NO. 103299-4

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent/Cross-Petitioner

v.

STEVEN KEITH NELSON,

Petitioner/Cross-Respondent.

Appeal from the Superior Court of Pierce County
The Honorable Grant Blinn

No. 21-1-00259-3

ANSWER TO PETITION FOR REVIEW AND CROSS-PETITION FOR REVIEW

MARY E. ROBNETT
Pierce County Prosecuting Attorney

PAMELA B. LOGINSKY
Deputy Prosecuting Attorney
WSB # 18096 / OID #91121
930 Tacoma Ave. S, Rm 946
Tacoma, WA 98402
(253) 798-2913

TABLE OF CONTENTS

TABLE OF AUTHORITIES

State Cases

Federal and Other Jurisdictions

Constitutional Provisions

Statutes

Rules and Regulations

Other Authorities

I. INTRODUCTION

Limits on appellate judicial fact-finding are well-established in Washington and elsewhere. Such limits protect the due process rights of the parties by ensuring the creation of a balanced and high-quality factual record upon which an appellate decision may be grounded. They guard against deciding cases on biased factual representations that might affect important matters usually reserved to the political branches. These limits safeguard the judiciary's legitimacy. The court of appeals failed to appreciate these well-established limits and binding decisions of this court when it reached an unpreserved state constitutional claim for which there was no record developed below.

Steven Keith Nelson raises an as administered challenge to his persistent offender sentence under article I, section 14 of the Washington Constitution. Nelson, however, did not assert this claim in the trial court. And the facts necessary to adjudicate the claim do not appear in the trial court record. The court of appeals, nonetheless, reached the

merits of the claim in an opinion based solely on extra-record fact-finding.

The court of appeal's assumption of the trial court's fact-finding role deprived the State of its right to test the accuracy of Nelson's assembled "facts." The appellate court eschewed the safeguards built into the evidence rules and it found a simple objection to be an adequate substitute for cross-examination and rebuttal evidence. The court of appeal's actions gives rise to two issues of substantial public concern that should be addressed by this court: (1) the short-term fairness question with respect to the parties, and (2) the long-term fairness question about the legitimacy of appellate court decisions grounded in late-provided and untested factual assertions about statistical evidence, generally. The State seeks review of the appellate court's reliance on inadmissible and untested evidence. Constitutional decisions must rest on firmer ground.

Nelson seeks review of the appellate court's rejection of his improperly asserted challenge to his persistent offender

sentence. He also seeks review of the denial of his motion for new counsel and the trial court's admission of the prior testimony of a witness who was hospitalized pursuant to an involuntary commitment proceeding. Review should not be granted on any of these issues because Nelson withdrew his request for new counsel, did not preserve his confrontation clause with a timely objection, and the facts necessary to adjudicate his constitutional claim are not in the record.

II. COURT OF APPEALS DECISION

The State seeks review of the published opinion of the Court of Appeals in *State v. Nelson,* ___ Wn. App. 2d ___, 550 P.3d 329 (Jun. 25, 2024).

III. STATE'S ISSUE PRESENTED FOR REVIEW

A. Should consideration of constitutional challenges to statutes be prohibited where the facts necessary to adjudicate the claim do not appear in the appellate record and decisions based solely on extra-record facts create an unacceptable risk of error, implicate separation of powers, and can result in a loss of confidence in the courts?

IV. RESTATEMENT OF ISSUES PRESENTED FOR REVIEW BY PETITIONER

A. Should further review of Nelson's unpreserved cruel punishment challenge to his persistent offender sentence be denied where it depends solely on extra-record facts?

B. Should further review of Nelson's post-mistrial motion for new counsel be denied where he affirmatively abandoned the request at the scheduled hearing?

C. Should further review of Nelson's confrontation clause claim be denied where Nelson did not object to the admission of a witness's prior testimony pursuant to ER 804(a)(4) after the State presented additional evidence of unavailability?

V. STATEMENT OF THE CASE

In the late morning or early afternoon of January 26, 2021, P.M. met the defendant, Steven Nelson, for the first time. 5RP 423, 535. [1] By late evening, P.M. was in a hospital emergency room receiving treatment for five stab wounds. 5RP 288-98, 312-13, 317, 321, 357-58, 375-76, 496, 602-03, 609. All five wounds were inflicted by Nelson with an 8-inch fixed blade kitchen

[1] The State has adopted Nelson's citation system for the verbatim report of proceedings.

knife. 5RP 385, 420-21, 489-91, 562-65, 612-13, 827, 829; Ex. 1.

Nelson stabbed P.M. in the right shoulder, right breast area, and right arm while the two were alone in Nelson's bedroom. 5RP 267, 283, 430, 437-38, 466-74, 607, 846. P.M. claimed that the stabbing occurred after Nelson accused her of withholding crack cocaine. 5RP 433-35, 487-88, 808-10. Nelson claimed that the stabbing occurred in self-defense after P.M. attacked him with a hammer after Nelson accused her of stealing his wallet. 5RP 873-78, 890. The jury believed P.M. and convicted Nelson of second degree assault while armed with a deadly weapon. CP 81, 83.

The jury's verdict of "guilty" occurred in a second trial, as the first trial ended in a mistrial. On the morning of the first trial, Nelson indicated he was unhappy with his court-appointed attorney and that he would like to continue the trial to get a different lawyer. 1RP 10. The trial court denied Nelson's

request as "tardy," and because it believed Nelson "overstated" the "issues" he was having with defense counsel. 1RP 13.

In the months following the mistrial, Nelson informed the trial court in ex parte communications that he desired new counsel. CP 136, 142, 149. Nelson struck the first hearing scheduled to hear the merits of his request, RP 3-4, and he abandoned his request for new counsel at the second hearing, choosing instead to proceed solely on his unequivocal request to represent himself. 3RP 4-8. Nelson does not claim that his request to proceed pro se was equivocal or that his waiver of counsel was not knowing, intelligent, and voluntary.

