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SUPREME COURT
STATE OF WASHINGTON

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NO. 82907-1

SUPREME COURT OF THE STATE OF WASHINGTON

JAKE HAWKINS,

Petitioner,

v.

THE STATE OF WASHINGTON,

Respondent.

STATE OF WASHINGTON'S MOTION TO STRIKE

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I. IDENTITY OF MOVING PARTY

The moving party is the State of Washington, Respondent herein.

II. STATEMENT OF RELIEF SOUGHT

Pursuant to RAP 17.4, the State moves the Court for an order striking Section B of Mr. Hawkins's supplemental brief in which he argues that his Constitutional right to privacy and his substantive due process rights were violated by the trial court's order from which he appeals. This motion is based on Mr. Hawkins' failure to raise either issue during the previous stages of this proceeding or in his petition for review as required by RAP 13.4(c)(5) and RAP 13.7(b).

III. STATEMENT OF THE CASE

The State filed this SVP case on February 21, 2006, seeking the involuntary civil commitment of Mr. Hawkins pursuant to RCW 71.09. CP at 8-9. Mr. Hawkins is currently awaiting trial on that Petition. As part of the pretrial psychological evaluation mandated by RCW 71.09.040(4), the State's expert requested that Mr. Hawkins undergo a sexual history polygraph examination. CP at 22. Mr. Hawkins declined to participate in the polygraph exam, and the state filed a motion to compel his participation. After considering the evidence and arguments presented by the parties, the trial court entered an order compelling Mr. Hawkins to submit to a sexual history polygraph. CP at 6-7. This

appeal followed.

In his opening brief to the court of appeals, Mr. Hawkins argued only that the trial court exceeded its statutory authority in ordering the polygraph exam, specifically that the Department of Social and Health Services (DSHS) exceeded its authority in promulgating WAC 388-880-034. Mr. Hawkins did not allege any Constitutional violation in his assignments of error. Rather, Mr. Hawkins made a single passing reference to his right to due process as part of his statutory construction argument as to whether the trial court exceeded its authority in ordering the polygraph exam. Specifically, he stated:

RCW 71.09 must be strictly construed to its terms, because it curtails civil rights. *In re the Detention of Martin*, [163 Wn.2d 501, 508, 182 P.3d 951 (2008)]. Civil incarceration achieved by means other than strict compliance with the procedures set forth in RCW 71.09 deprives a person of liberty without due process of law, in violation of the federal and state constitutions.

App. Open. Brf. (Appellant's Opening Brief) at 2. He then went on to make additional statutory construction arguments. App. Open. Brf. at 2-3.

On February 12, 2009, the Court of Appeals, Division II, issued an unpublished opinion unanimously upholding Mr. Hawkins's the trial court's order.

Mr. Hawkins limited his Petition for Review to three issues; (1) whether the trial court exceeded its statutory authority in ordering the

polygraph exam; (2) whether WAC 388-880-034 should be interpreted as specifically allowing alleged SVPs to decline to take polygraph exams if they do not wish to do so; and (3) whether DSHS exceeded its authority in promulgating WAC 388-880-034. Pet. at 1. In reliance on the petition for review and above proceedings, the State's supplemental brief addressed the issues that Mr. Hawkins raised in his petition.

Mr. Hawkins, however, filed a supplemental brief the majority of which is devoted to arguing Division Two's decision below renders RCW 71.09.040 unconstitutional. For example, the supplemental brief includes the first argument that the decision below was "not narrowly tailored to serve a compelling government interest." It includes the first ever reference to Article 1, Section 7 which is accompanied by an argument that a polygraph examination would violate Mr. Hawkins' constitutional right to privacy. This new argument that the Sixth Amendment provides him the right to counsel at a pretrial forensic interview is directly contrary to his apparent concession in his opening brief that the Sixth Amendment does not confer such a right.

IV. ARGUMENT

Pages 7 through 14 of Mr. Hawkins's Supplemental Brief claiming a violation of his Constitutional rights is beyond the scope of his Petition for Review. Those pages should be struck because they make arguments

not presented to the trial court, or to the Court of Appeals, or even alleged in the Petition for Review. Inclusion of these issues is unfairly prejudicial to the State, and is contrary to the rules of this Court that are designed to ensure fair and comprehensive briefing of matters.

Rule of appellate procedure 13.7(b) provides that "the Supreme Court will review only the questions raised in ... the petition for review and the answer, unless the Supreme Court orders otherwise" For instance, in *State v. Korum*, this Court declined to consider a merger issue raised by the State even though the State had argued the issue in the argument section of its petition for review. *Korum*, 157 Wn.2d 614, 625, 141 P.3d 13 (2006). This Court explained that although the State had "raised" the issue in the argument section, it had failed to comply with RAP 13.4(c)(5) which requires each party to provide "[a] concise statement of the issues presented for review." *Id.* Because the State failed to properly raise the merger issue within the meaning of RAP 13.7(b) and 13.4(c)(5), this Court declined to review the matter. *Id.*

Mr. Hawkins's argument is far more substantial than the violation of the rules in *Korum*. His failure to raise and preserve these Constitutional occurred over the course of the nearly three years since the motion to compel the polygraph exam was first argued to the trial court. By arguing Constitutional issues not raised in his Petition for Review,

Mr. Hawkins prejudices both the State and the Court. The State was entitled to rely on the Petition and the rules which direct the petitioning party to define the issues it is seeking review on. Accordingly, the State briefed only the issues presented in the Petition. The Court is entitled to full briefing on all matters before it, particularly ones that involve Constitutional matters.

V. CONCLUSION

Mr. Hawkins did not put the Court or the State on notice of any Constitutional arguments. Therefore, the Court should strike Section B of Mr. Hawkins's brief, pages 7 through 14, which argues that his Constitutional right to privacy and his substantive due process rights were violated by the trial court's order. *See* Pet. Supp. Brf. at 7-14.

RESPECTFULLY SUBMITTED this 9th day of April, 2010.

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NO. 82907-1

WASHINGTON STATE SUPREME COURT

In re the Detention of:

Jake Hawkins,

Appellant/Petitioner.

DECLARATION OF SERVICE

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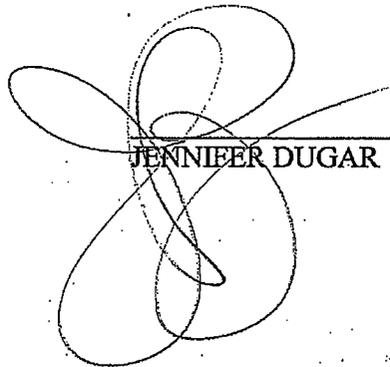
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On this 9th day of April, 2010, I sent via email and deposited the United States mail true and correct cop(ies) of State of Washington's Motion To Strike and Declaration of Service, postage affixed, addressed as follows:

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

DATED this 9th day of April, 2010, at Seattle, Washington.


JENNIFER DUGAR

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SENT TO EMAIL

ORIGINAL

OFFICE RECEPTIONIST, CLERK

To: Dugar, Jennifer (ATG)
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Subject: RE: Hawkins, Jake - State of Washington's Motion To Strike

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In re the Detention of Jake Hawkins, Appellant/Petitioner.

WSSC No. 82907-1

State of Washington's Motion To Strike

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