if, as the court asserts, the Legislature intended only a judge to decide the sole question at the hearing --whether Mr. Ross committed the acts charged.

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[10] The Court of Appeals claims that, absent an ambiguity, the Court will not resort to any rules of statutory construction. Slip op. at 4. However, the rule on exceptions was applied in *Taylor, Acron* and *Khandelwal* to the unambiguous statute or court rule at issue.

[11] Also, since the statute only applies to incompetent persons, that one exception is surplusage unless it is the only exception.

The Court of Appeals also failed to strictly construe the grant of rights and conflicts with this Court's precedent. "We strictly construe statutes curtailing civil liberties ***to their terms***." (Emphasis added.) *In re Detention of Martin*, 163 Wn.2d 501, 508, 182 P.3d 951 (2008). Instead of reading the express terms of "all constitutional rights available to defendants at criminal trials" to include the right to a jury, the Court of Appeals carved out the jury right. This holding also violates Mr. Ross's right to due process. Civil incarceration that is noncompliant with the statutory process deprives a person of basic liberty without the process due. *Id.* at 511.

2. The Court of Appeals erroneously reads "court" to mean only "judge" to exclude the right to a jury.

The Court of Appeals concluded based on a single dictionary definition that "court" as used in the statute means only "judge" and, thus, precludes a jury as the trier of fact.[12]

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[12] The dictionary referenced by the Court also has a broader definition that includes other judicial decision makers: "3a: an official assembly for the transaction of judicial business."

Slip op. 7-8. The court reads the statute through this single lens and discards as surplusage any conflicting language.

"Court" does not always mean "judge" in RCW 71.09.060(2). The last sentence of RCW 71.09.060(2) states "the court . . . may proceed to consider whether the person should be committed pursuant to this section," if the charged acts are proved. Here, "court" is not limited to a judge as trier of fact because commitment can be decided by a judge or jury. RCW 71.09.050(3); RCW 71.09.060(1). To read "court" in this sentence to mean only "judge" conflicts with those two statutes.[13]

(www.merriam-webster.com/dictionary/court last visited May 7, 2024.) Other standard dictionaries have similar definitions. "Court n. 6: a judicial body or a meeting of a judicial body." The Merriam-Webster Dictionary (11th ed. 2019). "Court n. 10 a) A person or persons appointed to try law cases, make investigations . . ." Webster's New World Dictionary (3rd College Edition 1994). None of these standard dictionary definitions exclude a jury as the trier of fact in this statute.

[13] Also, RCW 71.09.060(2) directs "the court" to perform other judicial functions such as hear evidence, make findings, or enter a final order. Slip op. at 9-10. Delegating these judicial functions to the judge does not preclude a jury from deciding

The word "court" in RCW 71.09.060(2) must be read in the context of the specific grant of rights, the purpose of the statute and the legislative intent. The legislative intent as derived from the plain language is to protect incompetent respondents by providing them the full panoply of constitutional criminal trial rights in a proceeding to determine whether they committed the predicate offense. Reading the word "court" to identify the judge as the sole trier of fact undermines this intent and conflicts with the plain language that grants all constitutional criminal trial rights (except one). This language provides for a determination by jury or judge (if the right to a jury is constitutionally waived).

Even assuming for the sake of argument that "court" implies "judge," the specific language "all constitutional rights available to defendants at criminal trials" controls the scope of the rights available at this hearing. "When there is an

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whether Mr. Ross committed the acts charged in the 2022 information.

'inescapable conflict' between a statute's general and specific terms, the specific terms prevail." *State v. Stately*, 152 Wn.App. 604, 609-610, 216 P.3d 1102 (2009). The Court of Appeals claimed that the dictionary definition above "obviated the need to avail ourselves of this principle." Slip op. 8. This singular focus on the word "court" ignores the language that specifically sets forth the scope of rights at this hearing.[14] The word "court" cannot control the scope of the constitutional criminal trial rights without discarding key words in the grant of rights –like "all," "trial" and "other than." A judge sitting as the trier of fact can give effect to all constitutional criminal trial rights only if the person has a jury right to waive and makes a valid waiver. *City of Bellevue v. Acrey*, 103 Wn.2d 203, 207-208, 691 P.2d 957 (1984). The word "court" does not modify the phrase "all constitutional rights available to criminal defendants at criminal trials." Only the single express

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[14] The court's sole attempt to reconcile "all" constitutional criminal "trial" rights with the judge as trier of fact (Slip op. at 11-12) fails for the reasons stated above in Section A.1.

exception ("other than the right not to be tried while incompetent") does that.

3. The Court of Appeals erroneously uses the language in RCW 71.09.060(1) to exclude the right to a jury in RCW 71.09.060(2). The court fails to recognize the different purpose each statute serves, the different rights granted for those purposes and the different language used to grant those rights.

The Court claims that RCW 71.09.060(2) does not confer the right to a jury because the word "court" is used instead of the phrase "court or jury" used in subsection (1).[15] Reading the two statutes together in this way ignores the fact that the Legislature chose to confer all constitutional criminal trial rights in subsection (2), but not subsection (1). The different language used in each statute reflects the Legislature's choice to treat incompetent respondents differently and to create a process that serves a unique purpose for this unique group of respondents. The fact that the Legislature used only the word

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[15] The Court wrote, "we achieve interpretive harmony when we respect the Legislature's manifest intent to differentiate between the role of the jury in parts of section (1) and the unitary role of the court in section (2)." Slip op. at 10.

"court" in RCW 71.09.060(2) instead of "court or jury" does not override the express grant of "all the constitutional rights available to defendants at criminal trials."

This Court recognized the unique purpose of RCW 71.09.060(2) as a rational basis for treating respondents like Mr. Ross differently from others facing indefinite commitment. *In re Detention of Stout,* 159 Wn.2d 357, 376, 150 P.3d 86 (2007) (rejecting equal protection claim for right to confront at commitment trials).

> [A] rational basis for the distinction between competent and incompetent SVP detainees with regard to constitutional protections is readily discernable. ***An incompetent SVP detainee has not yet stood trial for the underlying criminal offense that predicates the SVP petition against him. See RCW 71.09.060(2)***. A competent SVP detainee has been convicted or charged under the criminal justice system. See RCW 71.09.020(16). Thus, the competent SVP detainee had an opportunity to contest the charges against him with the full panoply of constitutional rights afforded to a criminal defendant. ***In contrast, the incompetent SVP detainee has not yet been afforded an opportunity to exercise his criminal trial rights. It is rational, then, to allow him or her to do so at the SVP commitment proceeding***, while the competent SVP detainee is not afforded another opportunity to do so. (Emphasis added.)

