NO. 101411-2

SUPREME COURT OF THE STATE OF WASHINGTON

CHAD WAYNE HURN,

Appellant,

v.

DEPARTMENT OF CORRECTIONS, et al.,

Respondents.

DEPARTMENT OF CORRECTIONS' ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

Chad Hurn filed a civil lawsuit against Department of Corrections employees for rejecting four pieces of Hurn's incoming legal mail, each of which contained unauthorized information about other inmates. The Court of Appeals affirmed the superior court's dismissal of Hurn's Sixth and First Amendment claims on the grounds that Hurn had not shown the requisite prejudice or injury to prevail on those claims. Hurn now seeks review, asserting the Court of Appeals decision was in violation of federal and state law protecting the attorney-client privilege. This Court should deny review because the Court of Appeals decision was correct and was aligned with Sixth and First Amendment case law.

II. STATEMENT OF ISSUE

1. Whether the Court of Appeals correctly affirmed dismissal of Hurn's Sixth and First Amendment claims because Hurn did not show substantial prejudice or actual

injury to his criminal appeals as a result of DOC staff rejecting four pieces of his legal mail?

III. STATEMENT OF FACTS

In 2015 and 2016 while in the Department's custody, Hurn received four pieces of legal mail which contain information about another inmate. Petition (Pet.) Appendix A, at 3-4. Department policy prohibited incoming mail that contained information about another inmate without specific approval from the facility superintendent, in order to minimize the threat of another inmate using printed documents to coerce or manipulate against that other inmate. Pet. App. A, at 2-3.

Each of Hurn's four pieces of legal mail were rejected, and Hurn appealed each rejection to the superintendent and correctional program manager. Each time, the rejections were upheld. Pet. App. A, at 3-4. Hurn then filed suit against numerous DOC officials for 42 U.S.C. § 1983 civil rights violations as well as negligence and trespass to chattels. Pet. App. A, at 4.

The superior court granted defendants' motion for summary judgment in full, and Hurn appealed. Pet. App. A, at 4. The Court of Appeals affirmed, noting that Hurn failed to show a violation of his Sixth Amendment right to counsel by providing no evidence that DOC staff's actions hindered him in any effort to pursue a legal claim. Pet. App. A, at 7-8. Hurn's First and Fourteenth Amendment claims similarly failed, and Hurn's request for injunctive relief was moot. Pet. App. A, at 6, 9-10. Hurn now files this petition for review in which he challenges the Court of Appeals' ruling on his Sixth and First Amendment claims. He does not seek review of his retaliation, due process, or tort claims.

IV. REASONS WHY REVIEW SHOULD BE DENIED

Hurn's petition does not satisfy any of the criteria for review in RAP 13.4(b). Here, the Court of Appeals held that Hurn's Sixth and First Amendment claims failed. *See* Pet. App. 1, at 7-9. This decision does not conflict with any precedent, nor does it involve a significant question of constitutional law or an

issue of substantial public interest. In light of this, the Court should decline review. RAP 13.4(b).

In petitioning for review, Hurn mainly claims that the Court of Appeals decision conflicts generally with "both state and federal constitutions as well as interpretive case law." Petition for Review, at 6. In other words, Hurn believes the Court of Appeals misapplied federal and state constitutional law to his claims. This is not enough to warrant review, and is also incorrect.

A Sixth Amendment claim in a civil action requires a showing of substantial prejudice. *Nordstrom v. Ryan*, 762 F.3d 903, 910 (9th Cir. 2014) ("When the government deliberately interferes with the confidential relationship between a criminal defendant and defense counsel, that interference violates the Sixth Amendment right to counsel if it substantially prejudices the criminal defendant."); *United States v. Hernandez*, 937 F.2d 1490, 1493 (9th Cir. 1991) ("[G]overnment invasion of [the Sixth Amendment] privilege . . . is not sufficient by itself to cause

a Sixth Amendment violation. The defendant must have been *prejudiced* by such actions."). Similarly, to prevail on his First Amendment claim, Hurn must show an actual injury related to contemplated or existing litigation. *Lewis v. Casey*, 518 U.S. 343, 346, 116 S. Ct. 2174, 135 L. Ed. 2d 606 (1996).

