NO. 1030541

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

In re the Detention of

RANDY RYAN ROSS,

Petitioner.

STATE'S ANSWER TO PETITION FOR REVIEW

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A. IDENTITY OF ANSWERING PARTY

The State of Washington, by and through the Office of the King County Prosecuting Attorney, appears as Respondent here.

B. STANDARD FOR ACCEPTANCE OF REVIEW

"A petition for review will be accepted by the Supreme Court only: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court." RAP 13.4(b).

C. ISSUES PRESENTED FOR REVIEW

Ross seeks review of the Court of Appeals' decision rejecting his claim that he is entitled – prior to his civil commitment trial as a sexually violent predator (SVP) – to empanel a jury for the preliminary determination of whether he

committed the requisite underlying sexually violent offense (SVO). In re Detention of Randy Ross, No 85652-9, slip opinion filed April 29, 2024. Pet. App. 1. The reasoning and authority set out in the Court of Appeals' opinion and the Brief of Respondent below amply demonstrate that the criteria for review are not met in this case. However, there are several points made by Ross in his petition that appear to misstate certain arguments and relevant facts and could thus benefit from clarification here.

D. STATEMENT OF THE CASE

The relevant facts are set out in the Court of Appeals' opinion and section B of the Brief of Respondent below, which the State incorporates herein. However, Ross attempts to add materials to his petition that were not in the record nor considered by the trial court and are therefore not properly before this Court. See RAP 9.1; RAP 9.11; State v. Hughes, 106 Wn.2d 176, 206, 721 P.2d 902 (1986) ("the appellate record is limited to the verbatim report, clerk's papers and exhibits"); State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995) (an

appellate court cannot accept or consider evidence that is outside the record and not before the trial court).

Specifically, Ross has improperly attached information from a separate SVP case, In re Detention of Jonathan Green, COA No. 86633-8-I, that was never before the court below or considered in producing the decision. Undersigned counsel represents the State in Green and as such, is familiar with the proceedings therein. If this Court were inclined to consider information outside the record regarding the procedural posture and history in Green, the State could provide additional documentation to clarify Ross' mischaracterization of the circumstances of that case. However, because this information is not properly before this Court in the first place, the State does not do so now and asks that Ross' materials not be considered as part of his petition.

E. THIS COURT SHOULD DENY THE PETITION FOR REVIEW

1. ROSS PRESENTS NO DECISIONS IN CONFLICT WITH THE COURT OF APPEALS' DECISION.

Ross focuses primarily on the first and second criteria for review listed in RAP 13.4(b), asserting that the Court of Appeals' decision conflicts with a decision of this Court and other Court of Appeals' decisions. However, as Ross readily acknowledges in his petition, there are no decisions by any Washington court (published or otherwise) that address the claim that he raised, and which the Court of Appeals properly rejected below: the issue of whether RCW 71.09.060(2) entitles a person to have a jury hear the preliminary issue of whether he committed an SVO. Pet. at 31. Ross therefore cannot establish any "conflict" that could justify review under RAP 13.4(b)(1) or (2).

Ross identifies the following substantive query as the issue for which he seeks review: "Does RCW 71.09.060(2) grant the right to have a jury decide whether Petitioner committed the

sexually violent acts charged"? Pet. at 7. Yet he also concedes that "[t]he only previously published decision on RCW 71.09.060(2) is In re Detention of Greenwood, 130 Wn. App. 277, 122 P.3d 747 (2005)," which he acknowledges "did not decide the scope of the rights granted" in that RCW 71.09.060(2).[1] Pet. at 31. In other words, Ross concedes that there is no decision – by this Court or the Court of Appeals – that is "in conflict" with Ross or otherwise creates a basis for review under RAP 13.4(b)(1) or (2).[2]

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[1] There are also no unpublished decisions on this issue.

