NO. 96944-2

SUPREME COURT
OF THE STATE OF WASHINGTON

In re the Detention of:

MICHAEL CANTY,

Petitioner.

STATE'S ANSWER TO AMENDED PETITION FOR REVIEW

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I. INTRODUCTION

Michael Canty seeks review of a Court of Appeals decision affirming the order committing him as a sexually violent predator ("SVP") following a unanimous jury verdict. This Court should deny the petition.

Canty's challenges to the jury instructions are meritless. The instructions accurately stated the law, allowed Canty to argue his theory of the case, and were consistent with the SVP statute, chapter 71.09 RCW, as well as the pattern jury instructions.

Canty's challenge to the admission of a victim's prior sworn testimony is equally meritless. The trial court properly admitted this testimony under ER 804(b)(1) because the victim was unavailable and Canty had the opportunity and similar motive to develop her testimony during cross-examination. In addition, this Court has already determined that individuals do not have a due process right to confrontation in SVP trials, and the facts of this case do not warrant a different result. Moreover, even if the admission of the testimony was erroneous, it easily satisfies the more stringent constitutional harmless error test because the testimony "mirrored" Canty's deposition testimony, which was also admitted at trial.

In short, this case presents routine questions that the Court of Appeals correctly resolved. It is consistent with other decisions and does not present a significant constitutional question or issue of substantial public interest. For all of these reasons, review is unwarranted.

II. RESTATEMENT OF THE ISSUES

Canty's petition for review fails to meet RAP 13.4(b) criteria and provides no basis for this Court's review. If this Court were to accept review, this case would present the following issues:

A. **Did the trial court properly decline to give Canty's proposed "recent overt act" instruction where Canty later withdrew the instruction, it was unsupported by the evidence at trial, and Canty could argue his theory of the case without it?**

B. **Where the SVP statute identifies certain offenses as sexually violent offenses as a matter of law, did the trial court properly instruct the jury that those offenses are "crimes of sexual violence"?**

C. **Where the jury was required to determine whether Canty is a "sexually violent predator"—a legal term defined by the SVP statute—and where the pattern jury instructions consistently use that legal term, did the trial court properly use that that term throughout the jury instructions?**

D. **Did the trial court properly admit victim Z.B.'s prior sworn testimony where this Court has consistently held that there is no due process right to confrontation in SVP trials, Z.B. was unavailable and Canty had a previous opportunity and similar motive to develop her testimony during cross-examination, and Canty's own testimony "mirrored" Z.B.'s?**

III. RESTATEMENT OF THE CASE

A. Canty's Sexual Offense History

Canty has a long criminal history. In June 1996, he was arrested for attempted murder after he stabbed a man in the neck after the man declined his sexual advances. *See* RP at 297-99. Because the victim did not want to pursue the matter, no charges were filed. *Id.*

One month later, in July 1996, Canty grabbed Z.B. in her yard, threw her to the ground, straddled her, and pressed his erect penis into her back. RP at 299-300, 620-24; CP at 336; Ex. 33 at 37. He then pulled her up by her hair and rubbed his penis while gesturing at her house. RP at 300-01, 624-25. A jury convicted Canty of sexual battery, attempted kidnapping, and false imprisonment for this offense, and the trial court sentenced him to 18 months in prison. *Id.* at 301-02, 726; Ex. 3. Canty admitted committing this offense. RP at 302; CP at 334-37.

In 1998, while on parole, Canty exposed his penis to a woman when he was doing work in her home. RP at 303. Canty then threatened to kill the woman after she told him to leave. *Id.* This offense was treated as a parole violation, and Canty returned to prison for one year. *Id.* Three months after his release, Canty followed two 17-year-old girls and grabbed their buttocks. RP at 304. This, too, was treated as a parole violation, and Canty returned to prison for another year. *Id.* at 304-05.