Between the first and second trial one of the State's witnesses, C.D., experienced serious mental health issues that led to a request to admit her prior testimony pursuant to ER 804(a)(4) and (b)(1). 5RP 29-30; CP 155. Nelson objected to the State's request on confrontation clause grounds, stating that C.D. had months to get mental health treatment and yet "here she is unavailable at this point." 5RP 31.

The State established C.D.'s unavailability through two witnesses. Marvin Leikam's testimony was heard on August 29th. 5RP 35-48. Mr. Leikam testified to C.D.'s mental health diagnoses, the worsening of her symptoms following her last 45+ day involuntary commitment, and that she was currently irrational, defiant, and occasionally talking gibberish. 5RP 35-36, 38-39, 40-43. Nelson objected to a finding of unavailability based on Mr. Leikam's testimony, contending that expert testimony from a mental health professional was required. 5RP 50-51. Although the trial court found that there was "substantial reason to believe [C.D.] might be unavailable to testify due to mental illness," it found that the current record did not quite rise to the level of unavailability under ER 804. 5RP 60-61.

Two days after Mr. Leikam testified, the State called Sergeant Thiry as a witness to C.D.'s unavailability. *See* 5RP 441-46. His unobjected to testimony established that C.D. was currently subject to an involuntary commitment detention that would last until at least September 8, 2022. 5RP 444-46. This

detention period extended past the estimated length of Nelson's trial. *See* 5RP 12-13 (State expected to complete its case in chief on September 6, 2024).

Following Sergeant Thiry's testimony Nelson did not renew his August 29, 2021, earlier demand for testimony from a mental health professional. 5RP 446-49. Nelson did not object to the trial court's finding that C.D. was unavailable under ER 804(a)(4) because she "is subject to an involuntary treatment proceeding and detention." 5RP 447-49. And Nelson did not assert any objection when C.D.'s prior testimony was presented to the jury on September 1, 2021. 5RP 586-90.

Nelson's second trial resulted in a conviction for second degree assault with a deadly weapon. CP 81, 83; 5RP 984. Sentencing was scheduled for a few weeks after the return of the jury's verdict. 5RP 991. In the weeks between the jury's verdict and sentencing Nelson filed no motions or other pleadings regarding sentencing.

During the sentencing hearing, Nelson raised no legal challenges to the court's finding that he was a persistent offender or to his sentence of life in prison without the possibility of parole (LWOP). *See* 5RP 994, 1000-1003. The court's finding that Nelson was a persistent offender was supported by both Nelson's stipulation to his criminal record and certified copies of judgment and sentences from Nelson's prior most serious offenses. CP 84; 5RP 995-97, 1003.

Nelson filed a timely appeal. CP 104. In the appellate court, Nelson he asserted an "as administered" article I, section 14 challenge to the Persistent Offender Accountability Act (POAA). Brief of Appellant at 1, 2-3, 49-63. Nelson supported his claim with extra-record materials that he placed in an appendix to his brief. Nelson did not obtain permission to include the extra-record materials as required by RAP 10.3(a)(8), nor did he move to expand the record pursuant to RAP 9.11.

The State filed a timely motion to strike the extra-record materials and all references and arguments predicated on the

extra-record materials contained in Nelson's brief. The court of appeals considered the motion along with the merits of the case. The court denied the motion to strike and relied on the extra-record materials in deciding the merits of Nelson's claim. *See Nelson*, 550 P.3d at 531-32.

Nelson filed a timely petition for review. The State files this timely cross-petition for review.

VI. ARGUMENT

The constitutional holding in this case, that the Persistent Offender Accountability Act (POAA)[2] is not unconstitutional as administered, is correct. But the process the court of appeals took to reach this conclusion is contrary to established norms and this court's precedent. Appellate decisions, and especially

[2] The POAA was adopted through the initiative process in November of 1993, with support from seventy-six percent of the voters. *State v. Thorne*, 129 Wn.2d 736, 746, 921 P.2d 514 (1996), *abrogated on other grounds by Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004); Laws of 1994, ch. 1 (Initiative 593). The key provisions of the POAA are currently codified at RCW 9.94A.030(37) and RCW 9.94A.570.

constitutional decisions, should not rest on extra-record appellate fact-finding. Such a practice poses an unacceptably high risk of error. The State's cross-petition for review should be granted and Nelson's petition for review should be denied.

A. Appellate Level Fact-Finding Is Contrary to Well Established Norms and in the Absence of Trial Court Guardrails, Will Result in Holdings that Rest on Sand Rather Than Granite

The American adversarial system, built upon the principle of party presentation, generally limits appellate judges' consideration of the facts to review of the record developed at trial by the parties. *See, e.g., Greenlaw v. United States*, 554 U.S. 237, 243-44, 128 S. Ct. 2559, 171 L. Ed. 2d 399 (2008) (discussing principle of party presentation); *Dalton M, LLC v. North Cascade Trustee Services, Inc.*, 2 Wn.3d 36, 50, 534 P.3d 339 (2023) (Washington courts follow the rule of party presentation). This system promotes fairness and accuracy by giving each party the "opportunity to use the appropriate weapons (rebuttal evidence, cross-examination, and argument) to meet adverse materials that come to the tribunal's attention."

Fed. R. Evid. 201(b), advisory committee's note on proposed rules (quoting Kenneth Culp Davis, *A System of Judicial Notice Based on Fairness and Convenience, in Perspectives of Law* 69, 93 (1964)). This process, policed and administered by the trial court, builds the record upon which appellate courts must rely, and it builds it in the daylight of adversarial process. David L. Faigman, *Constitutional Fictions: A Unified Theory of Constitutional Facts* 126 (2008).