RCW 71.09.060(2) uses different language than used in subsection (1) to grant trial rights ---particularly the right to a jury. Subsection (2) does not list out each constitutional criminal trial right conferred. Rather, the statute confers "all constitutional rights available to defendants at criminal trials." Those rights include, among others, the right to remain silent, to be presumed innocent, to confrontation and the right to a jury. None of these constitutional rights apply to the commitment trial in RCW 71.09.060(1).[16] Since there is no constitutional right to a jury for the commitment trial, RCW 71.09.060(1) includes language detailing the role of the jury. For example, as the Court of Appeals points out, subsection (1) uses "court or

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[16] *In re Detention of Young,* 122 Wn.2d 1, 52, 857 P.2d 989 (1993) (no right to remain silent); *In re Detention of Stout,* 159 Wn.2d 357, 376, 150 P.3d 86 (2007) (no right to confront); *In re Detention of Law,*146 Wn.App. 28, 48-49, 204 P.3d 230 (2008) (no presumption of innocence); *In re Detention of Coppin*, 157 Wn.App. 537, 546, 238 P.3d 1192 (2010) (statutory right to jury trial).

jury" to indicate that a judge or jury are both available. In subsection (2), the court grants all constitutional trial rights which includes the right to a jury (and a judge as trier of fact if the right to a jury is waived).

In other words, in subsection (1) the Legislature refers to the statutory right to a jury granted in RCW 71.09.050(3) and in subsection (2) the Legislature conferred the constitutional criminal trial right to a jury. In this context, RCW 71.09.060(1) delineates the roles of the judge and jury in greater detail and provides other procedural rights.[17] In contrast, RCW 71.09.060(2) provides all constitutional criminal trial rights – which includes the right to a jury— in the same statute. Additional language is unnecessary.

The related provisions and statutory scheme as a whole demonstrate that RCW 71.09.060(2) is substantially different

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[17] For example, subsection (1) requires jury unanimity. RCW 71.09.060(1). Such language is unnecessary in subsection (2) because the state constitution guarantees jury unanimity in a criminal trial. *State v. Ortega–Martinez*, 124 Wn.2d 702, 707, 881 P.2d 231 (1994).

from subsection (1). Subsection (2) requires the State to prove the acts charged for the sexually violent offenses upon which the petition is based— a crime that has never been proved. At the commitment trial in subsection (1), the State is not required to re-prove the predicate sexually violent offense, but only that the person was previously convicted of such an offense.[18] RCW 71.09.060(1); RCW 71.09.020 (19). *See also In re Detention of Stout, supra at* 376.

B. This case presents a significant constitutional question. RAP 13.4(b)(3). Due process requires the right to have a jury determine beyond a reasonable doubt that Mr. Ross committed the predicate sexually violent offense.

Courts resolve due process claims by balancing three factors: the individual interest at stake, the risk of error posed by the current procedure, and the State's interest in maintaining the current procedure. *Mathews v. Eldridge*, 424 U.S. 319, 335, 96

[18]Or that the person was found NRGI of a sexually violent offense. *See* RCW 71.09.030(a), (b), (d), (e); WPI 365.10. Such facts are readily established by court records.

S. Ct. 893, 47 L. Ed. 2d 18 (1976). Generally, in SVP cases, the balance often turns on the second factor. *In re the Detention of Hatfield,* 191 Wn.App. 378, 396-398, 362 P.3d 997 (2015). Due process is a flexible concept and the process due depends on what is fair in a particular context. *In re the Detention of Stout,* Wn.2d 357, 370, 150 P.3d 86 (2007).

The context here is that Mr. Ross, unlike every other respondent subject to an SVP petition, has never been convicted or found to have committed the sexually violent offense upon which the SVP petition is predicated. The context is a hearing in which the State must prove beyond a reasonable doubt the sexually violent acts charged in the 2022 information –acts that have never been adjudicated because Mr. Ross was incompetent to stand trial. The core function of the hearing is to provide Mr. Ross the opportunity to exercise his constitutional criminal trial rights to contest the conduct on which the SVP petition is predicated. *See In re the Detention of Stout, supra,* 159 Wn.2d at 376.

While any trier of fact can make mistakes, the constitutional criminal trial right to have a jury decide the acts charged has long been viewed as a key protection against the risk of erroneous deprivation of liberty by the government. *See City of Pasco v. Mace,* 98 Wn.2d 87, 94, 653 P.2d 618 (1982).

The Court of Appeals erroneously held that the second factor does not weigh in favor of a jury trial, quoting *State v. McCuiston, 174 Wn.2d 369, 393, 275 P.3d 1092 (2012)* for the proposition that the risk of error is low because "'before the State may commit an individual as an SVP, if must hold a full, evidentiary trial at which the individual enjoys an array of procedural protections.'" Slip op. at 15-16. *McCuiston* has no application to this case.

There this Court rejected a due process challenge to the prerequisites for "gaining a full ***post-commitment*** hearing" on release under RCW 71.09.090. (Emphasis added.) *Id.* at 392. The procedures were deemed adequate because the State had already proved the person is an SVP at the commitment trial with a full

array of rights and post-commitment procedures provided further protections. *Id.* But the commitment trial and the post-commitment procedures provide no protection against the risk of erroneous decision as to whether Mr. Ross committed a sexually violent acts charged. At the commitment trial, the State is not required to re-prove the sexually violent acts upon which the petition is predicated. RCW 71.09.060(1). The core issue at the hearing in RCW 71.09.060(2) is whether Mr. Ross committed the act charged in the 2022 information. This is Mr. Ross's only opportunity to challenge the allegations and exercise all of his constitutional criminal trial rights.

The Court of Appeals also held that an erroneous finding at the hearing in RCW 71.09.060(2) does not result in loss of liberty because Mr. Ross will only be committed after a trial pursuant to RCW 71.09.060(1). This conflicts with the holding in *In re the Detention of Young,* 122 Wn.2d 1, 46, 857 P.2d 989 (1993). This Court held due process required detainees have an opportunity to appear in person to contest probable cause after

an SVP petition is filed because the respondent's "liberty interests are substantially infringed upon during the 45-day period leading up to trial." *Id.* Similarly, the State may not continue to detain Mr. Ross unless and until the State proves beyond a reasonable doubt that he committed the acts charged in the 2022 information. If the State's proof fails, Mr. Ross must be released. Mr. Ross clearly risks a loss of liberty at this stage of the proceedings.

C. The issue raised in the petition is of substantial public interest that should be determined by this Court. RAP 13.4(b)(4).