Within two weeks of his release from prison in 2001, Canty pushed his way into a woman's apartment, grabbed her by the throat, and threatened to break her neck. RP at 307-09; CP at 350; Ex. 33 at 51. The woman had muscular dystrophy and was frail. RP at 310. Canty pushed her down, straddled her, tried to force his penis into her mouth, and ejaculated on her. RP at 309, 746; CP at 348-50. A jury subsequently convicted him of indecent liberties with forcible compulsion, burglary in the first degree with sexual motivation, and robbery in the second degree. RP at 310; Ex. 13. The trial court sentenced him to 15 years in prison. *Id.* While in prison, Canty

received 80 infractions, several of which were for sexual misconduct. RP at 311-12.

B. Civil Commitment Trial

Prior to Canty's release from prison, the State filed a petition alleging that he is an SVP. CP at 1-2. The case proceeded to a jury trial in June 2017. *See* RP at 1-1036.

Before trial, the State moved in limine to admit sworn testimony from victim Z.B. during a preliminary hearing in the 1997 criminal case. CP at 69-70, 91-133; RP at 93-101. The Sate's investigator declared that he had been unable to locate Z.B. for trial despite exhausting all resources. CP at 92. The trial court found that the investigator's declaration detailing the efforts to locate Z.B. was sufficient to establish her unavailability. RP at 99, 606-07. After considering the types of proceedings, the nature of the testimony, and the fact that the prior testimony was under oath and subject to cross-examination, the trial court ruled that Z.B.'s former testimony was admissible under ER 804(b)(1). *See* RP at 99-101, 606-11; CP at 362.

At trial, the State read portions of Z.B.'s sworn testimony to the jury. RP at 619-27. The testimony detailed Canty's attack on Z.B. *Id.* Her account was undisputed, as the State also played a portion of a videotaped deposition where Canty admitted committing the offense as described by Z.B. *See* CP at 334-38; RP at 257-58, 321-22; Ex. 33. In addition, both experts testified in detail about this offense, and their testimony was consistent with Z.B.'s account. *See* RP at 299-302, 725-27, 746, 761.

Following the presentation of evidence, the court issued jury instructions. RP at 939-51; CP at 462-83. The trial court declined Canty's request to instruct the jury that the State could bring a new commitment petition if Canty committed a "recent overt act." *See* RP at 817; CP at 213, 218, 469. The trial court also declined Canty's request to modify the pattern jury instructions to use the phrase "criteria for civil commitment" instead of the legal term "sexually violent predator." *See* RP at 118-24, 817; CP at 215-20, 365. Lastly, the trial court decided to follow the pattern instructions and identified Canty's predicate sexually violent offenses as "crimes of sexual violence." RP at 852; CP at 467.

At the conclusion of the trial, the jury found beyond a reasonable doubt that Canty is a sexually violent predator, and the trial court entered an order of commitment. CP at 371-72. Canty appealed, and the Court of Appeals affirmed the jury's determination. *In re Detention of Canty*, No. 50573-8-II (Wash. Ct. App. Feb. 13, 2019). Canty now petitions this Court for discretionary review.

IV. ARGUMENT

A. The Court of Appeals Properly Rejected Canty's Challenges to the Jury Instructions

Canty raises three challenges to the trial court's jury instructions. The Court of Appeals properly rejected all of them. The jury instructions accurately stated the law, allowed Canty to argue his theory of the case, and were consistent with the SVP statute and the pattern jury instructions. They

do not present any significant question of constitutional law or substantial public interest, and further review of these issues is unwarranted.

1. The trial court properly declined to give an instruction that had been withdrawn, was unsupported by the evidence at trial, and was unnecessary

The trial court properly declined to give Canty's proposed "recent overt act" instruction. As the Court of Appeals correctly recognized, Canty withdrew this instruction, so this challenge is unpreserved. *Canty*, slip op. at 17. Moreover, the trial court properly declined to give this instruction because there was insufficient evidence to support it and because Canty could have argued his theory of the case without it.

Prior to trial, Canty proposed a modified version of the pattern instruction defining the phrase "likely to engage in predatory acts of sexual violence if not confined in a secure facility." CP at 218. Canty's proposed instruction added language informing jurors that the State could file a new SVP petition if Canty committed a "recent overt act" following his release.[1] *Id.* Canty also moved in limine to allow testimony that he could be subject to a new petition if he committed a recent overt act. CP at 139; RP at 115. He argued such evidence was relevant because the threat of a new petition may serve as a deterrent. CP at 139; RP at 115-18.