[2] Ross does not appear to cite this Court's opinion in In re Detention of Stout, 159 Wn.2d 357, 376, 150 P.3d 86 (2007) as a decision "in conflict" with the Court of Appeals' holding. To the extent that he does so, he is incorrect. Stout did *not* hold that the "core purpose" of RCW 71.09.060(2) was to guarantee "all criminal trial rights" including the right to a jury at the SVO hearing. Pet. at 8-9, 16, 28. Stout was addressing an SVP's Sixth Amendment right to confrontation in the context of an Equal Protection claim and did not (because it was never asked to) address the statutory construction of language regarding "court" versus "court or jury" in RCW 71.09.060(1) and (2). Stout, 159 Wn.2d at 375-76; see State v. Arlene's Flowers, Inc., 193 Wn.2d 469, 494, 441 P.3d 1203 (2019) (noting court in prior opinion "had no reason to discuss" an argument that had not been raised). Because this Court did not address the statutory construction of

Instead, Ross attempts to re-frame the Court of Appeals' use of general canons of statutory construction as the "decision" that is in conflict with "decisions" of this Court and lower divisions. However, this attempt to markedly stretch the scope of RAP 13.4(b)(1)-(2) fails for two reasons. First, the purpose of RAP 13.4(b)(1)-(2) is to limit review of lower decisions that conflict *directly* with the holdings of this Court or sister courts. It is not to provide a forum for parties to argue over the use of

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RCW 71.09.060 or the right to a jury at the SVO hearing, Stout does not stand for the proposition that RCW 71.09.060(2) guarantees that right, and thus it in no way conflicts with the Court of Appeals' decision in this case. In re Pers. Restraint of Swagerty, 186 Wn.2d 801, 810, 383 P.3d 454 (2016) ("'Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.'" (quoting Webster v. Fall, 266 U.S. 507, 511, 45 S. Ct. 148, 69 L. Ed. 411 (1925)).

Even if Stout had been a statutory construction and not an Equal Protection analysis of the right to confrontation, it could rightly reach the conclusion that RCW 71.09.060(2) guarantees a right to confrontation, because nowhere in RCW 71.09.060 is there plain language repeatedly stating that the SVO hearing would be held without live witnesses, as is the case here where RCW 71.09.060(2) repeatedly states that "the court" will be the factfinder.

broad principles of construction, without regard for the actual issues involved. If this was the case, then all decisions employing canons of statutory construction would merit review under RAP 13.4(b)(1)-(2).

Second, the Court of Appeals' decision here was not a decision regarding a general canon of statutory construction. No holding was issued that changed or otherwise altered a particular canon or rule. The issue, as Ross himself points out, was the meaning of a particular statute, specifically RCW 71.09.060(2), not the statutory maxim used to construe it. The fact that Ross disagrees with the *substantive result* of the Court of Appeals' application of certain statutory maxims and wants this Court to re-apply them in a manner more favorable to him does not constitute grounds for review under RAP 13.4(b)(1)-(2).

The issue at bar here is whether RCW 71.09.060(2) guaranteed a person the right to a jury to determine whether he committed an underlying SVO. No other decision directly addresses this issue, and there is thus no decision "in conflict" to

justify review under RAP 13.4(b)(1) or (2). This attempt at manufacturing a conflict does not warrant review.

Moreover, the Court of Appeals properly applied principles of statutory construction in this case. While the State will not reiterate the arguments made in the Brief of Respondent and oral arguments below, it will note that in presenting additional, alternate definitions of the word "court" in his petition to counter the Court of Appeals' conclusion that the plain meaning of "court" is "judge" and not "jury," Ross leaves out two critical details. Pet. at 6-8. First, he cites WEBSTER'S NEW WORLD DICTIONARY (3rd College Edition 1994) as defining "court" as "A person or persons appointed to try law cases, make investigations . . .". Pet. at 19-20 n.12, However, the full entry reads: "A person or persons appointed to try law cases, make investigations, **etc.; judge or judges; law court**." Id. (emphasis added).

Second, as the Court of Appeals pointed out with the original definitions of "court" that Ross offered, the

WEBSTER'S NEW WORLD definition above, as well as the two other additional definitions cited in his petition ("an official assembly for the transaction of judicial business" and "a judicial body or meeting of a judicial body"),[3] all fail in the same way the others did below: they still "do not mention a 'jury' at all and thus, do not support Ross' claim that a 'court' could mean a jury." Slip op. at 7.