The only previously published decision on RCW 71.09.060(2) is *In re the Detention of Greenwood*, *130 Wn.App. 277, 122 P.3d 747 (2005).* Because the State agreed to a jury in that case, *Greenwood* did not decide the scope of the rights granted by the language "all constitutional rights available to defendants at criminal trials, except for the right not to be tried while incompetent." Here, the Court of Appeals decision fails

to give effect to the plain language of the statute, strictly construe the statute to protect against massive curtailment of Mr. Ross's liberty, and conflicts with the clear legislative intent as well as decisions of this Court and the Court of Appeals.

There are two of these cases currently pending in King County Superior Court. While Mr. Ross's case was pending in the Court of Appeals, the trial court in the other matter, *In re the Detention of Green,* ruled the respondent "is entitled to a Jury Trial on the question of whether he committed the predicate offense alleged by the State." Appendix 3. The judge explained.

> The court cannot ignore the plain language of the statute which grants the petitioner, "all constitutional rights available to defendants at criminal trials, other than the right not to be tried while incompetent ..." RCW 71.09.060(2). The right to a jury trial is a fundamental right granted to all defendants at criminal trials and could not have escaped the awareness of the legislature when it wrote the language contained in RCW 71.09.060(2). Once such a grant of rights is made by the legislature, it cannot be ignored or overcome simply by language that seems to imply otherwise.

The order also certified the question pursuant to RAP

2.3(b)(4).[19] The State filed a notice of discretionary review on April 22, 2024. Appendix 3. Had the Court of Appeals reversed the trial court in this case, it appears the State was poised to seek further review in both *Ross* and *Green.*

Given the conflicting trial court decisions in *Ross* and *Green,* there appears to be substantial grounds for a difference of opinion that should be resolved by this Court. A decision by this Court will guide future cases and avoid continued appellate litigation to resolve the questions presented here.

VII. CONCLUSION

For the reasons stated above, this Court should grant Mr. Ross's petition and decide that RCW 71.09.060(2) provides Mr. Ross with a jury to determine if he committed the acts charged

[19] "The Court certifies under RAP 2.3(b)(4) that its ruling on Mr. Green's motion for jury trial under RCW 71.09.060(2) involves a controlling question of law as to which there is substantial ground for a difference of opinion and that immediate review of the order may materially advance the ultimate termination of the litigation."

in the 2022 information.

CERTFICATE OF COMPLIANCE

I certify that this document complies with RAP 18.17, and that font is size 14, and the word count (excluding materials listed in RAP 18.17(b)) 4971 words, as calculated by our word processing software.

Respectfully submitted this 8th day of May, 2024.

Christine A. Jackson

Christine A. Jackson, WSBA#17192
Attorney for Appellant

CERTIFICATE

I certify that on today's date, I emailed a copy of this document to:

Paula Olson, Guardian ad Litem for Mr. Ross
By email at olsonlaw@nventure.com

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Seattle, Washington on May 9, 2024.

Christine A. Jackson, No. 17192
Attorney for Petitioner

APPENDIX 1

Court of Appeals slip opinion filed 4/29/2024

FILED
4/29/2024
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In the Matter of the Detention of RANDY RYAN ROSS.	No. 85652-9-I DIVISION ONE PUBLISHED OPINION

DÍAZ, J. — The State twice charged Ross with a sexually violent offense. Each time, the court found Ross incompetent and dismissed the charges. Following the dismissal of the second charged offense, the State filed a sexually violent predator (SVP) petition. Ross moved the court to empanel a jury to make the required preliminary determination whether he committed that crime, which motion the court denied. Ross sought, and this court granted, discretionary review. We hold that neither RCW 71.09.060(2) nor due process requires a jury, in this preliminary stage of an SVP proceeding, to determine whether Ross committed the predicate act(s). Thus, we affirm the denial of Ross' motion, and remand this matter to proceed consistent with this opinion.

I. BACKGROUND

In 2015, the State charged Ross with two counts of child molestation in the first degree and rape of a child in the second degree. In 2016, the trial court found

Ross not competent to stand trial and his competency non-restorable. The court dismissed the charges without prejudice and committed Ross to Western State Hospital.

In a completely separate incident seven years later, in 2022, the State charged Ross with one count of attempted child molestation in the first degree. In 2023, the trial court dismissed the charges against Ross, finding him still unable to assist in his defense and thus incompetent. The same day, the State filed a petition to commit Ross as an SVP per chapter 71.09 RCW. The State stipulated it would bring its petition under only the 2022 charge.

Ross moved the court for an order empaneling a jury to make the preliminary determination required by the statute that he committed the 2022 charge. The trial court denied the motion, finding chapter 71.09 RCW envisions the court and not a jury making that determination. Ross then petitioned for discretionary review, which a commissioner of this court granted.

II. ANALYSIS

A. Whether RCW 71.09.060(2) Requires a Jury to Determine Whether the Respondent Committed the Charged Act(s)

1. Overview of Sexually Violent Predator Proceedings

"The legislature has established a civil involuntary commitment system for individuals who are found to be an SVP." In re Det. of Reyes, 184 Wn.2d 340, 343, 358 P.3d 394 (2015). "The statute defines a 'sexually violent predator' as a 'person who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence if not confined in a

secure facility.'" Id. (quoting RCW 71.09.020(18)).

There are several classes of persons who are subject to the SVP petition process. RCW 71.09.030(1). Relevant here is the class of persons "who has been charged with a sexually violent offense and who has been determined to be incompetent to stand trial [, and] is about to be released, or has been released, pursuant to RCW 10.77.086(7)." RCW 71.09.030(1)(c).

The charges brought by the State in Ross' 2015 and 2022 cases qualify as sexually violent offenses under RCW 71.09.020(18). And, thus, Ross falls within the class of persons who could be committed under RCW 71.09.030(1)(c).

RCW 71.09.060 lays out a three-step procedure for a court to undertake when presented with an SVP petition under RCW 71.09.030(1)(c).

First, under RCW 71.09.060(2), the court holds a preliminary hearing, at which:

> *the court* shall first hear evidence and determine whether the person did commit the act or acts charged if the court did not enter a finding prior to dismissal under RCW 10.77.086(7).

RCW 71.09.060(2) (emphasis added).

In such a "*hearing*," "the rules of evidence applicable in criminal cases shall apply, and all constitutional rights available to defendants *at criminal trials*, other than the right not to be tried while incompetent, shall apply." Id. (emphasis added). "If, after the conclusion of the hearing on this issue, the court finds, beyond a reasonable doubt, that the person did commit the act or acts charged, it shall enter a final order [with specific findings to be discussed later], appealable by the person, on that issue, and may proceed to consider whether the person should be

committed pursuant to this section." Id.