The trial court agreed to admit such evidence under the condition that Canty lay a foundation showing that he had knowledge of the potential

[1] A "recent overt act" means "any act, threat, or combination thereof that has either caused harm of a sexually violent nature or creates a reasonable apprehension of such harm in the mind of an objective person who knows the history and mental condition of the person engaging in the act or behaviors." RCW 71.09.020(12).

for a recent overt act petition as well as its consequences. CP at 365; RP at 118, 782-96. But at trial, Canty did not lay a proper foundation. *See* RP at 785-96. Thus, the trial court did not allow expert testimony about the possible deterrent effect of a recent overt act petition. RP at 795-96.

Following this evidentiary ruling, Canty's attorney expressly conceded that the proposed jury instruction was "no longer relevant." RP at 816. Accordingly, Canty withdrew the instruction. *See id.* at 816-20. Canty also took no exception to the failure to give his proposed instruction. *See* RP at 921-29. Thus, the Court of Appeals properly concluded that Canty failed to preserve this challenge. *Canty*, slip op. at 17.

Nonetheless, the Court of Appeals also properly concluded that Canty's argument fails because the trial court did not abuse its discretion by declining to give an instruction that was unsupported by the evidence at trial. *Canty*, slip op. at 16-18.[2]

It is well established that "it is error to give an instruction which is not supported by the evidence." *State v. Benn*, 120 Wn.2d 631, 654, 845 P.2d 289 (1993) (citing *State v. Hughes*, 106 Wn.2d 176, 191, 721 P.2d 902 (1986)); *accord State v. Mendes*, 180 Wn.2d 188, 194, 322 P.3d 791 (2014)

That principle controls here. As noted earlier, Canty did not present any evidence showing that the potential for a new petition would deter him from reoffending. In the absence of such evidence, the trial court properly

[2] Canty asserts in a footnote that the Court of Appeals should have reviewed the trial court's determination about the lack of evidence supporting his instruction *de novo*. Pet. for Review at 4 n.7. But even if this Court applied that standard, Canty fails to cite to *any* evidence at trial supporting the proposed instruction. Thus, his claim still fails.

declined to instruct the jury about such petitions. *See In re Det. of Taylor-Rose*, 199 Wn. App. 866, 885-86, 401 P.3d 357 (2017), *review denied*, 189 Wn.2d 1039, 409 P.3d 1070 (2018) (holding that the trial court properly declined to instruct the jury about a possible recent overt act petition in part because "there was no evidence presented at trial that Taylor-Rose would be less likely to reoffend because of the potential for new SVP petitions").

Moreover, Canty's proposed instruction was unnecessary because he could have argued his theory of the case without it. The trial court's given instruction stated that the jury could consider "all evidence that bears on the issue" of whether Canty is likely to engage in predatory acts of sexual violence. CP at 444. This would have included any evidence about the deterrent effects of future SVP petitions, had Canty presented any. *See* Pet. for Review at 5. If there was any limitation on Canty's ability to argue about the deterrent effects of future SVP petitions, it was due to his failure to introduce evidence supporting his theory—not the court's decision to omit his proposed language from the jury instruction.

Canty argues, in general, that the possibility of a future petition mitigates an offender's risk by incapacitating the offender and by having a deterrent effect. Pet. for Review at 3-4. But even if true, Canty fails to explain how that renders the trial court's jury instruction erroneous, especially given the absence of any evidence on these points at trial. In a footnote, Canty argues that the trial court should have admitted expert testimony about his knowledge of recent overt act petitions and the deterrent effect of such knowledge. *Id.* at 4 n. 6. But Canty's dissatisfaction with an

evidentiary ruling—which he did not appeal—is wholly irrelevant to determining whether the jury instruction was proper.

