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SUPREME COURT  
STATE OF WASHINGTON  
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NO. 82907-1 BY RONALD R. CARPENTER

SUPREME COURT OF THE STATE OF WASHINGTON

In re the Detention of:

JAKE HAWKINS,

Appellant.

STATE'S REPLY TO  
RESPONDENT'S ANSWER TO  
THE STATES MOTION TO  
STRIKE SUPPLEMENTAL BRIEF

I. INTRODUCTION

Appellant Jake Hawkins presented three issues in his petition for review to this Court, all focusing on the statutory construction of RCW 71.09. None of the issues contained any reference to the Washington State Constitution, nor any reference to protecting a right to privacy. When granting review of Appellant's Petition, the Court did not authorize consideration of any additional issues, thus restricting consideration to those identified by the Petition.

The Court should decline to consider this new issue and strike Section B of Petitioner's Supplemental Brief.

II. ARGUMENT

Rule of Appellate Procedure 13.7(b) states:

If the Supreme Court accepts review of a Court of Appeals decision, the Supreme Court will review only the questions raised in the motion for discretionary review, if review is sought of an interlocutory decision, or the petition for review and the answer, *unless the Supreme Court orders otherwise upon granting of the motion or the petition.*

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RAP 13.7(b). As noted above, the Court did not "order otherwise" when it granted this Petition.

Hawkins asserts that his privacy claim under the Washington Constitution is simply a matter of "statutory interpretation" and, therefore, he was within his right to raise this for the first time in his supplemental brief. Answer to State's Motion to Strike Supplemental Brief ("Answer"), at 2.<sup>1</sup> He cites *State v. Miller*<sup>2</sup> in support of his argument, stating he has "reasonably developed issues and arguments *raised below*." Answer, at 4-5). This argument should be rejected because resolution of a claimed violation of a right to privacy involves much more than a "reference to the constitutional provisions implicated by the statute" as Hawkins suggests.

As this Court has long recognized:

In determining whether a right of privacy has been violated under [Const. Art. I, § 7], the relevant inquiry is whether the State unreasonably intruded into a person's private affairs. *State v. Goucher*, 124 Wn.2d 778, 782, 881 P.2d 210 (1994); *State v. Young*, 123 Wn.2d 173, 181, 867 P.2d 593 (1994); *Boland*, 115 Wn.2d 571, 577, 800 P.2d 1112 (1990). The focus is on the privacy interests Washington citizens have held, and should be entitled to hold, safe from government trespass without a warrant.

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<sup>1</sup> Article I, section 7 of the Washington State Constitution states that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law." Hawkins claims his rights were violated by the state's failing to comply with the "warrant requirement," yet he fails to explain how the trial court's finding of good cause to order the sexual history polygraph differs from a requirement of a judge finding probable cause.

<sup>2</sup> *State v. Miller*, 156 Wn.2d 23, 32 n.5, 123 P.3d 827 (2005).

*State v. Myrick*, 102 Wn.2d 506, 511, 688 P.2d 151 (1984).

This is an entirely different analysis than the statutory and rule interpretation arguments raised by Hawkins at the trial court and court of appeals. He never argued below that taking a polygraph touched on a constitutional right to privacy, in either level below, nor in his Petition for Review. Thus, the *very first time* he mentioned privacy, or the Washington Constitution, was in his supplemental brief.

This Court has declined to address issues that have been raised for the first time outside of the Petition for Review:

In Clam Shacks' reply to the response to the petition for review it contends that it requested review of the entire Court of Appeals opinion. That is not how an issue is raised on review. RAP 13.4(c)(5) requires a concise statement of the issues presented for review; RAP 13.7(b) limits review to only the questions raised in the petition.

*State v. Collins*, 121 Wn.2d 168, 178, 847 P.2d 919, 924 (1993), *citing Clam Shacks of Am., Inc. v. Skagit Cy.*, 109 Wn.2d 91, 98, 743 P.2d 265 (1987). *See also In re Custody of Brown*, 153 Wn.2d 646, 651, 105 P.3d 991 (2005) (declining to review issue raised only in supplemental brief).

The reasons behind this rule are clear. This Court's ability to fairly and fully determine the issue is prejudiced by the limitations in the record. Hawkins now makes legal and factual claims in the Supplemental Brief that

are not supported by anything in the record.<sup>3</sup> The trial court heard specific objections and ruled accordingly. Had he properly raised this issue below, the record would reflect the analysis and procedures followed by the trial court and provide this court with an adequate record upon which to decide the issue.

The State's motion is consistent with the Rules of Appellate Procedure that prohibit parties from raising issues for the first time on Appeal. RAP 2.5(a). Similarly, parties are required to lodge objections at appropriate times below so that parties and trial courts can operate to protect the record and correct any error. *Smith v. Shannon*, 100 Wn.2d 26, 37, 666 P.2d 351 (1983), citing *Estate of Ryder v. Kelly-Springfield Tire, Co.*, 91 Wn.2d 111, 114, 587 P.2d 160 (1978). Because his claim was not presented to the trial court, there is no record upon which this Court can make any determination.

### III. CONCLUSION

Appellant impermissibly seeks to raise a new issue in his

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<sup>3</sup> For example, Hawkins makes several assertions about how the Department might be limited in its ability to compel him to answer questions IN THR ABSENCE OF A COMPELLED polygraph (see Petitioner's Supplemental Brief at 10 n.7) without reference to the State's right to seek answers about sexual history through depositions and the use of other discovery tools ( *In re the Detention of Williams*, 147 Wn.2d 476, 55 P.3d 597 (2002)), and the State's ability to hold the individual in contempt for failure to comply with evaluation procedures ( *In the Matter of the Detention of Young*, 163 Wn.2d 684, 185 P.3d 1180 (2008)). He further asserts that his privacy right is fundamental, ignoring well established case law that convicted sex offenders have truncated privacy interests. *In re Detention of Campbell*, 139 Wn.2d 341, 355-56, 986 P.2d 771 (1999)

supplemental brief. The Court should strike this portion of his brief and limit the issues to those properly raised in the petition.

RESPECTFULLY SUBMITTED this 23rd day of April, 2010.

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#### PROOF OF SERVICE

I certify that I served a copy of this document on all parties or their counsel of record on the date below as follows:

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

DATED this 23rd day of April, 2010, at Seattle, WA.



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