Second, if the person "did commit" the acts charged as determined in the hearing above, RCW 71.09.060(1) then permits "*a court or a jury*" to determine whether, beyond a reasonable doubt, an individual meets the statutory definition of an SVP; someone who "would be likely to engage in predatory acts of sexual violence if not confined in a secure facility" because of a mental health disorder. RCW 71.09.060(1) (emphasis added). The statute implicitly refers to this second determination as a "trial." Id.

Third and finally, "[i]f 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 for placement in a secure facility operated by the department of social and health services for control, care, and treatment," unless a less restrictive option is in the best interest of the person and community safety. Id.

2. Principles of Statutory Interpretation

When reviewing a statute, "[w]e begin with the statute's plain language. 'If the plain language is subject to only one interpretation, our inquiry ends because plain language does not require construction.'" Matter of C.A.S., 25 Wn. App. 2d 21, 26, 522 P.3d 75 (2022) (quoting HomeStreet, Inc. v. Dep't of Revenue, 166 Wn.2d 444, 451, 210 P.3d 297 (2009)). "A statute is ambiguous if 'susceptible to two or more reasonable interpretations,' but 'a statute is not ambiguous merely because different interpretations are conceivable.'" HomeStreet, 166 Wn.2d at 452 (quoting State v. Hahn, 83 Wn. App. 825, 831, 924 P.2d 392 (1996)).

Our goal in reviewing statutory language is "'to ascertain and carry out the intent of the Legislature.'" In re Det. of Anderson, 185 Wn.2d 79, 85, 368 P.3d 162 (2016) (quoting In re Det. of Martin, 163 Wn.2d 501, 506, 182 P.3d 951 (2008)). We discern the meaning "of a statutory provision . . . 'from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question.'" Id. at 87 (quoting Dep't of Ecology v. Campbell & Gwinn, LLC, 146 Wn.2d 1, 11, 43 P.3d 4 (2002)).

Taking these principles together, "it is settled that the plain meaning of a statute is determined by looking not only 'to the text of the statutory provision in question,' but also to 'the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole.'" State v. Hurst, 173 Wn.2d 597, 604, 269 P.3d 1023 (2012) (quoting State v. Ervin, 169 Wn.2d 815, 820, 239 P.3d 354 (2010)).

"Another well-settled principle of statutory construction is that 'each word of a statute is to be accorded meaning.'" State v. Roggenkamp, 153 Wn.2d 614, 624, 106 P.3d 196 (2005) (quoting State ex rel. Schillberg v. Barnett, 79 Wn.2d 578, 584, 488 P.2d 255 (1971)). "'[T]he drafters of legislation . . . are presumed to have used no superfluous words and we must accord meaning, if possible, to every word in a statute.'" Id. (alteration in original) (quoting State v. J.P., 149 Wn.2d 444, 450, 69 P.3d 318 (2003)).

In examining such laws, we must keep in mind that "statutes that involve a deprivation of liberty must be strictly construed." In re Det. of Hawkins, 169 Wn.2d 796, 801, 238 P.3d 1175 (2010). "Strict construction requires that, 'given a choice

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

Finally, we review such questions of statutory interpretation de novo. Echo Global Logistics, Inc. v. Dep't of Revenue, 22 Wn. App. 2d 942, 946, 514 P.3d 704 (2022).

3. Discussion

Ross argues that strict construction of RCW 71.09.060 "guarantees" Ross a trial by jury at the preliminary stage of SVP proceedings. Specifically, he avers that, because the proceeding described in RCW 71.09.060(2) mandates that "all constitutional rights available to defendants at criminal trials . . . shall apply," he is entitled to a jury determining that issue in the same way any criminal defendant is entitled to a jury trial under the Sixth Amendment. Ross claims the court and State's interpretation of the statute, which permits a judge alone to make that determination, effectively adds the word "bench" to the requirement that "*all* constitutional rights available to defendants at criminal trials" applies to these proceedings. (Emphasis added). We disagree for three overarching but interrelated reasons.

First, RCW 71.09.060 does not define the term "court." RCW 71.09.060. "When a statutory term is undefined, the court may look to a dictionary for its ordinary meaning." In re Estate of Blessing, 174 Wn.2d 228, 231, 273 P.3d 975 (2012). Merriam-Webster defines "court" as "a judge or judges in session."

MERRIAM-WEBSTER ONLINE DICTIONARY (last visited April 10, 2024), https://www.merriam-webster.com/dictionary/court). Thus, as a matter of plain language, the legislature meant "judge" when it used the word "court."

In response, Ross argues that "the common meaning of 'court' includes both judge and jury." In support, Ross offers a panoply of sources of definitions for the meaning of "court," including:

- an internet browser search engine, which defines "court" as a "tribunal presided over by a judge, judges, or a magistrate";
- Encyclopedia Britannica, which defines "court" as a "body of persons having judicial authority to hear and resolve disputes"; and
- Black's Law Dictionary, which defines, not "court" but, "trier of fact" as "either a judge or a jury."

We decline to rely on these sources, first, because we "may consider the plain and ordinary meaning of [a] term in a *standard dictionary*." State v. Fuentes, 183 Wn.2d 149, 160, 352 P.3d 152 (2015) (emphasis added). Addressing each in turn, it is patently obvious that an internet browser search engine and an encyclopedia are not standard dictionaries. Further, the Encyclopedia Britannica citation is to an article about the functions of courts rather than the meaning of the term "court" itself. Brian P. Smentkowski, James L. Gibson & Delmar Karlen, *Court*, BRITANNICA (Apr. 17, 2024), https://www.britannica.com/topic/court-law [https://perma.cc/J9NX-SKSL]. Moreover, both of these first two definitions do not mention a "jury" at all and, thus, do not support Ross' claim that a "court" could mean a jury. Finally, while Black's Law Dictionary may be a standard dictionary, Ross provided the definition of a "trier of fact" instead of the definition of "court." In short, none of these sources offered by Ross support his proposed definition of

"court" or disturb our reliance on Merriam-Webster.

Ross further argues that, even if we assume "court" means only a judge, the specific language of RCW 71.09.060(1) ensuring "all [criminal] constitutional [] [trial] rights" controls over the more general word "court." However, only if a statute is ambiguous do courts "resort[] to [such] principles of statutory construction . . ." Taylor v. Burlington N.R.R. Holdings, Inc., 193 Wn.2d 611, 617, 444 P.3d 606 (2019). Here the dictionary definition of the term "court" as "judge or judges in session" obviates the need to avail ourselves of this principle.