Lastly, Canty claims that the trial court's instruction relieved the State of its burden of proof and violated his right to due process. Pet. for Review at 5. But Canty fails to provide any analysis for these claims, and a naked constitutional claim unsupported by analysis is not sufficient to require this Court's consideration and discussion. *State v. Johnson*, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992). Further, due process was satisfied when the trial court accurately instructed the jurors on the elements the State was required to prove beyond a reasonable doubt. *See State v. Scott*, 110 Wn.2d 682, 690, 757 P.2d 492 (1988).

2. The jury instructions identifying Canty's predicate offenses as "crimes[s] of sexual violence" accurately stated the law and did not improperly comment on the evidence

Consistent with the pattern jury instructions, the trial court identified Canty's prior sexually violent offenses in the jury instructions as "crime[s] of sexual violence." *See* CP at 467, 471. This was proper. As the Court of Appeals correctly recognized, because the instructions accurately stated the law, they did not constitute improper comments on the evidence. *Canty*, slip op. at 21-22.

A jury instruction "that does no more than accurately state the law pertaining to an issue . . . does not constitute an impermissible comment on the evidence by the trial judge." *State v. Woods*, 143 Wn.2d 561, 591, 23 P.3d 1046 (2001). An appellate court reviews jury instructions de novo to

determine if the trial court has improperly commented on the evidence. *See State v. Levy*, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006).

Here, the State was required to prove that Canty is an SVP, which requires proof that he has been convicted of or charged with a "crime of sexual violence." *See* RCW 71.09.020(18). Consistent with the pattern instruction, the trial court instructed the jury that it must find beyond a reasonable doubt that Canty "has been convicted of a crime of sexual violence, namely Indecent Liberties with Forcible Compulsion and/or Burglary in the First Degree with Sexual Motivation." CP at 467; *see also* 6A *Washington Practice, Washington Pattern Jury Instructions, Civil* 365.10 (2017). Also consistent with the pattern instruction, the court instructed the jury that "'Sexual violence' means: Indecent Liberties by Forcible Compulsion; Burglary in the First Degree with Sexual Motivation; Residential Burglary with Sexual Motivation; and Unlawful Imprisonment with Sexual Motivation." CP at 471; *see also* 6A WPI 365.16.

Canty argues that these instructions improperly commented on the evidence and removed a factual determination from the jury because they identified his predicate sexually violent offenses as "crimes of sexual violence." Pet. for Review at 5-11. He asserts that this was "tantamount to a directed verdict." *Id.* at 6. Canty's arguments fail because the jury instructions accurately stated the law.

The Court of Appeals has repeatedly determined that crimes expressly identified by the legislature in the SVP statute as "sexually violent offenses" necessarily also qualify as "crimes of sexual violence," and this

Court has consistently denied review of those decisions. *In re Det. of Taylor-Rose*, 199 Wn. App. 866, 875-76, 401 P.3d 357 (2017), *review denied*, 189 Wn.2d 1039, 409 P.3d 1070 (2018); *In re Det. of Coppin*, 157 Wn. App. 537, 551-54, 238 P.3d 1192 (2010), *review denied*, 170 Wn.2d 1025, 249 P.3d 181 (2011). Accordingly, this issue is well-settled and, contrary to Canty's assertion, it does not present a significant constitutional question that is of substantial public interest. *See* Pet. for Review at 9.

Moreover, there is no reason for this Court to upend settled law on this issue, because these decisions are well-reasoned and consistent with legislative intent. A court's purpose in interpreting a statute is to carry out the legislature's intent. *State v. Gray*, 189 Wn.2d 334, 340, 402 P.3d 254 (2017). The clearest indication of intent is the language enacted by the legislature. *Id.* Rather than reading statutes in isolation, courts ascertain the plain meaning by taking into account the context of the entire act as well as other related statutes. *Id.* "Statutes on the same subject matter must be read together to give each effect and to harmonize each with the other." *US West Commc'ns, Inc. v. Wash. Util. & Transp. Comm'n*, 134 Wn.2d 74, 118, 949 P.2d 1337 (1997). A court must avoid unlikely, absurd, or strained results. *Morris v. Blaker*, 118 Wn.2d 133, 143, 821 P.2d 482 (1992). "The spirit and intent of the statute should prevail over the literal letter of the law." *Id.*