Appellate courts eschew fact-finding. They are less equipped than the trial courts to find facts as they only see a cold record. Because of this, appellate courts can overturn a trial court's finding only when that finding is not supported by substantial evidence. *See, e.g., State v. Hill*, 123 Wn.2d 641, 647, 870 P.2d 313 (1994). And the appellate courts must defer to the trial court fact-finder's credibility determinations, resolution of conflicting testimony, and weight to be accorded to the testimony. *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004), *abrogated in part on other grounds by Crawford v.*

Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

When a reviewing court finds fault with a trial court's fact-finding, the appellate court does not substitute its own fact-finding, it instead remands the case to the trial court for further factual development. *Pullman-Standard v. Swint*, 456 U.S. 273, 293, 102 S. Ct. 1781, 72 L. Ed. 2d 66 (1982); *Noll v. Special Electric Company, Inc.*, 9 Wn. App. 2d 317, 322-23, 444 P.3d 33 (2019). This same practice is followed when an appellate court deems it appropriate to accept additional evidence on review, RAP 9.11(b), or when facts need to be developed in an appellate court original action. *See* RAP 16.2(d); RAP 16.11(b).

The assignment of fact-finding to trial courts rather than appellate courts is not simply a matter of convenience. At the trial court, free-range factual adventuring is constrained by the challenges of the adversaries, the rules of evidence, and the prospect of appeal. But none of these guardrails apply to appellate courts. Thus, at the appellate level, free-range factual

adventuring is constrained by denying appellate courts a fact-finding role.

Appellate courts, however, like trial courts may take judicial notice of facts that are not "subject to reasonable dispute." ER 201(b), (f); *Spokane Research & Defense Fund v. City of Spokane*, 155 Wn.2d 89, 97-98, 117 P.3d 1117 (2005). This usually means uncontestable facts, like the day of the week the Fourth of July falls on each year, but also includes a fact that is "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." ER 201(b).

The sources that have traditionally fallen into this category includes, among other things, dictionaries, government documents, maps, encyclopedias, and well-recognized treatises. 21B Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure: Evidence* § 5106.2 (2d ed. Jun. 2024 Update); 5 Karl B. Tegland, *Wash. Prac. Evidence Law and Practice* § 201.5 (6th ed. Aug. 2024 Update). Private law firms or legal

services entities, such as Columbia Legal Services,[3] are advocates, not objective or expert arbiters, and thus are not sources whose accuracy cannot be doubted.

A party is generally entitled to be heard on the propriety of taking judicial notice and the tenor of the matter noticed." ER 201(e). And this court has stated that RAP 9.11 places restrictions on an appellate court's consideration of extra-record information through judicial notice. *Spokane Research & Defense Fund*, 155 Wn.2d at 98-99.[4] RAP 9.11 "ordinarily"

---

[3] The Columbia Legal Services is a non-governmental provider of legal services with a focus on immigration and mass incarceration. *See* Columbia Legal Services, *Who We Are* at https://columbialegal.org/about/#mission-and-values (last visited Aug. 9, 2024); Wash. Secretary of State, Corporations and Charities Filing System, Columbia Legal Services, Business Information available at https://ccfs.sos.wa.gov/?_gl=1*yt9hzv*_ga*NTU5NzI0NjA0LjE2OTE3OTUxMzA.*_ga_7B08VE04WV*MTcyMzIzNTAzOC4xNy4xLjE3MjMyMzUyMTAuMC4wLjA.#/BusinessSearch/BusinessInformation (last visited Aug. 9, 2024).

[4] Nelson's extra-record appendix fails three of the RAP 9.11 criteria as it relates to an unpreserved claim, the contents are inadmissible under the rules of evidence, and the underlying data summarized in the appendix was available prior to Nelson's October 7, 2022, sentencing hearing. *See* RAP 9.11(a)(1), (2), and (3).

requires a remand to the trial court to take the additional evidence and find the facts based on that evidence. RAP 9.11(b).

Judicial notice may also be taken by appellate courts of "legislative," "social," or "constitutional" facts. A legislative fact is not case-specific but is rather a generalized claim about the state of the world. Allison Orr Larsen, *The Trouble with Amicus Facts*, 100 Va. L. Rev. 1757, 1774 (2014). Legislative facts can enter a case through avenues ranging from legislative hearing transcripts, amicus briefs, to independent research. Sometimes legislative facts are based on not much at all. *See, e.g., Gonzales v. Carhart*, 550 U.S. 124, 159, 127 S. Ct. 1610, 167 L. Ed. 2d 480 (2007) (assertion that "some women come to regret their choice" to have an abortion, despite having "no reliable data" to back up the assertion); Ira Mark Ellman and Tara Ellman, *"Frightening and High" The Supreme Court's Crucial Mistake About Sex Crime Statistics*, 30 Constitutional Commentary 495, 497-99 (2015) (statistic regarding recidivism

rate for untreated sex offenders in *McKune v. Lile*[5] taken from a mass market magazine aimed at a lay audience by an author who lacked the scientific credentials that would qualify him to testify at trial as an expert on recidivism).

Currently appellate courts tend to rank all legislative or social fact as equally significant, while dismissing inconvenient examples. But research on which social frameworks are erected can "vary from well-designed, competently executed, and oftreplicated studies, to novel research that is poorly designed and sloppily executed." Michael J. Saks, *Judicial Attention to the Way the World* Works, 75 Iowa L. Rev. 1011, 1015 (1999). And the legal relevance of any study will depend on its scientific credibility. David L. Faigman, *To Have and Have Not: Assessing the Value of Social Science to the Law as Science and Policy*, 38 Emory L.J. 1005, 1081 (1989).

[5] 536 U.S. 24, 33, 122 S. Ct. 2017, 153 L. Ed. 2d 47 (2002).

Studies can be funded by universities, governments, or by private entities—even by parties themselves. Studies and reports can be produced for purposes of litigation or to sway decision makers, rather than for publication in a peer-reviewed social science journal.[6] Studies can be prepared by individuals with expertise in the techniques used, or by individuals who lack the necessary education, training, or experience.[7] Studies may be replicated by other researchers or retracted for errors.[8] The trial

---

[6] *See, e.g., The Trouble With Amicus Facts*, 100 Va. L. Rev. at 1787-95.