As to our second overarching reason, we must read the two sections of RCW 71.09.060 in relation to each other to understand the "context" of the provisions in question. Hurst, 173 Wn.2d at 604 (quoting Ervin, 169 Wn.2d at 820). When we do so, it becomes clear that sections (1) and (2) of RCW 71.09.060 expressly distinguish when a task is the role of the "court" or the role of the "court or the jury."

Specifically, following the provisions reviewed above, RCW 71.09.060(1) states that:

> If *the court or* unanimous *jury* decides that the state has not met its burden of proving that the person is a sexually violent predator, *the court* shall direct the person's release.

RCW 71.09.060(1) (emphasis added). Similarly, the next sentence delineates distinct steps for first the jury and then for the court to take, thus defining different roles, temporally and functionally:

> If *the jury* is unable to reach a unanimous verdict, *the court* shall declare a mistrial and set a retrial.

Id. (emphasis added). It nearly goes without saying that juries do not direct a

person's release or declare mistrials in our legal system. Thus, in this provision, the legislature carved out a role for the jury and a separate role for the court.

In contrast, section (2) of the statute specifically and repeatedly describes a role for "the court" with no mention of a jury. Again, it is "*the court* [which] shall first hear evidence and determine whether the person did commit the act or acts charged . . ." RCW 71.09.060(2) (emphasis added). Likewise, it is the court which "[a]fter hearing evidence on this issue . . ." shall make specific findings on whether the person "did commit the act or acts charged" and other findings. Id. And finally, it is the court at "the conclusion of the hearing" which "shall enter a final order." Id. Unlike in section (1), none of the actions set out in section (2) mention any role for a jury. And, again, juries do not *enter* "final orders" in our legal system.

Moreover, it is clear that the legislature intended the provisions of this statute to be read together. The first sentence of section (2) directly refers the reader back to section (1), stating: "if . . . commitment is sought . . . pursuant to subsection (1) of this section." Id. That sentence also connects the two subsections with the conjunction "and." We do not consider these connections superfluous or meaningless, giving effect to all language used. Linville v. Dep't of Ret. Sys., 11 Wn. App. 2d 316, 321, 452 P.3d 1269 (2019). Indeed, at oral argument on appeal, counsel for Ross acknowledged the two provisions of the statute "work together."[1] Therefore, the two sections are properly read in

[1] Wash. Ct. of Appeals oral argument, In re the Detention of Randy Ross, No. 85652-9-I (March 7, 2024) at 1 min., 54 sec. through 2 min., 15 sec., video recording by TVW, Washington State's Public Affairs Network, https://tvw.org/video/division-1-court-of-appeals-2024031199/?eventID=2024031199.

conjunction with each other.

It is a "fundamental rule of statutory construction . . . that the legislature is deemed to intend a different meaning when it uses different terms." Roggenkamp, 153 Wn.2d at 625. "Because the legislature chose different terms, we must recognize that a different meaning was intended by each term." Id. at 626. Here, the full context of the statute makes clear that certain tasks are within the purview of the "court" without the jury, such as directing a respondent's release, declaring a mistrial, making sundry findings, and enacting "final orders." RCW 71.09.060(1), (2). And, the legislature makes equally clear the circumstances when the jury plays its role as fact-finder in determining when someone qualifies as an SVP subject to detention. RCW 71.09.060(1).

In short, we "adopt the sense of the words which best harmonizes with the context." Roggenkamp, 153 Wn.2d at 623 (quoting McDermott v. Kaczmarek, 2 Wn. App. 643, 648, 469 P.2d 191 (1970)). And we achieve interpretive harmony when we respect the legislature's manifest intent to differentiate between the role of the jury in parts of section (1) and the unitary role of the court in section (2).

As to our third overarching reason, Ross again argues that the State is reading in the term "bench" in the provision that grants "all the constitutional rights available to defendants at criminal trials." Ross' argument assumes that this preliminary hearing is the type of hearing that would, as a matter of constitutional right, be determined by a jury at a criminal trial. We disagree (a) because this type of preliminary hearing is not determined by a jury pursuant to a "constitutional right available to defendants at criminal trials" and (b) because ample authority has

established SVP proceedings are not criminal trials at all.

Unlike in RCW 71.09.050 and .060(1), the process set out in RCW 71.09.060(2) is not the "trial" as to whether a person is an SVP. Cf. RCW 71.09.060(1) (permitting a mistrial and retrial). Instead, as Ross acknowledges, the process in section (2) is a preliminary "hearing" to determine whether the commission of the acts underlying the charge of a sexually violent crime occurred. Because the respondent to the SVP petition is incapacitated, by definition, the purpose of this hearing is *not* to assign guilt or culpability for the crime, but simply to determine whether the actions occurred and to make *additional* evidentiary findings. RCW 71.09.060(2).[2]

This preliminary hearing in an SVP proceeding is comparable to a court's determination on a motion to dismiss, or any initial hearing on the relevance of certain evidence. See, e.g., CrR 8.3(c) ("The court shall grant the motion if there are no material disputed facts and the undisputed facts do not establish a prima facie case of guilt."); ER 404(b). Such hearings are not a trial at all, where the conclusion would be an acquittal, a finding of guilt, or even the imposition of incarceration, but rather are hearings on a specific evidentiary issue. Because juries do not determine motions to dismiss or motions to exclude certain evidence,

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[2] These additional findings include commentary on the quality of the hearing itself, namely:

> "the extent to which the person's incompetence or developmental disability affected the outcome of the hearing, including its effect on the person's ability to consult with and assist counsel and to testify on his or her own behalf, the extent to which the evidence could be reconstructed without the assistance of the person, and the strength of the prosecution's case."

RCW 71.09.060(2).

and thus such hearings do not involve a "constitutional right available to defendants at criminal trials," the preliminary hearing in RCW 71.09.060(2) likewise does not implicate the constitutional right to a jury determination.

Moreover, "Washington courts do not characterize SVP proceedings as quasi-criminal and have consistently held that the SVP statute is resolutely civil in nature." In re Det. of Reyes, 184 Wn.2d at 347. As such, "[w]e have repeatedly relied on this distinction as a basis for declining to extend certain rules from criminal law to SVP proceedings." Id. We decline to extend the right to a jury trial to this preliminary determination because, as analyzed herein, that is clearly not the intent of our legislature.