Here, Hurn did not provide any evidence of how he was prejudiced or actually injured in pursuing any attack on his sentence. The record instead showed several instances of appeals which Hurn brought, including one in which Hurn was successful in obtaining resentencing. *See* Pet. App. A, at 8. Without any showing of injury or prejudice, the Court of Appeals was correct to affirm that Hurn's Sixth and First Amendment claims failed, and this Court need not accept review of that correct finding.

Hurn continues to insist that he need only allege a chilling of his Sixth Amendment rights to prevail on his Sixth Amendment claim. This is an incorrect reading of *Nordstrom*, in which the Ninth Circuit reviewed the dismissal of the plaintiff's complaint at the pre-answer screening stage and held that to state

a claim and survive screening or a motion to dismiss, a plaintiff need only allege a chilling effect. *Nordstrom*, 762 F.3d at 907-08, 911. However, to prevail on such a claim, which would include Hurn's claim surviving summary judgment, a plaintiff must show that government interference in an attorney-client relationship "substantially prejudice[ed] the criminal defendant." *Id.* at 910. Hurn made no such showing of any prejudice, let alone substantial prejudice. *See* Pet. App. A, at 8-9.

Hurn also puts forward the standard for showing a Sixth Amendment violation in a criminal case and asks this Court to accept review so that it can extend this standard to civil actions like his. Petition for Review, at 10-12 (citing *State v. Irby*, 3 Wn. App. 2d 247, 259, 415 P.3d 611 (2018); *State v. Pena-Fuentes*, 179 Wn.2d 808, 818-20, 318 P.3d 257 (2014); *State v. Cory*, 62 Wn.2d 371, 377-78, 382 P.2d 1019 (1963)). By doing so, Hurn admits that such a standard does not apply to his case and could only apply through this Court's expansion of that standard. *See* Petition for Review, at 12 ("[T]his Court should take this

opportunity and extend this same test, or craft a new one"). However, he does not provide a persuasive reason why this Court should expand the standard beyond the criminal context. The burden in a civil case is on the plaintiff, who can ultimately obtain monetary damages or injunctive relief if successful. A standard from a criminal case such as *Irby*, where the burden is on the State to prove criminal violations, is not instructive for resolving a civil claim such as Hurn's.

In asking for the criminal standard to be expanded to his case, Hurn claims article I, section 22 of the Washington Constitution provides "the right to trial and the right to appeal in all cases," and accordingly this Court should apply the test from *Irby* to his civil action. Petition for Review, at 12. But article I, section 22 outlines the rights of person involved in criminal prosecutions and has no direct applicability to Hurn's civil rights lawsuit. *See* WASH. CONST. art. I, § 22; *In re Det. of Leck*, 180 Wn. App. 492, 503, 334 P.3d 1109 (2014).

Because Hurn abjectly failed to show injury or prejudice as a result of DOC staff rejecting his legal mail in question, his Sixth and First Amendment claims fail as a matter of law. The Court of Appeals recognized this, affirming dismissal of Hurn's claims in a way that is consistent with existing constitutional case law. This Court need not disrupt this ruling, and Hurn's continued disagreement with the ruling does not present a persuasive basis for this Court to accept review.

V. CONCLUSION

The Court of Appeals decision in this case is sound and not in conflict with any case law. Hurn has not shown that the criteria for accepting review under RAP 13.4(b) are satisfied. This Court should deny review.

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VI. CERTIFICATION

This document contains 1,327 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 7th day of December, 2022.

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CERTIFICATE OF SERVICE

I certify that on the date below I filed the DEPARTMENT OF CORRECTIONS' ANSWER TO PETITION FOR REVIEW with the Clerk of the Court using the electronic filing system which caused it to be served on the following non-electronic filing system participant via United States Postal Service 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.

EXECUTED this 7th day of December 2022, at Olympia, Washington.

s/ Amy Jones
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