[7] *Compare* the credentials of the authors of the Gregory death penalty study. Katherine Beckett (curriculum vitae available at https://faculty.washington.edu/kbeckett/VITAE.pdf (last visited Aug. 16, 2024)) and Heather Evans (curriculum vitae available at https://soc.washington.edu/people/heather-d-evans (last visited Aug. 16, 2024), *with* the credentials of the authors of the recent Civil Rights Clinic Report, *see infra* at n. 18. Melissa R. Lee (curriculum vitae available at https://law.seattleu.edu/faculty/directory/profiles/lee-melissa.html (last visited Aug. 16, 2024)) and Jessica Levin (curriculum vitae available at https://law.seattleu.edu/faculty/directory/profiles/levin-jessica.html (last visited Aug. 16, 2024)).

[8] *See, e.g.*, Sage Perspectives, *A Note from Sage on Retractions in Health Services Research and Managerial*

court provides an opportunity for parties to explore these issues and guidance as to their impact[9]—the appellate court does not.[10] The potential harm from unrestrained appellate fact-finding

Epidemology (Feb. 5, 2024) (retracting Mifepristone studies that were relied on by lower courts to restrict access to the medication) (available at https://perspectivesblog.sagepub.com/blog/note-from-sage-on-retractions-in-health-services-research-and-managerial-epidemiology (last visited Aug. 16, 2024).

[9] *See, e.g.,* ER 607 (impeachment); ER 706 (disclosure of underlying facts); CrR 4.7 and CR 26 (discovery); WPIC 6.01, 6.51, and WPI 2.01 and 2.10 (jury instructions).

[10] Academics have urged appellate courts to require disclosure of this information in all briefs as to all social science studies. *See, e.g.,* Michael Rustad and Thomas Koenig, *The Supreme Court and Junk Social Science: Selective Distortion in Amicus Briefs,* 72 N.C. L. Rev. 91, 157-58 (1993) (urging appellate courts to require answers to these questions in appellate court briefs).

exists regardless of who tenders the facts—parties, law review articles,[11] amicus curiae,[12] or the court's independent research.[13]

Legislative facts relate to the policy-making function of a court. Legislative facts are generally used to bolster a judicial decision's persuasive power. The use of legislative facts is most appropriate when "a court is asked to decide on policy grounds

---

[11] Barry Friedman, *Fixing Law Reviews*, 67 Duke L.J. 1297 (2018) (student editors, lack of peer and blind review, and in school nepotism results in many articles lacking value).

[12] *See, e.g.,* David DeMatteo and Kellie Wiltsie, *When Amicus Curiae Briefs are Inimicus Curiae Briefs: Amicus Curiae Briefs and the Bypassing of Admissibility Standards*, 72 Am. U. L. Rev. 1871, 1908-09 (2023) (amicus curiae briefs inclusion of expert information bypass traditional admissibility standards and frequently include inaccurate, misleading, or mischaracterized expert information); Michael Rustad and Thomas Koenig, *The Supreme Court and Junk Social Science: Selective Distortion in Amicus Briefs*, 72 N.C. L. Rev. 91, 119-151 (1993) (demonstrating how amici misused the available social science data through misleading and out-of-context depictions).

[13]Allison Orr Larsen, *Confronting Supreme Court Fact Finding*, 98 Va. L. Rev. 1255, 1262-63 (2012) (pointing out that independent judicial factfinding creates risks including "the possibility of mistake, unfairness to the parties, and judicial enshrinement of biased data").

whether to continue or eliminate a common law rule." *Wyman v. Wallace*, 94 Wn.2d 99, 103, 615 P.2d 452 (1980).

The problem with legislative facts arises, when, as here, the appellate court treats legislative facts as potentially dispositive to the case's outcome. Social science, statistical analyses, and other non-legal information introduced for the purpose of assessing adjudicative facts should be presented to the trial court, and not on appeal. Social science used in this way influences a judge or jury's view of the facts. If consideration of social science data and statistics is appropriate for this purpose it deserves to be developed in open court and subject to scrutiny, criticism, and challenge. And while the State concedes that cross-examination and the adversary system may not conclusively determine scientific validity, they are preferable to casual introduction of such evidence on appeal with only limited opportunity to examine it.

The members of this court and most other judges are not statisticians, social scientists, or masters of other scientific fields.

See generally State v. Copeland, 130 Wn.2d 244, 922 P.2d 1304 (1996) (rejecting the federal test for admission of expert testimony because judges generally "lack the understanding of scientific principles and methodology to evaluate science including social science"); *accord* David DeMatteo and Kellie Wiltsie, *When Amicus Curiae Briefs are Inimicus Curiae Briefs: Amicus Curiae Briefs and the Bypassing of Admissibility Standards*, 72 Am. U. L. Rev. 1871, 1905-06 (2023) (low percentage of judges understand testing criterion, can identify major flaws in studies or separate out high-quality studies from junk science). Lacking the expertise needed to distinguish completely unsound research from fundamentally sound research, junk science can and does worm it way into opinions. And the consequences of this in independent state constitutional cases can be profound, including a loss of public confidence in the courts.

While the political process can correct decisions based on errant appellate fact-finding in many cases, the ability to repair

error in constitutional decisions is largely forfeited. This is because constitutional decisions can only be corrected by constitutional amendment,[14] or by the court itself. Thus, a false-fact embedded into an appellate court decision has no natural repair and will be replicated in other court decisions. *See, e.g.*, Caitlin E. Borgmann, *Appellate Review of Social Facts in Constitutional Rights Cases*, 101 Calif. L. Rev. 1185, 1216-18 (2013) (describing how an assertion of "fact" in an amicus brief made its way into a supreme court opinion and from there into subsequent appellate court decisions). And while opinions premised on empirical judgments or untested predictions should be provisional and should be reconsidered whenever their assumptions are disproven,[15] this seldom occurs.

---

[14] An amendment to the Washington Constitution requires either a two-third vote in both houses of the legislature followed by approval by a majority of the electors at the next general election or a constitutional convention followed by approval in a vote of the people. *See* Wash. Const. art. XXIII.

[15] *United States v. Leon*, 468 U.S. 897, 927-28, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984) (Blackman, J., concurring).