The SVP statute defines a "sexually violent predator" as "any person who has been convicted of or charged with a *crime of sexual violence* and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence if not

confined in a secure facility." RCW 71.09.020(18) (emphasis added). The SVP statute does not define "crime of sexual violence," but it does define "sexually violent offense." RCW 71.09.020(17). Because there is no material difference between those terms, it would be absurd to conclude that crimes that the legislature expressly identified as "sexually violent offenses" do not also qualify as "crimes of sexual violence." Such a result would be a hyper-technical interpretation of the SVP statute that is inconsistent with the principles of statutory construction identified earlier.

Canty claims that these two terms have different meanings and that a "crime of sexual violence" requires proof at trial of "a sex offense accomplished through 'swift and intense force' or 'rough and injurious physical force'" Pet. for Review at 8. He further claims that that it was for the jury to determine whether his predicate offenses were "violent in fact." *Id.* These arguments are meritless. The legislature has expressly declared that Canty's predicate offenses are "sexually *violent* offenses" as a matter of law. *See* RCW 71.09.090(17) (emphasis added). There is absolutely no basis to conclude that a sexually violent offense must be sufficiently "rough" in order for it to be a "crime of sexual violence."

Canty next asserts that this case conflicts with several decisions setting forth general principles of statutory construction. Pet. for Review at 9-10 (citing *State v. Costich*, 152 Wn.2d 463, 475-76, 98 P.3d 795 (2004); *Durland v. San Juan County*, 182 Wn.2d 55, 79, 340 P.3d 191 (2014); *In re Det. of Martin*, 163 Wn.2d 501, 509, 182 P.3d 951 (2008); *In re Det. of Hawkins*, 169 Wn.2d 796, 801, 238 P.3d 1175 (2010)). Specifically, he

argues that this case conflicts with *Costich* and *Durland* by failing to give different meanings to different statutory phrases, and it conflicts with *Martin* and *Hawkins* by failing to strictly construe statutes against the State. *Id.* But those principles are inapplicable here, because there is no material difference between the two statutory phrases, and there is no ambiguity in the statutory scheme. Further, the decision in this case is entirely consistent with principles of statutory construction set forth by this Court, which require courts to harmonize statutes and to avoid absurd results. There is simply no conflict warranting review.

3. Using the legal term "sexually violent predator" in jury instructions is consistent with the jury's inquiry, the statutory language, and the pattern jury instructions

The trial court properly declined to use the phrase "criteria for civil commitment" instead of the legal term "sexually violent predator" throughout the jury instructions. Using the legal term "sexually violent predator" is consistent with the jury's inquiry, the statutory language, and the pattern jury instructions.

At a commitment trial, the jury must determine beyond a reasonable doubt whether the person is a sexually violent predator. RCW 71.09.060(1). The term "sexually violent predator" is defined by statute and has a specific legal meaning. RCW 71.09.020(18). Given that the central issue in this trial was whether Canty is a "sexually violent predator" under the statute, the trial court properly used that term in the jury instructions. Using the precise

legal term was consistent with the State's allegations and most accurately reflected the jury's inquiry.

The trial court's instructions also mirrored the statutory language and were consistent with the pattern jury instructions. The term "sexually violent predator" is used throughout chapter 71.09 RCW. *See generally* ch. 71.09 RCW. The term is also used throughout the pattern jury instructions including the verdict form, which asks whether the State "proved beyond a reasonable doubt that [the respondent] is a sexually violent predator." *See* 6A WPI 365.01, 365.10, 365.11, 365.21.

Relying on law review articles, Canty claims that the term "sexually violent predator" produces an emotional response that encouraged jurors to commit even if the State fails to meet its burden of proof. Pet. for Review at 11-14. He further claims that the trial court's decision to use the term "sexually violent predator" instead of the phrase "criteria for civil commitment" violated his right to due process. *Id.* at 11. The Court of Appeals properly rejected these claims.

