COA NO. 47661-4-II

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

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IN RE DETENTION OF JOSEPH PETERSON:

STATE OF WASHINGTON,

Respondent,

v.

JOSEPH PETERSON,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Jack Nevin, Judge

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# REPLY BRIEF OF APPELLANT

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

## A. ARGUMENT IN REPLY

### 1. THE COURT ERRED WHEN IT ADMITTED THE HEARSAY STATEMENTS MADE BY H.L. TO POLICE UNDER ER 803(a)(5).

#### a. Peterson was not civilly committed but review of the trial court's ruling remains available.

The State asks this Court to dismiss the appeal because Peterson is not an aggrieved party under RAP 3.1. Brief of Respondent (BOR) at 5-8. Peterson asks the Court to review the merits of his claim.

The rules of appellate procedure are intended to "be liberally interpreted to promote justice and facilitate the decision of cases on the merits." State v. Watson, 155 Wn.2d 574, 577-78, 122 P.3d 903, 904 (2005) (quoting RAP 1.2(a)). Moreover, appellate courts "may choose to disregard RAPs if the interests of justice require." Watson, 155 Wn.2d at 578 (citing RAP 1.2(c)).

The interests of justice call for review here even though Peterson may not be technically aggrieved at the present time. According to the State, "Peterson is not an aggrieved party unless and until the State refiles a petition alleging he is an SVP, and unless and until the State actually uses the trial court's determination in another SVP proceeding, he is not injured in any legal sense." BOR at 7-8. This raises the specter of the trial court's ruling being used against Peterson in a future SVP case. "In

limited circumstances, even if a case is moot, an appellate court may apply the doctrine of equitable vacatur in order to prevent the unreviewable underlying judgment from having preclusive effect or spawning other unwarranted legal consequences." 15A Wash. Prac., Handbook Civil Procedure § 85.1 (2015-2016 ed.) (citing Federal Way School Dist. 210 v. Vinson, 154 Wn. App. 220, 232-33, 225 P.3d 379 (2010), rev'd on other grounds, 172 Wn.2d 756, 261 P.3d 145 (2011)). Under this doctrine, and consistent with RAP 1.2(a) and (c), Peterson requests review to avoid any unwarranted legal consequences flowing from the trial court's ruling.

**b. The totality of circumstances does not show the hearsay statements are reliable and so they should not have been admitted as recorded recollections.**

The State seems to suggest the totality of the circumstances test is dispensed with so long as the declarant claims her prior statement accurately reflects prior knowledge. BOR at 11 n.6, 14. If so, the State is mistaken. The totality of circumstances test for reliability is meant to be used across the board, as Alvarado itself understood in embracing the test: "We therefore must decide how best to gauge whether the rule has been satisfied *in any given case*." State v. Alvarado, 89 Wn. App. 543, 550, 949 P.2d 831 (1998) (emphasis added). "In adopting a totality of the circumstances test *as opposed to* the requirement that the declarant attest to the statements accuracy on the stand, the Alvarado court set forth several prongs that may

be considered when determining indicia of reliability." State v. Derouin, 116 Wn. App. 38, 46, 64 P.3d 35 (2003) (emphasis added).

In any event, the trial court did not enter a factual finding that H.L. verified the accuracy of her prior statements. CP 312. "In the absence of a finding on a factual issue we must indulge the presumption that the party with the burden of proof failed to sustain their burden on this issue." State v. Armenta, 134 Wn.2d 1, 14, 948 P.2d 1280 (1997). The court merely noted in the oral ruling that H.L. did not disavow her statements, which is not the same thing as verifying their accuracy. 3RP 91. The court determined reliability using the totality of circumstances standard. CP 312. Peterson challenges the court's determination on this point in the opening brief, and the argument need not be repeated here.

**c. The evidentiary error prejudiced the outcome.**

The State claims the trial court correctly admitted H.L.'s prior statements as recorded recollections. But it does not dispute Peterson's argument that if the statements should not have been admitted, then the trial court's ruling that Peterson committed a sexually violent offense must be reversed.

## B. CONCLUSION

For the reasons stated above and in the opening brief, Peterson requests that this Court review the merits of his claim and vacate the trial court's order on the sexually violent offense issue.

DATED this 7th day of June 2016.

Respectfully submitted

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| Appellant. | ) | |

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I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 3RD DAY OF JUNE 2016, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] JOSEPH PETERSON
18816 SMOKEY POINT BOULEVARD
ARLINGTON WA, 98223

**SIGNED** IN SEATTLE WASHINGTON, THIS 3RD DAY OF JUNE 2016.

X Patrick Mayovsky

# NIELSEN, BROMAN & KOCH, PLLC

## June 03, 2016 - 3:29 PM

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