This court's precedent guards against constitutional decisions being predicated on errant facts by prohibiting appellate courts from considering matters outside the record and from resolving constitutional questions first raised on appeal when the facts necessary to adjudicate the claim are not in the trial court record. *State v. McFarland*, 127 Wn.2d 322, 332-35, 899 P.2d 1251 (1995); *State v. Riley*, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993); *State v. Tolias*, 135 Wn.2d 133, 140-41, 954 P.2d 907 (1998). And these rules have been applied to as administered challenges to the death penalty under article I, section 14. *See State v. Davis*, 175 Wn.2d 287, 343-45, 290 P.3d 43 (2012), *abrogated in part by State v. Gregory*, 192 Wn.2d 1, 427 P.3d 621 (2018). The appellate court's decision in this matter directly conflicts with these precedents, warranting review under RAP 13.4(b)(1).

The appellate court's justification for reaching the merits of a constitutional claim that is factually unsupported by the record is that RAP 2.5(a) uses the word "may" with respect to

unpreserved issues. *Nelson*, 550 P.3d at 532. But use of the word "may" in this rule only allows an appellate court to review unpreserved claims that do not involve manifest constitutional error. The permissive "may" does not authorize consideration of poorly presented and developed facts. Precedent interpreting the rule did not rely on extra-record facts contained in an appendix. When, as here, the facts necessary to resolve the constitutional claim appear only in an appendix to the appellant's brief, this court strikes those facts from the record and refuses to reach the claim. *See, e.g., Davis*, 175 Wn.2d at 344-45.

Review of the court of appeals' failure to grant the State's RAP 10.7 and 10.3(a)(8) motion to strike Nelson's appendix should be granted pursuant to RAP 13.4(b)(1) and/or RAP 13.5(b)(3) as the decision is directly contrary to this court's precedent and is an unwarranted departure from the accepted and usual course of appellate proceedings.[16] And while the court of

[16] The *Nelson* decision conflicts with unpublished opinions in which the court of appeals refused to consider similar

appeals ultimately rejected Nelson's unpreserved constitutional challenge on the merits, its willingness to consider the question without an adequate trial court record raises an issue of substantial public interest. RAP 13.4(b)(4).

The court of appeals' refusal to honor the allocation of fact-finding between appellate and trial courts creates the possibility that individual proclivities will result in the announcement of "facts" that match their personal views—even when the data is inconclusive or non-existent. *See, e.g.,* Christopher J. Ferguson and Sven Smith, *Race, class, and*

---

appendices tendered for the first time on appeal. *See State v. Smith*, No. 38246-0-III, 2022 WL 4475952 at * 1 (Wash. App. Sep. 27, 2022) (unpublished) ("it would not be fair to decide this case on the grounds argued by Mr. Smith without providing the State an opportunity to rebut the data he presents and to present its own data"); *State v. Simmons*, No. 80563-1-I, 2021 WL 4947119 at * 12 (Wash. App. Oct. 25, 2021) (unpublished) ("in order to fully engage in the racial disproportionality analysis of the POAA that [the defendant] seeks, we simply must ground that review in comprehensive data. . . . this sort of challenge requires thorough studies and specific data on the matter of disproportionality, and, in the absence of such a record, we decline to reach this issue.").

criminal adjudication: Is the US criminal justice system as biased as is often assumed? A meta-analytic review, 75 Aggression and Violent Behavior Article 101905 at §§ 4.3, 4.5 (2024) (both citation bias and expectation bias have resulted in an overstatement of race's impact on prosecution and sentencing); Ben K. Grunwald, *Suboptimal Social Science and Judicial Precedent*, 161 U. Pa. L. Rev. 1409, 1428-33 (2013) (cultural cognition impacts both researchers and judges' views and results in favoring studies that confirm their beliefs). The risk of reliance on one-sided development of legislative facts by courts is contrary to the Washington's constitution's allocation of the balancing of public policy interests and the enactment of laws to the legislature. *Rousso v. State*, 170 Wn.2d 70, 88, 92, 239 P.3d 1084 (2010).

This court has repeatedly stated that the wisdom of a statute is a question for the legislature, not the courts, and that policy arguments in support of changes in the law must be directed to that body. *See, e.g., Russo*, 170 Wn.2d at 87-88. Only

when the legislature's policy judgment as expressed in the statute offends constitutional precepts, may a court reject a statute. *See Davis v. State ex rel. Department of Licensing*, 137 Wn.2d 957, 976 n. 12, 977 P.2d 554 (1999).

Statutes are presumed to be constitutional, and a challenger bears the burden to prove otherwise beyond a reasonable doubt. *See State v. Bassett*, 192 Wn.2d 67, 77, 428 P.3d 343 (2018). This stringent standard is not met simply because a court doubts the wisdom of the punishment. *State v. Moretti*, 193 Wn.2d 809, 830, 446 P.3d 609 (2019); *State v. Campbell*, 103 Wn.2d 1, 691 P.2d 929 (1984). It is the function of the legislature and not the judicial to alter the sentencing process. *State v. Law*, 154 Wn.2d 85, 103 n. 14, 110 P.3d 717 (2005). Appellate court fact-finding is inconsistent with these well-established principles.

Policy decision making is vested in the legislature rather than the courts for cogent reasons. The legislature, unlike appellate courts, may speak directly to constituents, hold

hearings, create stakeholder committees and advisory groups, and commission research projects. *See, e.g.*, RCW 9.94A.8673 (Sex Offender Policy Board); RCW 9.94A.860 (specifying appointment of individuals with diverse experience to commission); RCW 43.20C.020 (commissioning report on evidence-based interventions). The legislature can easily alter course in response to new facts or circumstances and can even make retroactive changes to the law to address past wrongs or unintended outcomes. *See, e.g.,* RCW 9.94A.647(3) (retroactively removing robbery in the second degree from the definition of "most serious offense."). Courts cannot.