By nature, many legal terms have the potential to provoke an emotional response. But legal terms are used at trial because they reflect the central issue before the factfinder. For example, a defendant charged with murder or rape may similarly claim that those legal terms are emotionally charged. Nevertheless, even though the defendant may prefer that those terms are not used at trial, such terms are utilized because they reflect precisely what the State must prove. Put simply, use of precise legal

terminology is critical to ensuring that the factfinder fully understands its role and can properly apply the facts to the law in a particular case.

Further, the trial court properly declined to use the phrase "criteria for civil commitment" because it is vague and misleading. There are various forms of civil commitment in Washington, and the jury needs to understand what form of civil commitment the State is seeking. *See*, *e.g.*, ch. 71.05 RCW. In addition, using vague terminology poses its own risks, as it heightens the possibility that the jury may not fully comprehend the nature and gravity of its determination.

B. The Court of Appeals Properly Rejected Canty's Challenge to the Admission of Victim Z.B.'s Prior Sworn Testimony

The Court of Appeals properly rejected Canty's challenge to the admission of victim Z.B.'s prior sworn testimony. The trial court properly admitted this testimony because the victim was unavailable and Canty had the opportunity and similar motive to develop her testimony during cross-examination. Moreover, this Court has already determined that there is no due process right to confrontation at an SVP trial, and the facts of this case do not warrant a different result. Finally, as the Court of Appeals correctly recognized, even if the admission of the testimony amounted to constitutional error, it was harmless beyond a reasonable doubt because Z.B.'s testimony was cumulative with other substantive evidence. *Canty*, slip op. at 12-15.

1. The trial court properly admitted Z.B.'s testimony because she was unavailable and Canty had the

opportunity and similar motive to develop her testimony during cross-examination

There is no need for this Court to accept review of this case to consider a routine evidentiary issue. Nevertheless, to the extent that Canty seeks review of the trial court's evidentiary ruling, this Court should decline review. *See* Pet. for Review at 20-24. The trial court properly exercised its discretion to admit Z.B.'s testimony under ER 804(b)(1) because she was unavailable and Canty had the opportunity and similar motive to develop her testimony during cross-examination.

ER 804(b)(1) provides that a witness's former testimony is an exception to the hearsay rule if the witness is unavailable and the party against whom the testimony is now offered had "an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination." A "similar motive" need not be "identical motive." *State v. DeSantiago*, 149 Wn.2d 402, 414, 68 P.3d 1065 (2003). A witness is unavailable if she is absent from trial and the State has been unable to procure her attendance "by process or other reasonable means." ER 804(a)(5). Where a witness cannot be reached by subpoena, the party offering the testimony "should at least be required to represent to the court that it made an effort to secure the voluntary attendance of the witness[] at trial." *Rice v. Janovich*, 109 Wn.2d 48, 57, 742 P.2d 1230 (1987).

Here, contrary to Canty's assertion, the admission of Z.B.'s testimony was proper under ER 804(b)(1). Prior to trial, the State made substantial efforts to locate Z.B. *See* CP at 91-92. The State's investigator

sent correspondence to Z.B.'s last known address and a possible relative, and it attempted to locate her using social media and law enforcement databases. *Id.* at 92. The investigator submitted a declaration stating that he had "exhausted all available resources" but despite the "numerous efforts and means employed," he was unable to find her. *Id.* These efforts were both reasonable and sufficient. *See DeSantiago*, 149 Wn.2d 409-13; *Rice*, 109 Wn.2d at 57. Canty cites no authority requiring the State to provide the details or utilize the methods he describes. *See* Pet. for Review at 22.

Further, Canty had both an opportunity and similar motive to develop Z.B.'s testimony at the prior proceeding. Canty cross-examined Z.B. at the 1996 preliminary hearing in the criminal case. *See* CP at 115-33. And Canty had a similar motive in this proceeding, as the purpose of the preliminary hearing was to determine whether there was probable cause to believe that Canty committed the charged offense. Canty's purpose was thus to test Z.B.'s credibility regarding the sexual assault. In short, the trial court here properly admitted this testimony.