Citing to In re Det. of Greenwood, 130 Wn. App. 277, 122 P.3d 747 (2005), Ross argues the initial SVP hearing for this class of persons should include the same rights as criminal trials because the "intent" of the statute [is] "to protect Ross' liberty." However, that argument overstates the intent of the hearing and conflicts with this court's holding that "the requirement of the initial hearing is not an end in itself as with a criminal trial, but a part of a two-step process designed to *protect* incompetent individuals." Greenwood, 130 Wn. App. at 285. That is, as in other cases surveyed in Greenwood, the hearing provides an important but limited gatekeeping mechanism intended to protect the accused from unsubstantiated claims, which *then may* lead to the second step in the process, a *further* finding that the State proved beyond a reasonable doubt that the respondent met the statutory definition of an SVP and then *later* as the third step under the statute, the trial court *may* deprive them of liberty by ordering detention on the basis of the

jury's finding. Id.

Stated otherwise, and as Ross acknowledges, a finding by a jury that the State demonstrated that he meets the definition of an SVP would not constitute *punishment* for the predicate crime. Indeed, punishment for that crime may still occur at a later date if, for example, Ross' competency is restored, the State opts to refile the criminal charges, and he is convicted. Instead, as Ross also concedes, an SVP petition initiates a civil proceeding to incapacitate the respondent from future offenses and to rehabilitate them so they are safe to re-enter the community. See In re Det. of Reyes, 184 Wn.2d at 343; In re Young, 122 Wn.2d 1, 46, 857 P.2d 989 (1993).

Thus, because this preliminary hearing does not play the role of a traditional trial, in procedure or outcome, and courts consistently have held that petitions seeking to detain someone under ch. 71.09 RCW do not initiate criminal proceedings, Ross' argument fails.[3]

For these reasons, we conclude that the court here did not err in denying Ross' motion for a jury to determine whether he "committed the act." RCW 71.09.060(2).

B. Whether Due Process Requires a Jury to Determine if a Predicate Act Occurred

[3] Finally, both before the trial court and here, Ross relies heavily on the simple fact that in Greenwood a jury determined whether the predicate act occurred. 130 Wn. App. at 285. While that is true, on appeal, he concedes that the reviewing court there was not presented with the question, and thus did not consider, whether that was the *appropriate* process. Accordingly, Greenwood is silent about who the fact finder should be for the hearing envisioned by RCW 71.09.060(2), and, thus, does not control here.

"'It is well settled that civil commitment is a significant deprivation of liberty, and thus individuals facing SVP commitment are entitled to due process of law.'" In re Det. of Hatfield, 191 Wn. App. 378, 396, 362 P.3d 997 (2015) (quoting In re Det. of Morgan, 180 Wn.2d 312, 320, 330 P.3d 774 (2014)). To determine whether a proceeding violates an individual's procedural right to due process, we consider three 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.

Id. at 396-397 (quoting Mathews v. Eldridge, 424 U.S. 319, 335, 96 S. Ct. 893, 903, 47 L. Ed. 2d 18 (1976)).

"'When this three-factor test is applied in the context of SVP civil commitment cases, the first factor often weighs in favor of the individual because a person has "a significant interest in his [or her] physical liberty.'" Id. at 396 (alteration in original) (quoting In Re Det. Morgan, 180 Wn.2d at 330). "The third factor often weighs in favor of the State because the 'State has a compelling interest both in treating sex predators and protecting society from their actions.'" Id. at 397 (quoting In Re Det. Morgan, 180 Wn.2d at 322). "Thus, the balance often turns on the second factor." Id.

We hold as the State concedes, that the first factor weighs in favor of Ross because he has "a significant interest in his . . . physical liberty." Id. at 396.

As to the third factor, the State argues its interest in these hearings is very high because "the State's interest lies in an orderly, logical process of factfinding."

See State v. McCuistion, 174 Wn.2d 369, 394, 275 P.3d 1092 (2012) ("the State has a substantial interest in encouraging treatment, preventing the premature release of SVPs, and avoiding the significant administrative and fiscal burdens associated with evidentiary hearings."). Ross does not contest this particular interest of the State, but rather asserts that the State "has an interest in an accurate and just decision . . . [i]n other words, the State does not benefit from an erroneous denial of liberty." Ross, however, does not explain why the interests he identifies are in conflict with those offered by the State. Regardless, because of the State's strong interests in protecting our communities and offering treatment and rehabilitation opportunities, we hold that this factor weighs in favor of the State.

The second Mathews factor is, as expected, the most disputed question. Ross argues that the one person's determination that he meets the definition of an SVP, made without the benefits of a jury, risks procedural error. Ross supports his argument with cases supporting the right to community participation via jury for misdemeanor trials. Ross offers no authority in the context of SVP commitment proceedings.

On the contrary, our Supreme Court has expressly held that, "[g]iven the extensive procedural safeguards in chapter 71.09 RCW, the risk of an erroneous deprivation of liberty under the challenged amendments is low." McCuistion, 174 Wn.2d at 393. That court so held because, "before the State may commit an individual as an SVP, it must hold a full, evidentiary trial at which the individual enjoys an array of procedural protections . . ." Id. at 393 (quoting RCW 71.09.040-.060, .020(7)). Even if there is some risk of allowing a singular decision-maker to

conduct the preliminary hearing, the resulting harm is not the loss of liberty; a respondent may lose their liberty only if a unanimous jury finds that the State proved beyond a reasonable doubt that the respondent meets the definition of an SVP in the second step set out in the statute and a determination is made in the third step that no less restrictive option is appropriate. RCW 71.09.060(1). Our Supreme Court has held that when the statutory procedures are followed, the risk of erroneous deprivation of liberty is low.

Although Ross has a significant liberty interest, the State has similarly important interests and there are procedural safeguards in the SVP trial to minimize the risk of erroneous deprivation of actual liberty. Our consideration under the Mathews factors weighs in favor of a conclusion that the statutory procedures set out in RCW 71.09.060, including a judicial determination at the preliminary stage under subsection (2), do not deprive Ross of his right to procedural due process.

III. CONCLUSION

We affirm the superior court.

Díaz, J.

WE CONCUR:

APPENDIX 2

RCW 71.09.060

APPENDIX 2

RCW 71.09.060

Trial—Determination—Commitment procedures.

(1) The court or jury shall determine whether, beyond a reasonable doubt, the person is a sexually violent predator. In determining whether or not the person would be likely to engage in predatory acts of sexual violence if not confined in a secure facility, the fact finder may consider only placement conditions and voluntary treatment options that would exist for the person if unconditionally released from detention on the sexually violent predator petition. The community protection program under RCW 71A.12.230 may not be considered as a placement condition or treatment option available to the person if unconditionally released from detention on a sexually violent predator petition. When the determination is made by a jury, the verdict must be unanimous.

If, on the date that the petition is filed, the person was living in the community after release from custody, the state must also prove beyond a reasonable doubt that the person had committed a recent overt act. If the state alleges that the prior sexually violent offense that forms the basis for the petition for commitment was an act that was sexually motivated as provided in RCW 71.09.020(15)(c), the state must prove beyond a reasonable doubt that the alleged sexually violent act was sexually motivated as defined in RCW 9.94A.030.