The *Nelson* court compounded its error by treating the State's objection to the extra-record materials in its motion to strike and its argument against consideration of the information in its brief as an adequate substitute for discovery, cross-examination, and introduction of a rebuttal analysis. The court also erroneously placed the burden on the State to prove why extra-record materials should not be considered rather than on

the proponent, Nelson, to prove why such a radical deviation from appellant practice was appropriate. Why, when a defendant may not submit evidence in the trial court free from the legitimate demands of the adversarial system and is not relieved of compliance with procedural and evidentiary rules, should a different practice apply to extra-record facts in the appellate courts?

While some, but not all the data Nelson utilized to generate his report came from government sources, Nelson's *manipulation* of the data did not. His attorney's statistical analysis of the manipulated data is insufficient to command consideration by any court as "calculations must come from a witness, not a party's lawyer." *Watkins v. Sverdrup Tech., Inc.*, 153 F.3d 1308, 1315-16 (11th Cir. 1998); *accord Mitchell v. City of LaFayette*, 504 Fed. Appx. 867, 871 (11th Cir. Jan. 28, 2013) (per curiam) (finding that the plaintiffs' statistical calculations lacked probative value because they were proffered by their attorney and were not vetted by an expert). This is because

statistical proof of causation rather than merely correlation of two items requires expert testimony that can address rival hypothesis and control for small data sets. *See generally In re Detention of Thorell,* 149 Wn.2d 724, 755, 72 P.3d 708 (2003) (admission of testimony regarding statistical analysis is governed by ER 702 and ER 703); *In re Oliver v. Pacific Northwest Bell. Tel. Co., Inc.*, 106 Wn.2d 675, 682, 724 P.2d 1003 (1986) (usefulness of statistics depends on the surrounding facts and circumstances); B.K. Nayak, *Understanding the Relevance of Sample Size Calculation,* Indian J. Opthamology 469, 469-70 (2010);[17] Lee Epstein and Gary King, *The Rules of Inference*, 69 U. Chi. L. Rev. 1, 76-80 (2002).

Nelson's attorney's descriptive analysis's failure to control for rival hypothesis and his manipulation of the data

[17] Available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2993974/ (last visited Aug. 16, 2024).

through the removal of many persistent offenders[18] renders it unhelpful in determining the existence of a discriminatory intent in sentencing. For instance, he removed every persistent offender who was listed as having a robbery in the second degree in their criminal history, even though some robbery in the second

---

[18] *See* Brief of Appellant, at appendix 2, ¶¶ 2-5. The same exclusions infect the recent report prepared by the Fred T. Korematsu Center for Law and Equality. *See* Melissa Lee and Jessica Levin, *Justice is Not a Game: The Devastating Racial Inequity of Washington's Three Strikes Law at 30* (hereinafter "Civil Rights Clinic Report").

The Civil Rights Clinic Report is a position or advocacy paper rather than a research paper. It suffers from researcher expectations and follows none of the best practices that ensure quality research. *See, e.g.,* Martin E. Hèroux, et. al., *Quality Output Checklist and Content Assessment (QuOCCA): a new tool for assessing research quality and reproducibility*, BMJ Open (Sept. 2022) (available at https://bmjopen.bmj.com/content/12/9/e060976 (last visited (Aug. 16, 2024)). Judicial notice may not be taken of position papers. *Kushner v. Beverly Enterprises, Inc.*, 317 F.3d 820, 829-30 (Jan. 2003); *One Hour Cleaners v. Industrial Claims Appeals Office*, 914 P.2d 501, 505-06 (Colo. App. 1995). The fact that the report was prepared by academics does not make it appropriate for judicial notice. *See generally Tri Union Frozen Products, Inc. v. United States*, 161 F. Supp. 3d 1333, 1337-38 (Ct. Int'l Trade 2016) (extended discussion on why "academic materials are also not the proper subject to judicial notice").

degree convictions are still most serious offenses. *See, e.g., State v. Smith*, No. 55329-5-II, 2022 WL 3592634 at *15-16 (Wash. App. Aug. 23, 2022) (unpublished) (robbery in the second degree with a deadly weapon enhancement is a most serious offense), *review denied*, 200 Wn.2d 1029 (2023).

The court of appeal's denial of the State's motion to strike extra-record materials summarized by Nelson's attorney in his declaration on the grounds that it came from "reputable sources, such as … Columbia Legal Services," is such "a departure from the accepted and usual course of judicial proceedings" that review is appropriate pursuant to RAP 13.5(b)(3). Whether reports, information, and other documents prepared by private advocacy organizations that are submitted on behalf of defendants will be immunized from the adversarial system and treated as a source that is entitled to judicial notice presents a question of substantial public interest that merits review under RAP 13.4(b)(4).

The *Nelson* court's labeling of the appendix to Nelson's brief and the other extra-record facts that he cited as "legislative facts" does not cure the impropriety or reduce the risk of error. While this court has taken judicial notice of implicit and overt racial bias against Black defendants in this state as a historical and contextual fact when deciding cases,[19] it has declined to review claims that a specific statute violates the cruel punishment clause based solely on this tenet. Rather it has required expert studies that have been subjected to our adversarial system. This court's practice recognizes that while evidence of correlation may constitute legislative or social facts, evidence of causation — that race is being used to harm individuals in a specific setting — are adjudicative facts whose existence must be found in the appellate record.

Racial disproportionality exists. The State does not dispute this fact. But disproportionality alone, does not establish

[19] *State v. Hawkins*, 200 Wn.2d 477, 501, 519 P.3d 182 (2022).

"disparity." *See generally* Taks Force 2.0 Research Working Group, *Race and Washington's Criminal Justice System: 2021 Report to the Washington Supreme Court*, 45 Seattle U. L. Rev. 969, 980 (2022) ("racial disparity" arises when a member of one racial group (e.g. Black capital defendants) is more likely to receive a sentence than a similarly situated member of a comparison group (e.g., White capital defendants)). Disparity arises only when race accounts for the unequal outcomes for one group as compared with outcomes for another group.