2. This Court has consistently determined that there is no due process right to confrontation at an SVP trial

The Court of Appeals saw no need to address the merits of Canty's constitutional claim given that the alleged error is harmless even under the more stringent harmless error test. In any event, this case does not present a significant question of constitutional law of substantial public interest because this Court has consistently determined that individuals do not have

a due process right to confrontation at a civil commitment trial. The facts of this case do not warrant a different conclusion.

Due process is a "flexible concept." *In re Det. of Stout*, 159 Wn.2d 357, 370, 150 P.3d 86 (2007). In determining what procedural due process requires in a given context, courts employ the *Mathews* test, which balances: (1) the private interest affected; (2) the risk of erroneous deprivation of that interest through existing procedures, and the probable value, if any, of additional procedural safeguards; and (3) the governmental interest, including costs and administrative burdens of additional procedures. *Id.* (citing *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976)).

In *In re Detention of Stout*, this Court applied the *Mathews* test and held that an SVP detainee does not have a due process right to confront live witnesses at a commitment trial or at a deposition. 159 Wn.2d at 374. This Court reached the same conclusion in *In re Detention of Coe*, despite the fact that, unlike in *Stout*, Coe never had an opportunity to cross-examine the five victims. 175 Wn.2d 482, 509-10, 286 P.3d 29 (2012). In doing so, this Court rejected Coe's argument that *Stout* was limited to its facts. *Id.* It noted that the "same statutory safeguards exist" as in *Stout* and that Coe's inability to cross-examine the five victims "does not reduce the effectiveness of the current statutory procedural safeguards." *Id.* at 511.

Here, as in *Stout* and *Coe*, application of the *Mathews* test confirms that Canty does not have a due process right to confrontation. Only the first *Mathews* factor weighs in Canty's favor, as he has a significant interest in

his physical liberty. *Stout*, 159 Wn.2d at 370. The other two factors weigh heavily in the State's favor.

As to the second factor, there is a minimal risk of erroneously depriving Canty of his liberty. For one, a "comprehensive set of rights" for the SVP detainee already exist, including the right to counsel, the right to a jury of 12 peers, the requirement that the State meet its burden beyond a reasonable doubt, and the requirement that the jury's verdict be unanimous. *Stout*, 159 Wn.2d at 370. These "significant safeguards" were deemed sufficient in *Stout* and *Coe*. *Id.*; *Coe*, 175 Wn.2d at 510. Moreover, the risk of erroneous deprivation is especially low in this case, where the witness's prior testimony was under oath, Canty had an opportunity to cross-examine the witness in the prior proceeding, Canty admitted the offense and does not dispute the victim's account, and Canty's own deposition testimony "mirrored" the victim's. For the same reasons, there is little—if any—probable value in adding a due process right to cross-examination in this particular context.

Finally, the third factor weighs in favor of the State because the State has a compelling interest in protecting the community from sex offenders who pose a risk of reoffending. *Stout*, 159 Wn.2d at 371. The State also has a compelling interest in "ensuring the availability of testimony that may come from witnesses who are no longer in the area or easily accessible." *Id.* at 371-72. Further, the "additional financial burden is unjustifiable considering the marginal protection that an additional confrontation right would provide to the detainee's liberty interest." *Coe*, 175 Wn.2d at 510.

Canty claims that *Mathews* test weighs in favor of cross-examination when the witness provides substantive evidence. Pet. for Review at 17-20. Specifically, he claims that the risk of erroneous deprivation was elevated in this case since the jury was not able to determine the truth of Z.B.'s prior statements. *Id.* at 17-18. But Canty's claim ignores that Z.B.'s prior testimony was under oath, Canty had a prior opportunity to cross-examine her, Canty has admitted the offense against Z.B. and does not dispute her account, and Canty's own deposition testimony "mirrored" the victim's. He thus fails to explain how cross-examination at trial would have assisted the jury as factfinder. Application of the *Mathews* test does not support Canty's claim.