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 for placement in a secure facility operated by the department of social and health services for control, care, and treatment until such time as: (a)

The person's condition has so changed that the person no longer meets the definition of a sexually violent predator; or (b) conditional release to a less restrictive alternative as set forth in RCW 71.09.092 is in the best interest of the person and conditions can be imposed that would adequately protect the community.

If the court or unanimous jury decides that the state has not met its burden of proving that the person is a sexually violent predator, the court shall direct the person's release.

If the jury is unable to reach a unanimous verdict, the court shall declare a mistrial and set a retrial within forty-five days of the date of the mistrial unless the prosecuting agency earlier moves to dismiss the petition. The retrial may be continued upon the request of either party accompanied by a showing of good cause, or by the court on its own motion in the due administration of justice provided that the respondent will not be substantially prejudiced. In no event may the person be released from confinement prior to retrial or dismissal of the case.

(2) If the person charged with a sexually violent offense has been found incompetent to stand trial, and is about to be or has been released pursuant to RCW 10.77.086(4), and his or her commitment is sought pursuant to subsection (1) of this section, the court shall first hear evidence and determine whether the person did commit the act or acts charged if the court did not enter a finding prior to dismissal under RCW 10.77.086(4) that the person committed the act or acts charged. The hearing on this issue must comply with all the procedures specified in this section. In addition, the rules of evidence applicable in criminal cases shall apply, and all constitutional rights available to defendants at criminal trials, other than the right not to be tried

while incompetent, shall apply. After hearing evidence on this issue, the court shall make specific findings on whether the person did commit the act or acts charged, the extent to which the person's incompetence or developmental disability affected the outcome of the hearing, including its effect on the person's ability to consult with and assist counsel and to testify on his or her own behalf, the extent to which the evidence could be reconstructed without the assistance of the person, and the strength of the prosecution's case. If, after the conclusion of the hearing on this issue, the court finds, beyond a reasonable doubt, that the person did commit the act or acts charged, it shall enter a final order, appealable by the person, on that issue, and may proceed to consider whether the person should be committed pursuant to this section.

(3) Except as otherwise provided in this chapter, the state shall comply with RCW 10.77.220 while confining the person. During all court proceedings where the person is present, the person shall be detained in a secure facility. If the proceedings last more than one day, the person may be held in the county jail for the duration of the proceedings, except the person may be returned to the department's custody on weekends and court holidays if the court deems such a transfer feasible. The county shall be entitled to reimbursement for the cost of housing and transporting the person pursuant to rules adopted by the secretary. The department shall not place the person, even temporarily, in a facility on the grounds of any state mental facility or regional habilitation center because these institutions are insufficiently secure for this population.

(4) A court has jurisdiction to order a less restrictive alternative placement only after a hearing ordered pursuant to RCW 71.09.090 following initial commitment under this section and in accord with the provisions of this chapter.

APPENDIX 3

Notice of Discretionary Review to Division I of the Court of Appeals

In Re the Detention of Jonathan Paul Green

King County Superior Court 20-2-03762-1 SEA

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CASE #: 20-2-03762-1 SEA

IN THE SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

In re the Detention of JONATHAN PAUL GREEN, Respondent.	No. 20-2-03762-1 SEA NOTICE OF DISCRETIONARY REVIEW TO DIVISION I OF THE COURT OF APPEALS

The State of Washington, pursuant to RAP 2.3(4), seeks review by the Court of Appeals of the State of Washington, Division I, of the trial court's Order Granting Respondent's Motion For Jury Trial Under RCW 71.09.060(2) And Certifying Discretionary Review Under RAP 2.3 entered on April 2, 2024.

DATED this 22nd day of April, 2024.

Respectfully submitted,

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Judge Coreen Wilson

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

In Re the Detention of JONATHAN PAUL GREEN, Respondent.	No. 20-2-03762-1 SEA ORDER GRANTING RESPONDENT'S MOTION FOR JURY TRIAL UNDER RCW 71.09.060(2), AND CERTIFYING DISCRETIONARY REVIEW UNDER RAP 2.3

THIS MATTER came before the Court upon Respondent Jonathan Green's motion for a jury to serve as the fact finder regarding an underlying sexually violent offense (SVO) under RCW 71.09.060(2). Having considered the parties' written briefing and oral argument presented on March 22, 2024, the court makes the following findings and issues the following Order:

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253-880-1236

The court cannot ignore the plain language of the statute which grants the petitioner, "all constitutional rights available to defendants at criminal trials, other than the right not to be tried while incompetent ..." RCW 71.09.060(2). The right to a jury trial is a fundamental right granted to all defendants at criminal trials and could not have escaped the awareness of the legislature when it wrote the language contained in RCW 71.09.060(2). Once such a grant of rights is made by the legislature, it cannot be ignored or overcome simply by language that seems to imply otherwise. It has long been the law in Washington that the right to a jury trial may only be waived by a knowing and voluntary act on the part of the accused. Having been granted all the rights available to defendants in criminal trials, and not having waived the right to a jury trial, Mr. Green is entitled to a Jury Trial on the question of whether he committed the predicate offense alleged by the State.

The court issued an oral ruling on March 22, 2024, granting Mr. Green's motion for a jury trial pursuant to RCW 71.09.060(2).

The court also stated its intent to modify its ruling depending on the outcome reached in the matter of In re Det. of Ross, No. 85652-9-I, which is currently pending before Division I of the Court of Appeals. Both parties and this Court agree that Ross seems to address the same legal issue presented in this case and that Ross will most likely control the outcome of the motion for a jury trial in this case. Oral argument for Ross was held on March 7, 2024, and an opinion is expected soon.

The Court certifies under RAP 2.3(b)(4) that its ruling on Mr. Green's motion for jury trial under RCW 71.09.060(2) involves a controlling question of law as to which there is substantial ground for a difference of opinion and that immediate review of the order may materially advance the ultimate termination of the litigation. The parties are aware that upon entry of this order, the State will file a Notice of Discretionary Review and Motion for Discretionary Review indicating that both parties are requesting that the Court of Appeals accept review, pending the outcome in Ross.

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For these same reasons, this Court hereby stays Mr. Green's trial proceedings until the resolution of appellate proceedings. The intent of this order is to avoid expending public resources on a duplicative appellate challenge where resolution of the issue is pending.

DATED this _____ day of April, 2024.