People are not born as persistent offenders. Rather, they earn that status by being convicted on three separate occasions of robbing, assaulting, raping, or murdering innocent people. Invalidating a facially neutral statute that imposes a sentence that passes constitutional muster based solely on racial disproportionality between persistent offenders and the general population, minimizes the impact of persistent offenders on their victims and the harm they cause their communities, while doing nothing to address systemic racism. And once a court starts

down this road, every sentencing scheme will ultimately be invalidated pursuant to an as administered challenge—a concept that has previously been limited to capital punishment.

Accurate data, careful analysis by qualified experts, and factual development in the trial courts can establish whether a facially neutral sentence is being administered improperly based on race. If the answer is "no" with respect to serious offenders, then the solution to disproportionate sentences likely lies in reduction of poverty, increased educational resources, and greater access for all Washingtonians to medical care, housing, and safe communities. Absent reliable empirical evidence effective ways to reduce disproportionality cannot be fashioned.

When a court concludes, as *Nelson* did, that "the disproportionate impact [of the POAA] likely is due to systemic racial injustice throughout the criminal justice system," 550 P.3d at 535, without empirical proof of causation, it can cause increased social discord, declines in race relations and other foreseeable negative outcomes. Christopher J. Ferguson and

Sven Smith, *Race, class, and criminal adjudication: Is the US criminal justice system as biased as is often assumed? A meta-analytic review*, 75 Aggression and Violent Behavior Article 101905 at § 4.6 (2024). Greater caution is called for in discussing these important issues.

B. Further Review of Unpreserved, Waived and/or Abandoned Claims is Not Warranted

Nelson seeks further review of three claims. Nelson, however, failed to timely assert two of the claims in the trial court and he abandoned the other. Initial review, much less further review, of procedurally defaulted claims is not warranted under RAP 13.4(b).

1. Nelson did not establish the facts necessary to adjudicate his cruel punishment claim in the trial court.

Nelson claims that his race-based challenge to the POAA merits review under RAP 13.4(b)(3). Petition for Review at 14. The State agrees that whether a statute is being implemented in a racially disparate manner presents a significant question under the constitution. This question, which is more properly asserted

under the equal protection clause rather than the cruel punishment clause,[20] however, only merits review in a case in which the challenge to the statute was asserted in the trial court and the facts necessary to adjudicate the claim appear in the record.

When, as here, neither of these prerequisites have been satisfied, an appellate court may not reach the merits of the claim.

---

[20] A facially neutral sentencing statute, however, does not violate equal protection principles solely because it disproportionately impacts people of color. *See generally Personnel Adm'r of Massachusetts v. Feeney*, 442 U.S. 256, 279, 99 S. Ct. 2282, 60 L. Ed. 2d 870 (1979) (lawmaking body must have "selected or reaffirmed a particular cause of action at least in part, 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group"); *Luft v. Evers*, 963 F.3d 665, 670 (7th Cir. 2020) (racially disparate impact does not establish racial discrimination; racial discrimination requires proof that a public official intends to hold a person's race against him).

Nelson has not established, or even claimed, that the people adopted Initiative 593 with the intent of incarcerating Blacks, rather than repeat offenders. Such an allegation, moreover, would fail because the purpose of the POAA was public safety and it was directed toward all persons with repetitive convictions for serious offenses with the goal of protecting our communities. RCW 9.94A.555.

See McFarland, 127 Wn.2d at 333. The constitutionality of the POAA, moreover, is settled law. *Moretti*, 193 Wn.2d at 820 ("We have continually upheld sentences imposed under the POAA as constitutional and not cruel under article I, section 14.") (collecting cases). And Nelson does not claim that these prior decisions are both incorrect and harmful. *See, e.g., State v. Otton*, 185 Wn.2d 673, 687-88, 374 P.3d 1108 (2016) (a prior decision will only be overruled if it is clearly incorrect and harmful).

Finally, because the sentence of LWOP follows automatically upon conviction of a third most serious offense,[21] Nelson's as administered challenge to the POAA would require him to demonstrate that prosecutors file most serious offense charges against "third-strikers" based on their race. Nelson has not made a selective prosecution challenge,[22] he has not argued,

---

[21] *Nelson*, 550 P.3d at 535.

[22] Unconstitutional selective prosecution occurs when a defendant is prosecuted where similarly situated people are not

much less established, that the State does not file second degree assault charges against non-persons of color who stab someone repeatedly, and he has not claimed that the evidence does not support his conviction for second degree assault.

2. Nelson abandoned his request for new counsel.

Nelson claims that the trial court refusal to conduct a hearing on Nelson's motion for a new attorney prior to the

---

based on an unjustifiable standard such as race. *See, e.g., State v. Munguia*, 107 Wn. App. 328, 339-40, 26 P.3d 1017 (2001). A claim of selective prosecution cannot be resolved on appeal where there was no evidentiary hearing on the issue in the trial court. *Id.* at 340-41.

Empirical studies, moreover, indicate that race does not affect prosecutorial charging decisions. *See* Christoper Robertson, Shima Baradaran Baughman, and Megan Wright, *Race and Class: A Randomized Experiment with Prosecutors*, 16 Journal of Empirical Legal Studies 807/ Arizona Legal Studies Discussion Paper No. 19-26 (2019) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3205657 (last visited Aug. 14, 2024)); *see also* Christoper Robertson, Shima Baradaran Baughman, and Megan Wright, *Dimensions of Prosecutor Decisions: Revealing Hidden Factors with Correspondence Analysis*, BYU Law Research Paper No. 24-18 (Mar. 13, 2024) (there are two dimensions to prosecutor decision making, neither of which is race) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4728007 (last visited Aug. 14, 2024)).

second trial merits review under RAP 13.4(b)(3). Petition for Review at 29. He is wrong because even assuming that Nelson properly filed post-mistrial motions for new counsel (he did not), he abandoned the request in favor of representing himself. *See Nelson*, 550 P.3d 529 at ⁋⁋ 67-68 (unpublished portion). And Nelson does not claim that his request to proceed pro se was equivocal.