3. The admission of victim Z.B.'s prior testimony was harmless beyond a reasonable doubt because it "mirrored" Canty's own testimony

Without addressing the merits of his constitutional claim, the Court of Appeals concluded that even if the admission of Z.B.'s testimony was constitutional error, it was harmless beyond a reasonable doubt because Canty's own description of the event "mirrored" Z.B.'s testimony and the testimony was thus cumulative. *Canty*, slip op. at 14-15. This was correct.

"When an error is of constitutional magnitude, the court must apply the 'harmless beyond a reasonable doubt' standard and query whether any reasonable jury would have reached the same result in the absence of the tainted evidence." *State v. Benn*, 161 Wn.2d 256, 266, 165 P.3d 1232

(2007). The State does not concede constitutional error. Nevertheless, the constitutional harmless error standard is easily satisfied in this case.

The portion of Z.B.'s prior testimony admitted in this trial provided details about Canty's 1996 assault. *See* RP at 619-27. This testimony was cumulative with other substantive evidence admitted at trial, specifically, Canty's videotaped deposition testimony. *See* CP at 334-38; Ex 33. As the Court of Appeals correctly recognized, "Canty's description of the event mirrored Z.B.'s." *Canty*, slip op. at 14. In addition, his testimony provided graphic detail about the assault. *See* RP at 619-27. For example, Canty testified that he was "high off of PCP," "needed to meet [his] immediate need of arousal," and planned to "jump the fence and grab [Z.B.] and . . . sexually offend against her, grope her." CP at 335, 336. He said he "grabbed her by the hair, threw her to the ground and then got behind her and got on her back and rode her . . . straddled her back." CP at 336. He said he then picked her off the ground but she "broke loose" so he "ran and jumped the fence." CP at 336. He testified that Z.B. said "No," but he did not stop because he was "being selfish." CP at 336, 337.

In addition, *both* experts testified about Canty's attack on Z.B., and their testimony was also consistent with Z.B.'s account. *See* RP 299-302, 684, 725-27, 746, 761, 770. The State's expert provided significant detail about the offense and testified that Canty admitted the offense as the expert had described it. RP 299-302. Thus, the details of this offense was already before the jury through ample other untainted evidence.

Canty asserts that the admission of this testimony was not harmless, pointing to a remark from an Assistant Attorney General that this "is a pretty close case." Pet. for Review at 24 (quoting RP at 5). But Canty's reliance on that quotation is unpersuasive. For one, Canty fails to note that the Assistant Attorney General made this remark in a pretrial hearing while arguing the State's contested motion to exclude certain evidence. *See* RP at 5. The remark in no way reflects the State's assessment of the case following the presentation of evidence at trial. Moreover, Canty cites no authority that this type of remark is relevant when conducting a harmless error analysis. The controlling inquiry looks at the untainted evidence presented at trial, and as just discussed, there was ample, untainted evidence presented in this trial that was cumulative with Z.B.'s testimony.

V. CONCLUSION

The Court of Appeals properly applied well-settled law to affirm Canty's commitment as an SVP. Nothing in the decision raises a significant constitutional question, conflicts with prior case law, or presents an issue of substantial public interest. Accordingly, this Court should deny Canty's petition for review.

RESPECTFULLY SUBMITTED this 14th day of June, 2019.

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NO. 96944-2

WASHINGTON STATE SUPREME COURT

In re the Detention of: MICHAEL CANTY, Petitioner.	DECLARATION OF SERVICE

I, Malia Anfinson, declare as follows:

On June 14, 2019, I sent via electronic mail, per service agreement, a true and correct copy of State's Answer to Amended Petitioner For Review and Declaration of Service, addressed as follows:

Manek Mistry and Jodi Backlund
Backlund and Mistry
backlundmistry@gmail.com

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

DATED this 14th day of June, 2019, at Seattle, Washington.

MALIA ANFINSON

WASHINGTON STATE ATTORNEY GENERAL'S OFFICE - CRIMINAL JUSTICE DIVISION

June 14, 2019 - 5:24 PM

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