Ross has failed to show any conflict. Review is not warranted.

2. ROSS FAILS TO PRESENT A SIGNIFICANT QUESTION OF CONSTITUTIONAL LAW.

Ross also fails to establish that this matter presents a significant question of constitutional law meriting review under RAP 13.4(b)(3). In addition to relying on the reasoning presented by the Court of Appeals and the Brief of Respondent below, the State responds to Ross' quarrel in his petition with

[3] Pet. at 19-20 n.12.

two aspects of the Court of Appeals' rejection of his due process claim.

First, Ross appears to argue that the Court of Appeals erroneously applied this Court's holding in State v. McCuistion, 174 Wn.2d 369, 393, 275 P.3d 1092 (2012), to reject Ross' claim that the absence of a jury would create a high risk of erroneous deprivation of liberty, asserting that McCuistion is limited to post-commitment scenarios. Pet. at 29-30. This is incorrect. McCuistion held that an SVP's requirements for obtaining a trial on the matter of conditional or unconditional release passed constitutional muster because of the significant procedural safeguards built into the SVP statutory scheme. Id.

However, the efficacy of those procedural safeguards is not limited to post-commitment matters. As this Court has repeatedly stated, the extensive procedural safeguards in chapter 71.09 RCW ensure minimal risk of erroneous deprivation of liberty *throughout* different stages of commitment. See Stout, 159 Wn.2d at 370 (lack of right to confront live witnesses *at trial*

does not violate procedural due process); In re Detention of Coe, 175 Wn.2d 482, 510-11, 286 P.3d 29, 43 (2012) ("A comprehensive set of rights for the SVP detainee already exists" throughout the entire commitment process).

Second, Ross takes issue with the Court of Appeals' holding that an SVO hearing does not result in loss of liberty, contending that this Court's holding in In re Detention of Young, 122 Wn.2d 1, 46, 857 P.2d 989 (1993), undermines the Court of Appeals' conclusion. Pet. at 30-31. But Ross' reliance on Young is misplaced, even beyond the incontrovertible fact that the SVO finding results in no incarceration or confinement in and of itself. Young held that "an opportunity to appear in person to contest probable cause" would ameliorate the risk of wrongful detention "during the 45-day period *leading up to trial*" in which his liberty was infringed. Id. In other words, the addition of the right to be present at a probable cause hearing (which has now been codified RCW 71.09.040(2)) protects against the risk of erroneous deprivation *until the commencement of the SVP trial itself*. Ross

cannot argue that the SVO hearing (which occurs before the SVP trial) somehow negates that protection and creates an additional loss of liberty.

Ross cannot establish a significant question of constitutional law. This Court should deny review.

3. ROSS' BASIS FOR "SUBSTANTIAL PUBLIC INTEREST" IS UNSUPPORTED.

Finally, while Ross correctly acknowledges that there have been no previous decisions addressing the issue of whether RCW 71.09.060(2) provides a right to a jury at the SVO hearing, he presents no authority for an argument that simply being the first decision on an issue (or the fact that he disagrees with that decision) serves as a basis for review. Moreover, as discussed above, while the State believes that Ross mischaracterizes the posture and circumstances of Green in an attempt to establish "substantial grounds for a difference of opinion that should be resolved by this Court," his entire argument on this point is premised on material that is outside of the record and not

properly before this Court. Pet. at 33. To the extent that these materials are properly excluded from consideration as part of Ross' petition, he has thus presented no grounds to review on this basis, and review should be denied.

F. CONCLUSION

For the foregoing reasons, this Court should deny the petition for review.

This document contains 2,226 words, excluding the parts of the document exempted from the word count by RAP 18.17.

DATED this 21st day of June, 2024.

Respectfully submitted,

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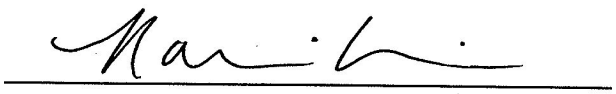

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