A party may abandon or waive a constitutional claim by affirmatively withdrawing the related motion. *State v. Valladares*, 99 Wn.2d 663, 672, 664 P.2d 508 (1983). And "[o]nce a constitutional challenge has been affirmatively withdrawn or abandoned, the challenge will not be considered on appeal." *In re Pers. Restraint of Cross*, 180 Wn.2d 664, 690, 327 P.3d 660 (2014), *abrogated on other grounds by State v. Gregory*, 192 Wn.2d 1, 427 P.3d 621 (2018).

Here, Nelson abandoned his request for new counsel prior to his second trial by striking the hearing scheduled for January 28, 2022, 3RP 3-4, and then by proceeding solely on a request to

represent himself at the February 25, 2022, hearing. *See* 3RP 8. The appellate court recognized this when it held that the trial court did not violate Nelson's right to counsel. *Nelson*, 530 P.3d 529 at ¶¶ 67-71 (unpublished portion). His request for further review should be denied.

3. Nelson waived his confrontation clause challenge to C.D.'s prior testimony.

Nelson seeks review of the trial court's decision to admit C.D.'s prior testimony under RAP 13.4(b)(3). Petition for Review at 38. Nelson's request must be denied because he forfeited the confrontation clause claim in the trial court.

A defendant waives an appellate argument that the admission of certain evidence violated his right to confrontation by failing to object to the admission of the evidence at trial. *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009); *State v. Burns*, 193 Wn.2d 190, 206-07, 438 P.3d 1183 (2019). An alleged violation of the confrontation clause may not be considered under RAP 2.5(a)(3). *Burns*, 193 Wn.2d at 208-211.

Here, Nelson asserted an insufficient evidence of unavailability objection to the admission of C.D.'s prior testimony on August 29, 2022, after the trial court heard testimony only from Marvin Leikam. 5RP 50-51. Nelson did not renew that objection on August 31, 2022, after the trial court heard testimony from Sergeant Thiry. 5RP 446-49. Nor did he object when the court announced its finding that C.D. was unavailable due to a mental illness or infirmity or when C.D.'s prior testimony was presented to the jury on September 1, 2021. 5RP 447-49, 586-90. Nelson's failure to renew his insufficient foundation/confrontation clause objection at any of these points precludes review. *See generally State v. Thomas*, 150 Wn.2d 821, 869, 83 P3d 970 (2004) (a lack of foundation objection must be renewed after the State presents additional foundation or it is waived).

Presumably Nelson did not renew his confrontation clause objection because he, like every court that has considered unavailability due to a mental illness under ER 804(a)(4),

recognized that individuals who are currently hospitalized for acute symptoms are unavailable. *See, e.g., United States v. Cabrera-Frattini*, 65 M.J. 241 (C.A.A.F. 2007) (witness in psychiatric hospital because she was a severe danger to herself, discharge from hospital unknown, but no sooner than 24 days later, and prognosis upon release from hospitalization was "guarded"); *Burns v. Clusen*, 798 F.3d 931, 934, 938 (7th Cir. 1986) witness was clearly unavailable during hospitalization on a psychiatric ward for acute symptoms); *State v. Anderson*, 402 P.3d 1063, 1068 (Idaho 2017) (witness "unavailable" when committed to a psychiatric hospital or when a danger to others). But regardless of the reason, Nelson has not provided any basis for reconsidering the waiver rule announced in *Burns*. *See* Petition for Review at 32-39. His petition for review must be denied.

VII. CONCLUSION

Ensuring that state constitutional decisions are based on a solid factual foundation is critical to the legitimacy of the

appellate courts. Fairness to the parties require that decisions be based on the record developed in the trial court. Review should be granted of the State's cross-petition and this court should reaffirm its long-standing rule that appellate courts will only reach constitutional claims when the factual predicate for the claim was developed in the trial court.

Review is not warranted of the questions presented by Nelson as he either abandoned or waived the issues in the trial court.

This document is in 14-point font and contains 7,666 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Respectfully submitted this 23rd day of August, 2024.

MARY E. ROBNETT
Pierce County Prosecuting Attorney

s/ Pamela B. Loginsky
PAMELA B. LOGINSKY
Deputy Prosecuting Attorney
WSB # 18096 / OID #91121
Pierce County Prosecutor's Office
930 Tacoma Ave. S, Rm 946
Tacoma, WA 98402
(253) 798-2913
pamela.loginsky@piercecountywa.gov

Certificate of Service:

The undersigned certifies that on this day she delivered by E-file to the attorney of record for the appellant true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington on the date below.

8/23/2024	*s/ Kimberly Hale*
Date	Signature

PIERCE COUNTY PROSECUTING ATTORNEY

August 23, 2024 - 1:56 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	103,299-4
Appellate Court Case Title:	State of Washington v. Steven Keith Nelson
Superior Court Case Number:	21-1-00259-3

The following documents have been uploaded:

- 1032994_Answer_Reply_20240823135454SC353725_7810.pdf
  This File Contains:
  Answer/Reply - Answer to Petition for Review
  The Original File Name was States Answer to Petition for Review and Cross-Petition for Review.pdf
- 1032994_Motion_20240823135454SC353725_1800.pdf
  This File Contains:
  Motion 1 - Overlength Answer
  The Original File Name was States Motion for Overlength Answer to Petition for Review and Cross-Petiiton for Review .pdf

A copy of the uploaded files will be sent to:

- Sloanej@nwattorney.net
- pcpatcecf@piercecountywa.gov
- pcpatvecf@piercecountywa.gov
- steedj@nwattorney.net

Comments:

Sender Name: Kimberly Hale - Email: kimberly.hale@piercecountywa.gov
Filing on Behalf of: Pamela Beth Loginsky - Email: pamela.loginsky@piercecountywa.gov (Alternate Email: PCpatcecf@piercecountywa.gov)

Address:
930 Tacoma Ave S, Rm 946
Tacoma, WA, 98402
Phone: (253) 798-7400

Note: The Filing Id is 20240823135454SC353725