_____
Hon. Judge Coreen Wilson

Presented By:

_____
Andrew Schwarz, WSBA #17303
Attorney for Respondent

Copy Received,

_____
Sharon Dear, WSBA #25244
Senior Deputy Prosecuting Attorney
Attorney for Petitioner

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King County Superior Court
Judicial Electronic Signature Page

Case Number:	20-2-03762-1
Case Title:	IN RE JONATHAN PAUL GREEN /DETENTION
Document Title:	ORDER RE JURY TRIAL
Signed By:	Coreen Wilson
Date:	April 02, 2024

Judge: Coreen Wilson

This document is signed in accordance with the provisions in GR 30.

Certificate Hash:	BABF8253831E280FAD890298CF459F3780805FE8
Certificate effective date:	1/18/2023 7:31:49 AM
Certificate expiry date:	1/18/2028 7:31:49 AM
Certificate Issued by:	C=US, E=kcscefiling@kingcounty.gov, OU=KCDJA, O=KCDJA, CN="Coreen Wilson: aA2Eiqkz7RGq3c47Z+2f0A=="

Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to the attorneys for the respondent, Ival Gaer and Andrew Schwarz, containing a copy of the Notice of Discretionary Review to Division I of the Court of Appeals, in IN RE THE DETENTION OF JONATHAN GREEN, Cause 20-2-03762-1 SEA in the Superior Court of Washington for King County.

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

Lorena Villa

Name Lorena Villa Date 4/22/24

Done in Puyallup, Washington

APPENDIX 4

Agreed Order Setting Trial Date

August 22, 2023

FILED
2023 AUG 22 04:16 PM
KING COUNTY
SUPERIOR COURT CLERK
E-FILED
CASE #: 23-2-10464-1 SEA

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR KING COUNTY

In re the Detention of **RANDY ROSS**, Respondent.	No. 23-2-10464-1 SEA **AGREED ORDER SETTING TRIAL DATE** ***CLERKS ACTION REQUIRED***

THIS MATTER having come before the undersigned judge on the joint request of the parties through their undersigned counsel, and the Respondent having waived his right to a speedy trial through November 30, 2024,

NOW, Therefore,

IT IS ORDERED THAT the date for the trial held pursuant to RCW 71.09.060(2) in this matter is set for January 8, 2024.

IT IS FURTHER ORDERED that the date for the commitment trial in this matter is set for November 4, 2024.

//

//

LAW OFFICES OF
THE DEFENDER ASSOCIATION DIVISION
KING COUNTY DEPARTMENT OF PUBLIC DEFENSE
710 SECOND AVENUE, SUITE 700
SEATTLE, WASHINGTON 98104
206-477-8700

DATED this _____ day of August, 2023.

THE HONORABLE JOHN McHALE
KING COUNTY SUPERIOR COURT JUDGE

Presented by:

Christine Jackson, WSBA #17192
Devon Gibbs, WSBA #31438
Counsel for the Respondent, Mr. Ross

Celia A. Lee, WSBA #41700
Counsel for Petitioner, State of Washington

LAW OFFICES OF
THE DEFENDER ASSOCIATION DIVISION
KING COUNTY DEPARTMENT OF PUBLIC DEFENSE
710 SECOND AVENUE, SUITE 700
SEATTLE, WASHINGTON 98104
206-477-8700

King County Superior Court
Judicial Electronic Signature Page

Case Number:	23-2-10464-1
Case Title:	IN RE RANDY ROSS
Document Title:	ORDER RE SETTING TRIAL DATE
Signed By:	John McHale
Date:	August 22, 2023

Judge: John McHale

This document is signed in accordance with the provisions in GR 30.

Certificate Hash:	DC75CF0D685D99788F5521FA5444EDB025C856AB
Certificate effective date:	1/3/2022 3:22:53 PM
Certificate expiry date:	1/3/2027 3:22:53 PM
Certificate Issued by:	C=US, E=kcscefiling@kingcounty.gov, OU=KCDJA, O=KCDJA, CN="John McHale: RNjR3Tst7BG30rPdKiMerw=="

APPENDIX 5

Agreed Order Striking Trial Date

December 18, 2023

FILED
2023 DEC 19
KING COUNTY
SUPERIOR COURT CLERK

CASE #: 23-2-10464-1 SEA

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR KING COUNTY

In re the Detention of **RANDY ROSS,** Respondent.	No. 23-2-10464-1 SEA **AGREED ORDER STRIKING TRIAL DATE** ***CLERKS ACTION REQUIRED*** ~~*(proposed)*~~

THIS MATTER having come before the undersigned judge on the joint request of the parties through their undersigned counsel, and the Respondent having waived his right to a speedy trial through November 30, 2024,

NOW, Therefore,

IT IS ORDERED THAT the date for the trial held pursuant to RCW 71.09.060(2) in this matter currently set for January 8, 2024 is stricken.

IT IS FURTHER ORDERED THAT the date for the trial held pursuant to RCW 71.09.060(2) is now set for June 3, 2024.

LAW OFFICES OF
THE DEFENDER ASSOCIATION DIVISION
KING COUNTY DEPARTMENT OF PUBLIC DEFENSE
710 SECOND AVENUE, SUITE 700
SEATTLE, WASHINGTON 98104
206-477-8700

IT IS FURTHER ORDERED that the date for the commitment trial in this matter currently set for November 4, 2024, is stricken. A new trial date will be set at the conclusion of the trial held pursuant to RCW 71.09.060(2).

DATED this 14th day of December, 2023.

THE HONORABLE JOHN McHALE
KING COUNTY SUPERIOR COURT JUDGE

Presented by:

Christine Jackson

Christine Jackson, WSBA #17192
Devon Gibbs, WSBA #31438
Counsel for the Respondent, Mr. Ross

/s/ Kelly L. Harris

Kelly Harris, WSBA #24019
Counsel for Petitioner, State of Washington

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KING COUNTY DEPARTMENT OF PUBLIC DEFENSE
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SEATTLE, WASHINGTON 98104
206-477-8700

May 09, 2024 - 8:44 AM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	85652-9
Appellate Court Case Title:	In re the Detention of Randy Ryan Ross

The following documents have been uploaded:

- 856529_Petition_for_Review_20240509084153D1759503_5095.pdf
  This File Contains:
  Petition for Review
  The Original File Name was Petition for Review.pdf

A copy of the uploaded files will be sent to:

- devon.gibbs@kingcounty.gov
- jennifer.ritchie@kingcounty.gov
- nami.kim@kingcounty.gov
- olsonlaw@nventure.com
- paoappellateunitmail@kingcounty.gov
- paosvpstaff@kingcounty.gov

Comments:

Sender Name: Christine Jackson - Email: christine.jackson@kingcounty.gov
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